THE LEGAL POSITION ON WINDING UP OF INSOLVENT FOREIGN COMPANIES IN NIGERIA

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Abstract

Registered companies remain veritable vehicles for carrying out business activitiesand generally depend on both equity capital and loan capitalto fund their undertakings. Although equity capital is the more convenient form of capital, it is never sufficient, hence the resort to loan capitalover time. One of the ways of recovering loan capital when there is default on the part of the borrower is through winding up proceedings. Winding up is a process for bringing the existence of a company to an endand which if possible, ensures that before the company ceases to exist, all its outstanding obligations are met, with surplus assets, if any, distributed to the members according to their agreed entitlements. In Nigeria, the primary legislation on winding up of companies is the Companies and Allied Matters Act 2020 and the Companies Winding up Rules. While the application of the above-mentioned legislation in winding up of companies registered under the extant laws in Nigeria is incontrovertible, it still arguable whether it can apply to foreign companies. This paper examines the legal position on winding up of insolvent foreign companies in Nigeria. The doctrinal research methodology was adopted. The conclusion of this paper is that foreign companies cannot bereadily wound up under the extant insolvency legal regime in Nigeria.

Keywords: Business, Capital, Foreign Company, Insolvency, Winding up.

1. Introduction

Companies remain one of the veritable vehicles for carrying out business in all jurisdictions. In order to carry out lawful business activities, companies usually require capital. The required capital can be in the form of equity capital and loan capital or either. However, equity capital is not always sufficient to settle the capital needs of a company. Hence, the resort to loan capital, which is usually predicated on provision of collateral security as guarantee for repayment. If at the due date for repayment, the company is not able to repay or settle all its debts, the company is deemed insolvent.

Insolvency typifies a situation when a company finances runs out and it is unable to pay its debts as they fall due.[1] In order to address insolvency, winding up is a procedure often invoked or activated. Winding up is a process for bringing the life of a company to an end, and which ensures that before the company ceases to exist, all its outstanding obligation are met, if possible, and any surplus assets, if there are any, distributed to the

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[1] Companies and Allied Matters Act, Cap C20 LFN 2004 (CAMA), ss 408(d), 409 (Repealed); Companies and Allied Matters Act 2020 (CAMA 2020), ss. 571(d), 572; D French, *Mayson, French & Ryan on Company Law* (36th edn, Oxford, UK: Oxford University Press 2019-2020) 683.

members according to their agreed entitlement.[2] Winding up proceedings are specialised, unique and *sui generis*.[3] In other words, the law and rules governing winding up proceedings are strictly followed and interpreted. TheCompanies and Allied Matters Act (CAMA) 2020,[4] and the Companies Winding up Rules 2001,[5] remain the principal legislation governing winding up petitions. The Court with jurisdiction over winding up of companies is the Federal High Court.[6] However, the jurisdiction of the Federal High Court is circumscribed to the registered office or head office of the Company to be wound up.[7] By implication, while the Federal High Court's exercise of jurisdiction over companies incorporated in Nigeria under the extant laws is not subject to debate, this not the case with companies incorporated outside Nigeria.

A foreign company is one registered as a company under the laws of a foreign country.[8]The general legal position is that a foreign company cannot carry on business in Nigeria without being registered as a company under the extant laws in Nigeria or granted exemptions.[9]Despite the prohibition on a foreign company carrying on business in Nigeria, a foreign company can sue and be sued in Nigeria.[10] Nevertheless it remains arguable if a winding up petition can be commenced against an insolvent foreign company in Nigeria. Again, where a winding up petition is invoked against an insolvent foreign company can it be successfully concluded, particularly in relation to gathering and distribution of offshore assets to persons that may be entitled. This is more intractable with the absence of any law on cross border insolvency as Nigeria is yet to adopt the United Nations Commission On International Trade Law (UNICTRAL) Model Law on Cross-Border Insolvency,[11]or the UNICTRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.[12]

This paper therefore, examines the legal position on winding up of insolvent foreign companies in Nigeria.It is divided into four parts: the introduction, which gives a

[2] P.L Davies and S Worthington, *Gower's Principles of Modern Company Law* (10thedn, London: Sweet and Maxwell 2016) 1151; J. E .OAbugu, *Principles of Corporate Law in Nigeria* (2ndedn, Lagos: MIJ Professional Publishers Limited 2014) 747.
[3]*Ecobank (Nig) Ltd* v *Honeywell Flour Mills Plc* [2019] 2 NWLR (pt 1654) 55 at 84, paras G-H.
[4] CAMA (n1), Pt XV; CAMA 2020 (n1), chap 20.
[5] 2001.
[6] CAMA (n1), s 407(1); CAMA 2020 (n1), s 570(1).
[7]CAMA (n1), s 407 (1) (2); CAMA 2020 (n1), s 570(1)(2).
[8]CAMA (n1), s 567(1); CAMA 2020 (n1), s 868(1).
[9] CAMA (n1), ss 54, 56; CAMA 2020 (n1), ss. 78(1), 80; Companies Regulations 2012 (as amended), reg 27; *Procter & Gamble Co* v *G.S.D Ind. Ltd* [2013] 1 NWLR (pt 1336) 409; *Citec Int'l Estates Ltd* v *Edicomsa Int'l Inc Associates* [2018] 3 NWLR (pt1606) 332; Abugu (n2) 137.
[10]CAMA (n1), s 60(b); CAMA 2020 (n1) s. 84(b); *INFAZ* V *COBEC* (Nig) LTD [2018] 12 NWLR (pt 1632) 127; Abugu (n2), 137.
[11] 1997
[12] 2018

summary of the paper, conceptual clarifications, winding up by or against a foreign company and conclusion.

2. Conceptual Clarifications

Conceptual clarifications are made to define and clarify some of the concepts used in this paper.[13]

2.1 Insolvency

The concept of insolvency and bankruptcy are often treated as synonyms for each other.[14] However, they differ to the extent that while bankruptcy identifies the state of an individual, insolvency on the other hand, though not subject to a precise meaning, refers to a company's inability to pay debt as they fall due,[15] or mature;[16] the situation of not having enough money to pay debts or creditors.[17] It is a legal term meaning that a debtor is unable to pay his debts.[18] Simply, insolvency is the inability of a company to pay its debts.[19] This concept is variously known as ordinary, common law, equity or commercial insolvency, which means inability to pay debt as they become due.[20]

The above definitions of insolvency are quite simplistic and do not represent the different shades of insolvency. To this end, it becomes imperative to define insolvency by distinguishing through classifications of cash-flow insolvency and balance-sheet insolvency. Cash flow insolvency, otherwise known as "inability",[21] or "short term" or "practical"[22] insolvency, refers to when a company is unable to pay its debt as they fall due,[23] and this is usually inferred from the fact that a company has failed to pay, on demand, a debt which is due.[24] On the other hand, balance sheet insolvency, otherwise

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[14] I F Fletcher, *The Law of Insolvency* (2nd edn, London: Sweet & Maxwell 1996) 4.
[15]French (n1) 683.
[16]G S Joslin, 'Insolvency in Bankruptcy: a Synthesis' *Indiana Law Journal*(1962) 38 (1): 23.
[17]C. E. Halliday,'Harmonisation of the Laws on Bankruptcy and Corporate Insolvency in Nigeria: a Desideratum'. *Port Journal of Business Law* (2018)4 (1): 154.
[18]K Gratzer, 'Default and Imprisonment for Debt in Sweden: From the Lost Chances of a Ruined Life to the Lost Capital of a Bankrupt Company*' in K Gratzer and D. Stiefel (eds), History of Insolvency and Bankruptcy from an International Perspective* (Sodertonshogskola 2008) 15
[19]O J Olujobi, & T Olusola-Olujobi ,'Insolvency Law and Business Recovery Practices in Nigeria's Upstream Petroleum Sector: the Need for a Paradigm Shift' *IJMET* (2019)10 (1): 1610.
[20]*London & Counties Assets Ltd v Brighton Ground Concert Hall & Picture Palace Ltd* [1915] 2 KB 493 at 501, 503; Honsbeger (n20) 201.
[21]Joslin (n16), 24.
[22]I F Fletcher, *The Law of Insolvency* (2nd edn, London: Sweet & Maxwell 1996) 5.
[23]I F Fletcher, *The Law of Insolvency* (4th edn, London: Sweet & Maxwell 2009)485; C A Candide-Johnson& A Alex-Adedipe, 'Debt Recovery: Corporate Insolvency-Receivership, Winding up and other Arrangements' in O. Olanipekun (ed), *Banking: Theory, Regulation, Law and Practice* (Lagos: Au Courant 2016) 432.
[24]J Armour'The Law and Economics of Corporate Insolvency: a Review' (2001) ESRC Centre for Business Research, University of Cambridge Working Paper No. 197. 3; Fletcher (n24); Candide-Johnson & Alex-Adedipe (n24)

known as "absolute",[25] insolvency, is an accounting concept and signifies that the book value of a firm's assets are less than those of its liabilities.[26]In other words, even where its overall assets position may not be in deficit, it has cash flow problems that prevent it from paying its debts when they fall due or upon demand. Also, it is where the aggregate of a person's property is not at a fair valuation sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its present and future obligations.[27] In other words, balance sheet insolvency describes an internal condition, the existence of which can be legally ascertained only through a comprehensive examination of the debtor's entire financial condition. Balance sheet insolvency occurs where the liabilities of a company exceeds its assets, taking into account, not only current liabilities but also, contingent and prospective liabilities.[28]

In addition to cash-flow insolvency and balance-sheet insolvency, there are new classifications of insolvency as ultimate insolvency and regulatory insolvency. While ultimate insolvency is a type of insolvency where on the liquidation of the assets of the company, there are no sufficient assets remaining to satisfy the claims of the creditors, regulatory insolvency refers to where though the assets of a corporate entity could exceed its liabilities, it will not meet the regulatory thresholds fixed under the applicable law.[29]

It is trite to state that there is a major difference between corporate insolvency and bank insolvency. While the primary concern of the law in corporate insolvency is the protection of the interest of the creditors of the company, bank insolvency usually has broader ramifications including the interest of shareholders, depositors and creditors of the affected bank, as well as the banking sector and the economy at large.[30] This difference between corporate insolvency and bank insolvency explains the reason for not restricting bank insolvency to the two tests of cash-flow insolvency and balance-sheet insolvency.

2.2 Winding up or Liquidation

Winding up and liquidation are often used interchangeably,[31] though they do not, at all times, mean the same thing. While winding up is the term used in Nigeria, liquidation is preferred in other jurisdictions such as the United Kingdom. Liquidation is a process for bringing the existence of a legal entity to an end,[32] and designed to ensure that before the company ceases to exist, all its outstanding obligations are met, so far as they can be, and

[25] Fletcher (n23).
[26]Armour (n25), 3.
[27](n22).
[28] (n23); Candide-Johnson & Alex-Adedipe (n24) 432-433.
[29](n17).
[30]K Ekwueme, 'Failure Resolution' inOlanipekun (n24) 493.
[31]French (n1) 702.
[32]Davies & Worthington (n2) 1151.

any surplus assets, if there are any, are distributed to members according to their agreed entitlement.[33]

Winding up is a term commonly associated with the ending of the life of a company. It is the process by which the assets of the company are collected in and realized, its liabilities discharged and the net surplus, if there is one, distributed to the persons entitled to it.[34] The term winding up is used to describe the process whereby the life of a company is brought to an end and its property is administered by an official called the liquidator, for the benefit of the creditors and members of the company.[35] It is also described as the process whereby the assets of a company are collected and realised and the resulting proceeds are applied in discharging all its debts and liabilities as far as the proceeds allow after paying the cost and expenses of winding up.[36] It is the process of "killing" a corporate person and appointing an undertaker for its funeral.[37] It is a process by which a company is liquidated and dissolved and its assets, if any, distributed in accordance with certain rules of priority, for the benefit of the creditors, members and employees of the company;[38] the extinguishment of the life of a registered company;[39] and removing the company from all its legal relationships.[40]

Winding up of a company can be based on either insolvency or solvency. Insolvent winding up refers to when a company is liquidated for inability to pay its debt,[41] while solvent winding up refers to a voluntary winding up under the circumstances provided in the CAMA,[42]and the CAMA 2020.[43]Furthermore, winding up is usually classified by the modes: by the court or compulsory winding up, voluntarily, and subject to supervision of the court. Compulsory winding up refers to liquidation initiated through the invocation of any of the circumstances mentioned in section 408 of the CAMA.[44] While winding up voluntarily is a winding up in accordance with *section* 457 of the CAMA, which can be

[33](n32).
[34]J. H Farrar & B Hannigan, *Farrar's Company Law* (4th edn, London: LexisNexis Butterworths Tolley 1998) 704.
[35]Abugu (n2) 747.
[36]R Keay and Others, 'Preferential Debts in Corporate Insolvency: A Comparative Study' (2001)*Int. Insolv. Rev*. 10 (3): 169 – 170.
[37]*Oyo State Paper Mills Limited v Nibel Co. (Nig) Ltd.* [2017] 3 NWLR (Pt. 1552) 207 at 243, para. C.
[38]Candide-Johnson&Alex-Adedipe (n24) 448; C. E. Halliday,'Applications and Orders in Winding up Proceeding in Nigeria: Resolved and Unresolved Issues' (2019)*Nnamdi Azikiwe University, Awka Journal of Commercial and Property Law* (6): 46.
[39]E A Esu,'Company Liquidation and Corporate Rescue in Nigeria: the Need for Reform' in O.V.C. Okene (ed),*Readings in Law and Policy:Current Issues and Trends* (Owerri: Zubic Infinity Concept 2017) 258.
[40](n32).
[41] CAMA (n1),ss. 408 (d), 409, 507(1); CAMA 2020 (n1), ss 571(d), 572, 673(1); IA 1986 (as amended), ss. 122 (1) (f), 123 (UK); IBC 2016 (as amended), ss. 6, 7 (India).
[42] CAMA, s. 457
[43] CAMA 2020 (n1), s.620.
[44]Halliday (n39) 48; Abugu (n2) 751-752; Esu (n40) 260.

either members' voluntary winding up or creditors' voluntary winding up, winding up subject to supervision of court is described as:

> … occupies one unique position in between winding up by the Court and Voluntary winding up as shown in Sections 490 (1) and (2) of the CAMA. Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the court, exercise all his powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up voluntarily…. that the powers specified in paragraphs D, E and F of Section 425 (1) shall not be exercised by the liquidator except with the sanction of the court or, in a case where before the order, the winding up was a creditors voluntary winding up, with the sanction of the court or the committee of inspection, or (if there is no committee) a meeting of the creditors... .[45]

2.3 Carrying on Business as a Foreign Company in Nigeria

A foreign company can carry on business only where it is registered as a company in Nigeria or granted exemptions.[46] The meaning of the expression "carry on business" is not easily discernible. However, it has been judicially construed as doing business on a continuous or reasonably long period of time in Nigeria.[47] If a foreign company meets with this definition of carrying on business', it has to be incorporated as a separate entity or granted exemption before it can continue to carry on business in Nigeria.[48]Exemption to a foreign company can be granted pursuant to the provision of theCAMA.[49]It is important to state that an exempted foreign company wears the status of an 'unregistered company'.[50]

3. Winding Up by or against a Foreign Company

While insolvency remains one of the grounds for winding up a company in the country of incorporation, it is still arguable weather a company can be wound up by a court in a country other than the country of incorporation. To this end, this paper will carry out a comparative analysis of law and procedure on the winding up of an insolvent foreign company in the United Kingdom and Nigeria.

3.1 The UK Position

It is trite that in the United Kingdom, winding up petition can be commenced against a foreign company as an unregistered company by virtue of insolvency legislation in

[45]*Corporate Affairs Commission v Davis* [2008] 1 N.W.L.R (Pt. 1067) 60 at 78 -79, paras. H–F.
[46] (n9).
[47]*Ritz Pumpenfabrik GMBH and Co KG* v *Techno Continental Engineers, Nig Ltd and Anor* [1999] 4 NWLR (pt 598) 298; *Soctin Consultants Services Ltd* v *Asuamah*[2002] FWLR (pt 130) 1729; *Edicomsa International Inc & Associates* v *Cites International Estates Ltd* [2006] 4 NWLR (pt 969) 114 at 125; (n9) 332; *Kwame* v *Sucre Export* (London) Ltd [2003] All FWLR (pt 186) 637.
[48] (n9).
[49] CAMA (n1), ss 54(3), 56(1); CAMA 2020 (n1), ss. 78(3), 80(1).
[50]CAMA (n1), s 58; CAMA 2020 (n1), s 82.

force.[51]This position were amply approved by the court in the following cases: *InRe Matheson Brothers Limited,*[52]*InRe Russian and English Bank,*[53]*In Re Russian Bank for Foreign Trade,*[54]*In Re TovarishestvoMacfacturLiudvigRabenek,*[55]*Banque Des Marchands De Moscou* v *Kindersley,*[56] and *In ReAzoff-Don Commercial Bank.*[57] In the decided cases, the courts have laid down constraints as regards circumstances in which the jurisdiction will be exercised. In this vein, Evershed MR in *Banque desMarchands De Moscou* v *Kindersley* stated thus:

> As a matter of general principle, our courts would not assume and parliament should not be taken to have intended to confer jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, to at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present, the exercise of the jurisdiction remains discretionary.[58]

It was until the case of*In Re CompaniaMerabello San Nicholas SA,*[59] that a recognisable principle was laid out. In this 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 showing that there is no reasonable possibility of benefit accruing to creditors from a winding up order.

The formulation of these principles has changed over time, and in particular, the presence of assets in the jurisdiction is no longer regarded as essential. Hence, following the decisions of the courts: Megarry J,*In ReCompaniaMerabello San Nicholas SA;*[60]Nourse J, *In Re ElocEloctro-Optiek and Communicatie BV*;[61] and Peter Gibson J, *In Re A*

[51] Companies Act 1862, s. 199 (repealed); Companies Act 1929, ss. 337, 338 (repealed); Companies Act 1948, s. 399 (repealed); Insolvency Act 1986 as amended, pt. V, s. 221.
[52][1884] 27 ChD 225.
[53] [1932] 1 Ch 663.
[54] [1933] Ch 745.
[55] [1944] 2 All ER 556.
[56] [1951] Ch 112.
[57] [1954] 1 ChD 947
[58] (n 58) at 125
[59] [1973] Ch 75
[60] (n61).
[61] [1981] 2 All ER 111; [1982] Ch 43.

Company,[62]the statement of the relevant principles has evolved to the point at which they were summarised by Knox J in *Real Estate Development Co*,[63]as consisting of three core requirements, as follows:

i) There must be a sufficient connection with England and Wales, which may, but does not necessarily have to, consist of assets within the jurisdiction;

ii) There must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding up order; and

iii) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.

In a nutshell, despite the width of the statutory provision, the English Court does not exercise its jurisdiction to wind up a foreign company unless a sufficient connection with England and Wales is shown. And there is reasonable possibility of benefit for the creditors from the winding up.[64] Suffice to state that the courts in the United Kingdom have jurisdiction to make winding up order against foreign companies, which for purposes of winding up are treated as unregistered companies.[65]However, the exercise of court's jurisdiction is a matter of discretion, depending on the facts of each case.

3.2 The Nigerian Position

Although a foreign company cannot carry on business in Nigeria without incorporation as a separate entity or after grant of exemptions, a foreign company generally is entitled to sue and be sued.[66] However, it not easily decipherable if a foreign company can be sued by way of winding up petition. This is because the registered office or head office, which typically denotes the domicile of a company is ordinarily situated in the country of incorporation. The jurisdiction of the Federal High Court over winding up proceedings is predicated on satisfaction of the provisions of *section* 570 of the CAMA 2020. And the territorial basis for the invocation of jurisdiction by the Federal High Court is premised on ascertainment of the registered office or head office of the company being wound up.[67]The registered office or head office referred to in *section* 570(1) of the CAMA 2020 means the place which has longest been the registered office or head office of the company to be wound up. To this end, it is pertinent that registered office or head office of a company is usually situate in the country of incorporation as it determines

[62] [1987] 2 All ER 137.
[63] [1991] BCLC 210 at 217.
[64]*InRe Paramount Airways Ltd* [1993] Ch 223; *In Re Titan International* [1998] 1 BCLC 102 at 106; *StoczniaGdanska SA v Latreefers Inc* [2000] *EWCA CIV* 36; [2001] *BCC* 174.
[65] IA 1986 (n 52), s 221(1); *StoczniaGdanska SA v Latreefers Inc* (n65).
[66] (n10); *Ritz Pumpen Fabrik GMBH&Co KG* v *Techno Conttinental Engineers Nig Ltd* (n47); *Watanmal (Singapore) PTE Limited* v *Liz Olofin& Co* [1998] 1 NWLR (pt 533) 311; *Nigerian Bank of Commerce & Industry Ltd* v *Europa Traders (UK) Ltd* [1990] 6 NWLR (pt 154) 36; *Olaogum Ent. Limited* v *S.J & M* [1992] 4 NWLR (pt 235) 361.
[67]CAMA (n1), s 407(1); CAMA 2020 (n1), s. 570(1);*Mercantile Bank of Nigeria Plc* v *Nwobodo* [2006] NWLR (pt 648) 297.

domicile.Thus, a foreign company cannot have its registered office or head office elsewhere other than its country of incorporation. It is therefore the position of this paper that a foreign company cannot be wound up by the FHC under the provisions of the CAMA 2020 since the jurisdiction vested on it to hear and determine a winding up petition does not extend to foreign companies by a sober interpretation of *section* 570 of the CAMA 2020.

On the other hand, it has been argued that insolvent foreign companies can be wound up as unregistered companies,[68]pursuant to the provisions of the repealed CAMA,[69] and the CAMA 2020.[70]Unfortunately, the definition of a foreign company as an unregistered company is faulty and misconceived. Contrary to the strenuous attempt to squeeze a foreign company under the definition of an unregistered company in *section* 567(1) of the CAMA (now *section* 868(1) of the CAMA 2020), by reason of the provisions of *section* 58 of the CAMA (now *section* 82 of the CAMA 2020), it is onlya foreign company granted exemption under the provisions of the repealed CAMA or the extant CAMA 2020 that is clothedwith status of an unregistered company. Therefore, it is only a foreign company granted exemption that may be wound up as an unregistered company.[71] Suffice to state that winding up as an insolvency procedure is focused on resolving insolvency arising mainly from failure of business. Foreign companies carrying on business by reason of an exemption, which is at best, temporary and insolvency remote, are not usual subjects of a winding up proceedings. Unlike the position in Nigeria, in the United Kingdom, jurisdiction in winding up is exercisable in relation to two kinds of company, namely those registered in England and Wales, which may be wound up by the court in accordance with chapter VI of Part IV of the IA 1986 , and those companies unregistered, within the meaning of the Insolvency Act.[72] Foreign companies come within the definition of unregistered companies for the purpose of the IA 1986, and the courts in the UK empowered to wind up a foreign company in accordance with Part V of IA 1986,[73] particularly on the ground of insolvency.[74]

It is instructive that as a general rule, a company incorporated outside the UK, whether within the EU or not, need not form a British subsidiary company in order to do business in the UK. It may trade through an agency or branch in the UK or, indeed, simply contract with someone in the UK without establishing any form of presence in the

[68] K Udofia, 'Winding up Insolvent Foreign Companies in Nigeria' ThisDay Lawyer (Lagos, 24 March 2020) 13.
[69] CAMA (n1), pt. XV, chap. 6, ss 532-536.
[70] CAMA 2020 (n1), chap. 25, ss 699-703.
[71] CAMA (n1), chap 6, pt XV; CAMA 2020 (n1), chap 3.
[72] IA 1986 (n52), s 220(1),
[73] Fletcher (n12) 519-520.
[74] IA 1986, s 221(5)(b)

country.[75]By implication,a foreign company can acquire assets, carry on business and have a place of business in the UK, hence, it is readily easy to establish sufficient connection with England and Wales for court to exercise jurisdiction over foreign companies in winding up petition. This is not possible in Nigeria where the extant Companies legislation prohibits a foreign company without obtaining incorporation as a separate entity from carrying on business in Nigeria or exercising any of the powers of a registered company or have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents towards incorporation as a separate entity in Nigeria.[76]Therefore, it is difficult to establish sufficient connection with Nigeria to ground the FHC's jurisdiction to hear and determine a winding petition against an insolvent foreign company.

It is appropriate to state that general problems associated with winding up containing international elements are yet to be addressed under extant insolvency laws in Nigeria. There are questions on whether the FHC can legitimately exercise jurisdiction in "cross border" insolvency matters, and secondly, if so, what rules of law would apply. The quick answer is that the Federal High Court is not equipped to exercise jurisdiction over cross-border insolvencies as the UNICTRAL Model Law on Cross-Border Insolvency, and the UNICTRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments have not been incorporated in the *corpus juris* in Nigeria to satisfy the provisions of *section* 12 of the CFRN 1999.

4. Conclusion

Generally, a foreign company is empowered to sue and be sued. However, companies winding up proceedings cannot be initiated against a foreign company in accordance with the provisions of the CAMA 2020. But a foreign company granted exemptions pursuant to *sections* 78(3) and 80 of the CAMA 2020, and thereby acquiring status of an unregistered company may be wound up in accordance with the provisions of chapter 25 of the CAMA 2020. Furthermore, the extant insolvency legislation in Nigeria are inadequate to the extent that there are no provisions addressing cross-border insolvency, and winding up containing international elements.

The following suggestions are made:

1. The National Assembly should further amend the provisions of the CAMA 2020, thus:
    i) Substitute *section* 78 of the CAMA 2020 with a new section that removes the requirement for fresh incorporation of a foreign company as a separate entity before it can carry on business in Nigeria. Instead a new *section* 78 of the CAMA

[75] Davies and Worthington (n2) 118.
[76] CAMA (n1), s. 54(1); CAMA 2020 (n1), s. 78(1).

2020 that mandates every foreign company to make appropriate disclosures and filings of its incorporation details with the Corporate Affairs Commission.

ii) Remove the provision on "registered office" or "head office" defining jurisdiction of the Federal High Court in winding up Petition as provided in *section* 570 of the CAMA 2020.

iii) Deletion of the exceptions to *section* 868(1) of the CAMA 2020 in relation to the definition of an "unregistered company".

2. The National Assembly should as a matterof urgency enact Acts to domesticate theUNCITRAL Model Law on Cross Border Insolvency and the UNICTRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

3. The National Assembly should unbundle and remove insolvency provisions from the CAMA 2020, and enact a specific insolvency legislation that will establish a body corporate, which will regulate insolvency and other incidental matters.