

RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY:

NIGERIA IN PERSPECTIVE

1 Pursuant to the USA Chapter 11 law (Bankruptcy Code), there is no particular threshold or minimum amount of assets to qualify for that rule of having assets in the USA to be a Chapter 11 debtor. In fact, non-USA corporations have been known to qualify as Chapter 11 debtors and its protection based on a few amounts of United States Dollars in their USA lawyer's retainer – this qualifies as assets in the USA to be a Chapter 11 debtor.

2 Forty-four (44) countries (including Australia, Canada, USA, United Kingdom, South Africa, Singapore, Mauritius, Japan, Kenya, Vanuatu and Greece) have passed legislations on the Model Law.

Proem

One of the challenges currently faced with Nigeria's standing in relation to international trade is the adequacy of the country's insolvency laws and regulations on cross-border insolvency. Trade has taken an international dimension over the decades, a corporation in one country will have interests – goods, assets, employees and claims in other countries. During the life of a company and as it continues to trade, there is the likelihood for the company to fail such that its liabilities far exceed its assets and it goes insolvent. The question that then arises is how do companies that have businesses spread across different jurisdictions in the world deal with such business failure. Trite international principles suggest that the cheapest and most efficient method of dealing with this failure, is to:

- (i) institute one main insolvency proceeding (perhaps in the country of the company's original incorporation or a favourable country, like the United States of America ("USA"), if the company has a place of business in the USA, or the company has assets¹ in the USA); and
- (ii) seek the recognition of the insolvency proceeding instituted in the main jurisdiction as well as seek the co-operation of the courts in such jurisdictions with its office holder (trustee, liquidator, or whatever name such officer is styled in the relevant jurisdiction).

In line with this ideology, the United Nations Commission on International Trade Law ("UNCITRAL") developed the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") to facilitate the adoption and implementation of the ideology.

Similarly, the Factories Act² also places an obligation upon employers/ Taking a leaf from England, Lord Hoffman in the case *IN RE HIH CASUALTY AND GENERAL INSURANCE LTD* [2008] 1 WLR, 852 explained the universalist ideology for cross-border insolvency as follows:

"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. The principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

Notwithstanding the innovations in the Model Law, there are jurisdictions that are yet to incorporate the provisions of the Model Law². Nigeria is one of such countries that is yet to adopt the Model Law, partially or in its entirety. There is, however, the Bankruptcy and Insolvency Bill (the "Bill") which seeks to repeal the Bankruptcy and Insolvency Act, No. 16 of 1979 Cap. B2 Laws of the Federation of Nigeria ("LFN"), 2004 and re-enact the Bankruptcy and Insolvency Act to make provisions for corporate and individual insolvency, and to provide for crossborder/ international insolvencies by incorporating provisions of the Model Law.

It is also worthy of mention that UNCITRAL recently published its *Model Law on Recognition and Enforcement of Insolvency Related Judgments* ("MLREIJ").



- 3 The President of the Federal Republic, on January 18, 2019, declined his assent to the Bankruptcy and Insolvency Bill of 2016 which was passed by both Houses of the National Assembly. One of the President's reasons for refusing his assent is that "the relationship between the corporate insolvency provisions of the Bill and existing provisions of winding up and insolvency under the Companies and Allied Matters Act needs to be clarified to avoid confusion in respect to the applicable governing corporate insolvency."
- 4 A 'Letter of Request' is essentially a request, made by the court granting the insolvency order in the originating jurisdiction, to a court in a foreign jurisdiction requesting assistance in realizing assets to which the insolvent entity has interests within its jurisdiction.
- 5 Notwithstanding the refusal of the President to assent to the Bill, the National assembly may still pass the Bill into law in so far as they comply with the legislative process for enacting a bill into law.
- 6 Judgment as defined under the Ordinance includes any judgment or order obtained in the High Court in England or Ireland, or in the Court of Session in Scotland, in any civil proceedings, whereby any sum of money is made payable, including arbitral awards, in pursuance of a law in force in the applicable jurisdictions, becomes enforceable in Nigeria in the same manner as a judgment given by an English High Court in England and Wales.
- 7 INSOL International, Cross-Border Insolvency II – A Guide to Recognition and Enforcement p.234

UNCITRAL recommends that all States give favourable consideration to the MLREIJ when revising or adopting legislation relevant to insolvency and invites States that have used the Model Law to advise the UNICTRAL accordingly. For UNCITRAL, the recognition and enforcement of insolvency related judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals have assets in more than one State and to move assets across borders.

In light of recent experiences, this article discusses insolvency practice in Nigeria and highlights the adequacy or in most cases, absence of assisting legislation for the recognition of foreign insolvency proceedings in Nigeria, with a view to potentially remedying future transactions.

Current Insolvency Law and Practice in Nigeria

There is currently no Insolvency Act in Nigeria in force³. Laws relating to insolvency are also enshrined in the Companies and Allied Matters Act, Cap C20 LFN 2004 ("CAMA"). The rules governing the winding up of companies are contained in the Companies Winding-Up Rules 2001. The Winding Up Rules 2001 provide a detailed framework and procedure for the application of insolvency under CAMA.

There is currently no law in Nigeria dealing specifically with the recognition and enforcement of cross-border insolvencies or any authority specifically set up to deal with issues that arise out of cross-border insolvencies. It is expected that the Bill and its many provisions (as we will examine later on in this article) will contain adequate provisions on cross-border insolvency as well as adopt the many innovations in the Model Law such as the use of a 'Letter of Request'.⁴

Until the Bill is passed into law, which seems unlikely given the President's refusal to assent to the Bill⁵ the challenges of enforcement of cross border insolvencies remain. Critically, there is a dearth of authorities in Nigeria regarding cross-border insolvencies. However, there have been various pronouncements by the courts regarding **enforcement of foreign judgments**. An issue of great concern to the courts in Nigeria in cases of registration of foreign judgments in Nigeria or the registration of Nigerian judgments abroad is ensuring that there is no conflict between the courts of the original jurisdiction and the registering court.

Process for Recognition and Enforcement in Insolvency Proceedings

Nigerian law does not currently provide for any process for applying for the recognition of a foreign insolvency order. However, until such time as the Bill is passed, the procedure for the recognition and enforcement of **final and conclusive** cross-border insolvencies order or judgments⁶ duly obtained in the courts of England, Ireland or Court of Session of Scotland (and other territories under Her Majesty's protection to which the Reciprocal Enforcement Ordinance is extended to by proclamation) will be enforceable in Nigeria without retrial or examination of the merits of the case, provided that it satisfies the requirements of, and is registered in accordance with the Reciprocal Enforcement of Judgments Ordinance Cap. 175 LFN and Lagos 1958 ("Ordinance"), as shown below:

- (a) application for registration and enforcement of the judgment must be filed within twelve (12) months after the date of the judgment or such longer periods as may be allowed by the Nigerian court;
- (b) the High Court must have acted within its jurisdiction;

- (c) the insolvent corporation must have voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of the High Court;
- (d) the insolvent corporation must have been duly served with the court processes;
- (e) the judgment was not obtained by fraud;
- (f) the judgment debtor satisfies the court that either an appeal is pending, or that he is entitled and intends to appeal against the judgment; or
- (g) the judgment is not in respect of a cause of action which, for reasons of public policy or for some other similar reasons, the Nigerian courts would have refused to entertain.

The Bill

In a bid to keep up with the ever-changing regulatory landscape of insolvency laws in the international community, particularly the Model Law, the Nigerian legislature took steps to enact a new insolvency law. The attempt to enact an insolvency law is coming at a crucial time in Nigeria's history as we continue to see a lot of international companies, that have operations and/or domestic companies in Nigeria, fail and become insolvent. There are several examples including companies in the energy, shipping and maritime industries. The common theme running through these cases is the difficulties faced by liquidators, trustees, etc. (appointed by foreign courts) in realising assets in Nigeria as well as the challenges faced in seeking the court's assistance in this regard. As we have pointed out earlier, the usual process was to register the 'judgments or orders', obtained in the foreign court, as a judgment here in Nigeria.

There is the unanswered question of whether the order of a foreign court declaring a foreign corporation insolvent and appointing a liquidator or trustee is a judgment per se. Where such an order cannot be termed a judgment per se for purposes of the Ordinance, the propriety of the process of enforcing such an order should then be called in to question. The Bill seeks to rectify this anomaly and adopt internationally accepted standards to aid commerce in all its ramifications.

The Bill was expected to provide direction to Nigerian courts with respect to international insolvency as the Bill incorporated provisions recognizing foreign insolvency orders and provides assistance to foreign representatives e.g. trustees, liquidators, etc.

Using South Africa as an example of an African country that makes provision for recognition of cross-border insolvency, South Africa enacted the Model Law as the Cross-Border Insolvency Act 42 of 2000 on December 8, 2000. However, since the requirement of reciprocity has been introduced by the South African Parliament, its Cross-Border Insolvency Act will apply only to states designated by the Minister of Justice and Constitutional Development by notice in the Government Gazette. The Minister may designate a state only if he or she is satisfied that the recognition accorded by the law of that state justifies the application of the Act to foreign proceedings in that state.⁷

In South Africa, a foreign representative may apply to the High Court for recognition of the foreign proceeding in which he or she has been appointed. This application must be accompanied by the relevant documentary evidence, including a statement of all foreign proceedings that the applicant knows relate to the debtor.



8 *Ibid*

9 *INSOL International, Cross-Border Insolvency II – A Guide to Recognition and Enforcement* p.236

10 *Ibid*

11 *Nigerian first instance court vested with exclusive jurisdiction on company and insolvent matters and the recognition of foreign judgments.*

12 *The Admiralty Jurisdiction Act, Cap A5, LFN 2004 defines maritime lien as a lien for "Salvage, damage done by a ship, wages of the master or a member of the crew of a ship or master's disbursements.*

13 See *"Ship Arrests, Maritime Liens and Cross-Border Insolvency"*, *Lloyd's Maritime and Commercial Law Quarterly [2018] LMCLQ 309-431 Part 3.*

14 *The CAMA Bill was passed on January 18, 2019 by the Nigerian House of Representatives; and was earlier in July 2018 by the Senate and only awaits the assent of the President before it becomes law.*

After recognition is granted, the foreign representative may participate in local insolvency proceeding and may intervene in any other legal proceeding to which the debtor is a party. Upon recognition of a foreign insolvency proceeding, the foreign representative acquires standing to initiate legal action to set aside any disposition that is available to a South African representative.⁸

After recognition has been obtained in South Africa, a South African court may impose conditions on the foreign representative in order to safeguard the rights and interests of local creditors. If recognition is refused by a South African court, or not applied for, a foreign creditor may apply for the sequestration or liquidation of the estate in this jurisdiction.⁹ South African courts will protect the interests of local creditors and orders will sometimes state that "property can only be transferred once administration costs and local debts have been paid before assets may be transferred". However, a foreign creditor should receive preferential treatment if he or she holds a security acknowledged by the local forum.¹⁰

The South African model provides an example of a system that provides assistance with crossborder insolvencies. It is instructive to note that the Bill contains provisions which will be similar in operation to that of South Africa and other countries that have adopted the Model Law.

In addition, there is a concept introduced in many jurisdictions to assist with cross-border insolvencies via requesting the assistance of the relevant courts in jurisdictions where the trustee or liquidator is to realise assets. This is generally referred to as a 'Letter of Request'. This is discussed briefly below.

Letter of Request

It is our understanding that under English law as well as Australian law, on application to an English or Australian court, a Letter of Request may be issued to a foreign court to "act in aid of" and "be auxiliary to" the English or Australian representative or proceedings. We also understand that generally, the debtor would be given notice of the application for the Letter of Request unless there is evidence of a possible avoidance by the debtor. We also understand that in considering such an application for a Letter of Request, the Australian court will consider the following:

- 1 That the request is related to a "bankruptcy" or an "external administration matter".
- 2 The power of the foreign court to be able to give effect to the orders sought. This may involve a consideration by the Australian court of the law of the foreign court [RE JOHN CECIL CLUNLES-ROSS EX PARTE: GEOFFREY FRANK TOTTERDEL]. In the case such application for a Letter of Request in so far as the request contained therein is not inconsistent with the provision of the Bill.
- 3 There is a remaining discretion upon the Australia court in deciding whether to make the request. The discretion will depend upon "considerations of utility and comity" [RE JOHN CECIL CLUNIES-ROSS EX PARTE: GEOFFREY FRANK TOTTERDELL (Federal Court of Australia August 26, 1988) at paragraph 37.]

At such time that the Bill is passed into law, we should see the rise in the use of Letters of Request, and we expect that such Letters of Request will be accepted by the Federal High Court of Nigeria ("FHC")¹¹ under the right circumstances. In the same vein, we expect to see the FHC issuing similar Letters of Request to courts in foreign jurisdictions requesting for assistance with crossborder insolvencies.

With respect to the procedure for recognizing such Letters of Request, it appears the spirit of the Bill is that the relevant parties should apply such legal or equitable rules that govern the recognition of foreign insolvency orders and the provision of assistance to foreign representatives in so far as they are not inconsistent with the provision of the Bill. In this regard, recourse could, therefore, be made to the Model Law and the more recent MLREIJ.

The Model Law and its Impact on Maritime Insolvency

Particular mention is made of maritime insolvency in this article because cross-border insolvencies relating to shipping and offshore service companies are somewhat more complicated than in other industries. It is incontrovertible that the Model Law has the capacity to affect the enforcement of the remedies for maritime liens¹² and maritime claims generally.

The Model Law has far reaching effects when it comes to maritime insolvency especially as it relates to the general stay provided for under the Model Law. The general stay operates such that it prohibits commencement and continuation of proceedings against the debtor and his assets. Interestingly, this stay granted pursuant to the Model Law is subject to local law. Notwithstanding the fact that such stay is subject to local law, it is not uncommon to see foreign representatives seek recognition of cross-border insolvencies and request a stay pursuant to the Model Law which has the effect of staying all proceedings relating to the debtor. For maritime claims, such a stay may very well become problematic as it ties the hands of the party with an in rem claim from making an application to arrest a ship owned or bareboat chartered by the insolvent debtor. The attendant challenges and drawbacks that flow from such a "blanket stay" are far-reaching.¹³ In the next sequel to this article, we will undertake an in-depth review of the Model Law and the MLREIJ vis a vis the Bill (and suggested updates) and their impact on maritime insolvency practice in Nigeria.

Conclusion

The draft of the Bill which was declined by the President appears to have adopted more modest provisions of the UNCITRAL Model Law. The Bill, in our view, provides the all-important gateway to assistance required of Nigerian courts – the FHC - in this case. Thus, the need for the passage of the Bill is crucial and the National Assembly needs to take further steps to ensure that issues raised by the President are promptly addressed and the Bill passed into law.

However, it is suggested that the Bill should be further revised taking into consideration the provisions of the recently adopted MLREIJ, especially the procedure for seeking recognition and enforcement of an insolvency-related judgment as set out in Article 11 of the MLREIJ. In addition, the Bill should be reviewed to ensure there is no overlap or conflict with the recent bill for an Act to repeal the Companies and Allied Matters Act 1990 Cap. C20 LFN 2004 and re-enact a new Companies and Allied Matters Act 2017 (the "CAMA Bill").¹⁴ The CAMA Bill contains provisions on Business Rescue and Insolvency amongst others which relate in part to provisions that would otherwise have been covered by an Insolvency Act.

There is no doubt that Nigeria has a lot of catching up to do seeing as the UNICTRAL has now adopted the MLREIJ whilst Nigeria is yet to even adopt the Model Law. The importance of developing our cross-border insolvency legislation cannot be overemphasized.



The UNCITRAL, in the preamble to the MLREIJ, opined that:

"inadequate coordination and cooperation in cases of cross-border insolvency, including uncertainties associated with recognition and enforcement of insolvency related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that the debtor's assets would be concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors".

It remains to be seen whether the National Assembly will take prompt steps to address the issues raised by the President, whilst refusing his assent, so as to get the Bill passed into law.

We will all be glad to see the effect the Bill, once passed into law, will have on international trade and how much confidence the Bill will give to foreign investors in the long run. At this point, we can only anticipate the timely passage of the Bill (despite the recent setback) with optimism, and hope that the passage of the Bill acts as a catalyst in improving Nigeria's indices in the world's ranking on ease of doing business.

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