TEMPLARS

CROSS-BORDER JUDICIAL ASSISTANCE UNDER NIGERIAN LAW

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Understanding the concept of cross-border judicial assistance

In winding up a company, a liquidator is usually saddled with the immediate responsibility, upon appointment, of gathering and taking into his custody all the assets of the company being wound up. This may sometimes require instituting a legal action. The liquidator is also empowered to sell these assets and the proceeds thereof form part of the monies to be distributed to the creditors. He may also institute debt recovery actions against the debtors of the company and/or intervene in actions involving the assets of the company. In the course of the proceedings, it may be necessary to summon and cross examine witnesses for information on the company's assets, seek production and inspection of documents, obtain interim seizure of assets etc. The work of a liquidator in a winding up process will therefore generally require different forms of judicial assistance.

Where the companies being wound up and the assets involved are within one country, this would usually present minimal difficulty. The reality however is that, as the world is fast becoming a global village, sometimes many of these companies have presence and assets in different countries of the world. And each of these countries is a sovereign nation with its own judicial system which is independent of (and not subject to) the other. The jurisdiction and powers of courts in one country do not extend to other countries and the orders (including winding orders and orders appointing liquidators) made by a court in one country are not ordinarily binding on or enforceable in other countries.

Thus, a winding up order made by a court and a liquidator appointed by an order of a court outside Nigeria, for example, may not be recognized in Nigeria. A court in Nigeria cannot make an order compelling the attendance of a witness that is resident outside Nigeria. A court in Nigeria can also not make an order for the seizure of an asset in the UK. A liquidator appointed in a winding up proceeding by a court outside Nigeria may not be able to take custody of the assets on the company that are in Nigeria. These, no doubt, present enormous challenges in cross border disputes, especially for liquidators in cross border insolvency. The principal consideration in this regard is the recognition

[1] The focus here is on insolvency cases

of foreign insolvency officials and their powers.[2]

There is therefore need for a unified legal regime which provides a framework within which countries may assist one another in cross border cases. It is for this reason that some countries have come up with bilateral arrangements in furtherance of which they have made provisions in their laws to provide other countries with different forms of assistance in cross border insolvency cases. The aim is to create a coordinated winding up process with a single system of distribution though the assets involved may be found in different jurisdictions.

Notable in this regard is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (UMLCI).[3] It provides a model legal framework which countries can adapt and convert to a local legislation to provide cross-border judicial assistance to other countries in cross-border insolvency cases.

Under Chapter III Article 15 of UMLCI, a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.[4] Article 21 highlights the nature of assistance that may be provided by the court following recognition under the law. For ease of reference, the provisions have been reproduced below:

1. *Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:*

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative

[2] Ian Fletcher (2005). Insolvency in Private International Law (2nd ed.). Oxford University Press. ISBN 978-0199262502

[3] In 1997, the UNCITRAL adopted a Model Law on Cross Border Insolvency. A total of 44 countries have adopted the UNCITRAL Modern Law on Insolvency and they include Australia, Canada, USA, UK, Israel, South Africa, Senegal and Cameroun.

[4] An application for recognition shall be accompanied by:

(*a*) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(*b*) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(*c*) In the absence of evidence referred to in subparagraphs (*a*) and (*b*), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

or another person designated by the court;

(f) *Extending relief granted under paragraph 1 of article 19;*

(g) *Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.*

2. *Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.*

The advantage afforded by the UMLCI is that a liquidator may apply to a court (whose country has adopted the UMLCI) outside his country of appointment for any of the above reliefs without necessarily having to institute a fresh action in that country. The procedure envisaged involves (i) instituting one main insolvency proceeding typically in the company's country of incorporation and then (ii) seek the recognition of the proceeding by and the assistance of the courts in other jurisdictions that have adopted the UMLCI where the company has assets.

Provisions under Nigerian law

Many a times foreigners (especially foreign liquidators[5]) make inquiries as to what form of cross border judicial assistance is available under Nigerian law. This article examines the minimal provisions in this regard available under Nigerian law and whether any form of assistance is afforded by these provisions.

Reliefs available from Nigerian courts:

Nigeria is yet to adopt the UMLCI (whether fully or partially), the Hague Convention or any other convention that provides a platform for judicial assistance in cross border judicial proceedings. As such, the reliefs afforded by these international legal instruments/conventions are not available in Nigeria.

We are therefore left with what is provided under our local law and practice, basically the rules of court. In this article, we have limited our review to the rules applicable to the High Court of the Federal Capital Territory (being the capital of Nigeria) and the High Court of Lagos State (being the commercial hub). The relevant rules of court are highlighted below.

The FCT High Court, High Court of Lagos State and the Federal High Court

The High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018 (**the FCT Rules**)[6], applicable in Abuja, the High Court of Lagos State Civil Procedure Rules (**Lagos Rules**)[7], applicable only in Lagos State and the Federal High Court Civil Procedure Rules (**FHC Rules**)[8], applicable throughout Nigeria, all provide that each of the courts can make an order for the issuance of a request to a foreign court to

[5] By foreign liquidators we mean liquidators that are appointed by the courts in insolvency proceedings outside Nigeria
[6] Order 34 Rules 6 & 7
[7] Order 36 Rules 6 & 7
[8] Order 20 Rules 6 & 7

examine a witness in a foreign country with whom Nigeria has entered into a convention, where such witness is required to be examined for the determination of a suit before the High Court of Lagos Sate or the Federal High Court. There is however no provision in the Rules of the courts for inbound requests from a foreign court on the basis of which any of the courts can render similar assistance to a foreign court.

We are aware of one case where a request for judicial assistance was made by an English court to the Federal High Court of Nigeria. The request was declined by the Federal High Court on the basis that there is no enabling law to that effect.

The High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2004 (**old FCT Rules**)[9], applicable in Abuja, made provisions that may have enabled a foreign court to obtain evidence that is located within the Federal Capital Territory, Abuja. The old FCT Rules provide that where it appears to the High Court of the Federal Capital Territory, Abuja (**the FCT High Court**), that a foreign court is desirous of obtaining the testimony of a witness domiciled in the jurisdiction of the Court, the latter may give effect to the intention of the letter of request made by the foreign court to examine the witness. The application to the FCT High Court is made *ex parte* by a duly authorised person with the letter of request from the foreign court annexed.[10]

A foreign liquidator may therefore have been able to obtain discovery of documents and also to cross examine under oath the relevant individuals believed to have information about the company being wound up with the assistance of the FCT High Court where a letter from a foreign court so requested.

The old FCT Rules appear to be the only legal instrument that made provisions that come closest to foreign judicial assistance in the manner usually required by foreign liquidators. Unfortunately, the provisions in the old FCT Rules in this regard were consciously left out in the extant FCT Rules. In any event, the provisions had notable limitations. First, they were mere rules of court which are not backed by any substantive legislation. Under Nigerian law, rules of court do not confer jurisdiction on courts.[11] It is only a statute that does. To the extent that there is no enabling law to that effect, it is doubtful that the FCT High Court would have jurisdiction to make orders in respect of matters which are not substantively before it.

Second, the provisions were only applicable in the Federal Capital Territory, Abuja. As such, even if we were to assume that the provisions had the force of law, they would not apply where the asset sought to be attached or persons whose attendance is sought are resident outside the Federal Capital Territory.

Moreover, the provisions were very narrow in scope. They only afforded the opportunity to summon witnesses, for production of documents etc. They did not provide for recognition of foreign proceedings and/or liquidators appointed in foreign proceedings on the basis of which these liquidators may gather assets of the company being wound up that may be within the Federal Capital Territory.

It affords some hope, nonetheless, that the FCT Rules, Lagos Rules and the FHC Rules, at least, make provisions for outbound requests for assistance by the foreign courts. Although there are no corresponding provisions in these Rules for inbound

[9] Oder 38 Rule 41

[11] See NATIONAL INSURANCE COMMISSION & ORS v. FIDELITY BOND OF (NIG) LTD & ORS (2016) LPELR-41427(CA); CLEMENT V. IWUANYANWU (1989) 4 SC (PT 11) 89. (P. 33, Paras. A-B)

requests from a foreign court, it may be implied that these courts may be able render similar assistance to a foreign court on the basis of reciprocity. The idea of cross border judicial assistance to foreign liquidators is therefore not entirely strange to the Nigerian law and practice. However, we are not aware of any successful precedent in this regard. That courts in Nigeria may be willing to accede to any such requests remains a mere theoretical possibility.

Conclusion/Recommendation

What we have highlighted above appears to be all there is on cross border judicial assistance under Nigerian law.[12] Evidently, they are as good as nothing. We may therefore safely conclude that there is currently no law in Nigeria that deals specifically with cross border judicial assistance generally and/or insolvency cases in particular. We are therefore left in doubt as to the legal status of foreign insolvency proceedings and foreign liquidators in Nigeria. This is especially as it relates to the assets of the companies being wound up that are in Nigeria. Without doubt, this presents enormous challenges to such foreign liquidators in their responsibility to gather all the assets of the companies being wound up (wherever they may be) for distribution to creditors.

This article therefore lends its voice to the call for Nigeria to adopt the UMLCI. The UMLCI makes ample provisions that adequately address the cross border insolvency issues we are always confronted with in Nigeria. Adopting the UMLCI will benefit Nigeria in many ways.[13]

Some countries (South Africa for example) in adopting the UMLCI have included reciprocal enforcement provisions to the effect that their domestic courts will recognize a foreign judgment or order only if the foreign court would recognize their judgment or order on comparable grounds.[14] Adopting the UMLCI will therefore open up the opportunity for liquidators from Nigeria to seek and obtain judicial assistance in these countries. This would invariably further project Nigeria on the global business map.

Having been adopted by many countries, the UMLCI now forms part of international best practices in dealing with cross border insolvency issues. It provides a robust mechanism for international cooperation. It offers a framework for collaboration between domestic and foreign courts and domestic and foreign insolvency practitioners which would help insolvency practitioners in Nigeria to build capacity. By so doing, Nigeria's position and participation in international trade will surely be enhanced.

Adopting the UMLCI is without doubt a step in the right direction for Nigeria.

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[12] There are the Foreign Judgments (Reciprocal Enforcement) Act Cap 152 LFN 2004 and the Reciprocal Enforcement of Judgments Ordinance Cap 175 LFN&L 1958 both of which make provisions for recognition of foreign judgments. They have not been discussed in this article as they only apply to money judgments and are therefore not relevant in this discussion.

[13] We understand that there is a Bankruptcy and Insolvency Bill which seeks to repeal the Bankruptcy and Insolvency Act, No. 16 of 1979 Cap. B2 Laws of the Federation of Nigeria 2004 and re-enact the Act to, among other things, provide for cross border insolvencies by incorporating provisions of the Model Law. This is commendable and should be vigorously pursued to a logical conclusion.

[14] Re Sefel Geophysical Ltd (1988) 70 CBR (NS) 97, 54 DLR (4th) 117 (Alta QB) [26].

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