REVISITING WINDING UP OF COMPANIES IN CORPORATE LAWS; SELECTED JURISDICTIONS (NIGERIA, UNITED STATES, AND CHINA).

BY

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INTRODUCTION:

1.0 Introduction

The winding up or liquidation of a company is the process by which a company's assets are collected and sold in order to pay its debts. Any monies remaining after all debts, expenses and

costs have been paid off are distributed amongst the shareholders of the company. When the winding up has been completed, the company is formally dissolved and it ceases to exist.

Winding up of a company in Nigeria is the liquidation and dissolution process of any given company in Nigeria. It is a decision that is collectively settled by the company to end the existence of such company, consequently leading to the distribution of the company's assets for the benefits of the creditors and members of the company.[1]The petition for winding up of a company can also be initiated by the creditors of the company.[2] However, the procedure for winding up of a company in Nigeria could be carried out in any of these three different modes, which are,: Voluntarily, By the Order of the Court, or Subject to the supervision of the Court.

It is often said that what has a beginning should have an end; what is born could die. Business and non-business organizations experience this natural phenomenon. A corporation is born upon its registration/incorporation and dies upon winding up/dissolution. Thus the court in Tate Industries Plc v Devcom M.B. Ltd[3] corroborated the analogy by stating ''A winding up proceedings is signing the death warrant of a company or a pronouncement of the death of the company.'' Unlike other business and non-business organizations, only companies undergo both winding up and dissolution[4] processes while Partnership, Business name and Incorporated Trustees only get dissolved by a statute.[5]

Winding up proceedings is the process by which a company is liquidated and dissolved (dead) and its assets (if any) distributed in accordance with certain rules of priority, for the benefit of its creditors, members and the employees.

[1]http://www.mondaq.com/Nigeria/x/758390/Corporate+Commercial+Law/Procedure+For+Voluntary Winding+Up+Of+A+Company+In+Nigeria Article by **Corporate & Commercial Law Department** Nigeria: Procedure for Voluntary Winding Up Of A Company In Nigeria Last Updated: 26 November 2018

[2] The Regulating Laws Relating To Winding Up Procedure In Nigeria
Companies and Allied Matters Act
Companies Proceedings Rules
Companies Winding up Rules
Federal High Court (Civil Procedure) Rules and Act
Investments and Securities Act. Etc.

[3] .(2004) 17 NWLR (pt901) JCA 182 @p.225 paras E-G

[4] N. C. Ogbunanya; Essentials of Corporate Law Practice in Nigeria p. 661

[5] Kwara Investments Co. Ltd v Garuba (2000) 10 NWLR (pt 674) CA. 25-40.

Broadly speaking, a company can be wound up in one of two ways. First, the Court can compulsorily wind up a company. Secondly, the shareholders or the creditors of the company can themselves apply to wind up the company in proceedings known as "voluntary winding up".

1.1 Voluntary Winding Up of a Company in Nigeria

This voluntary winding up of a company with specific referencing to the sections 457- 485 of the Companies and Allied Matters Act.[6]

The Sections 457 of the Act provides two instances by which a voluntary winding up could occur, with the first being when the period, if any, fixed by the articles of the company stipulates the duration the company is to exist and same subsequently expires, or if the article base the existence of the company on some future event and same subsequently occurs; the company at its general meeting may pass A resolution requiring the company to be wound up voluntarily.

Secondly, if the company decides on its own to terminate its existence, members of the company may by the passage of a Special Resolution at the general meeting of the company wind up the company voluntarily.

1.2 Process for Voluntary Winding Up Of A Company

There are two types of procedures that can be used to voluntarily wind up a company in Nigeria. The procedures include the following:

1. A Members winding up (i.e. where the company is solvent and can pay its debt in full within such period not exceeding twelve months from the commencement of the winding up). Sections 464- 470 of CAMA[7]; Or
2. A Creditors winding up (I.e. if the company is insolvent and the creditors of the company would have to take charge of the liquidation process) as provided for under sections 472- 478 of the Act[8].

1.3 Procedure for a Company Voluntary Winding-Up By Members

[6] Cap C20 LFN 2004
[7] ibid
[8] ibid

1. The company at a general meeting would pass a special resolution proposing to wind up the company, and at this meeting would appoint one or more liquidators for the process. The appointed liquidator may be a corporate lawyer or professional such as an accountant with the good knowledge of the winding up laws and procedures.
2. The company shall give notice of the special resolution passed to the Corporate Affairs Commission (CAC) within 14 days of its passage and also advertise it in the official gazette or in two daily newspapers. Section 458 (2)CAMA[9].
3. A statutory Declaration of solvency must be made by the directors or majority of the directors within 5 weeks immediately preceding the date of the passing of the special resolution for winding up the company. Section 462 (1),(2)(a)CAMA[10]
4. The company must thereafter cease to carry out business after the resolution for winding up has been passed, and the powers of the directors' ceased upon the appointment of the liquidator unless the company in a general meeting or the liquidator allows the continuance of it. Section 464(2)CAMA.
5. In the event the winding up process last for more than a year, the liquidator is to hold a meeting at the end of each year, and these meetings should be called to notice by publishing it in the official gazette and in some newspapers printed in Nigeria.
6. The liquidator is to hold final meetings upon liquidation of the company and a copy of the accounts/returns of the meeting sent to the Corporate Affairs Commission within 7days of the meetings for registration. Section 468 (3)CAMA
7. As soon as the affairs of the company are fully wound-up the liquidator is to prepare, send and convene a meeting for the purpose of laying before it the financial accounts of the winding up, thus showing how the winding up was conducted and result of any trading during this period. Section 470 (3)
8. The liquidator is required to preserve all books/papers/documentation of the company on his activities as a liquidator for a period of 5 years before any destruction or otherwise directed by the commission in such event shall not destroy same until the CAC consents in writing. Section 470(8)
9. The liquidator shall within 28days after this meeting sends to the Corporate Affairs Commission the copies of the accounts and a statement of holding of meeting and dates for registration. Section 470 (4)

[9] ibid
[10] ibid

10. The liquidator is thereafter to finally apply for dissolution order and send same to the commission. It should be noted that the company is deemed dissolved after 3 months of the registration of the accounts/returns with the Corporate Affairs Commission in accordance with the Sections 478(4)

1.4 Voluntary Winding Up By Creditors of Company

In voluntary winding up by creditors, both the company and its creditors would hold separate meetings to propose for a winding up of the company. In this case, the company must call the meeting of the creditors on the same day or the next day after Section 472(1). The Creditors and the Company at their respective meetings may nominate a person to be the liquidator of the winding up process. However, the person nominated by the Creditors will be the liquidator if different persons were nominated at the two meetings. Meanwhile, any director, member, or creditor may apply to the court to order otherwise. Section 473(1).[11]

The Creditors at their meeting may, if they think fit, appoint a committee of inspection of not more than 5 persons. The Company may also appoint not more than 5 persons to the committee but the creditor may reject such persons so appointed by the Company. The liquidator shall within 14 days of his appointment publish it in the official gazette and 2 daily newspapers and he is to deliver same to the commission for registration a Notice of his appointment. Section 477. The liquidator shall make publications of notice of the final meeting and the account of the liquidation is laid before and approved by the meeting. And after this meeting, the liquidator must within 7 days sends a copy of the account and return holding of the meeting to the Corporate Affairs Commission. The company is subsequently deemed dissolved after 3 months of the registration of the accounts and return to the commission, Section 478(4). However, the Court upon an application by the liquidator, member, or creditor can defer the date, which the dissolution is to take effect.[12]

For Members' Voluntary Winding Up to take place, a company must be in a position to pay its debts in full within 12 months after the commencement of winding up. The directors of the company are required to file a declaration of solvency to the above effect. The liquidator will be appointed by the company while in Creditors' Voluntary Winding Up, if a company is unable to

[11] ibid

[12] http://www.supremecourt.gov.sg/rules/court-processes/civil-proceedings/other-civil-proceedings-and-processes/company-winding-up-proceedings

pay its debts and wishes to be wound up, it may do so by way of a creditors' voluntary winding up. In addition to the requirement of a members' resolution to wind up the company, the company must also convene a meeting of its creditors to consider the proposal for a voluntary winding up. The company will appoint a liquidator, subject to any preference the creditors may have as to the choice of liquidator.[13]

Usually, a voluntary winding up is effected by the passing of a special resolution by the members of the company. The winding up commences at the time of passing the resolution.[14]

In conclusion, it is noteworthy that the moment a company voluntarily decides to wind itself up, there are effects and consequences of such action being carried out towards the structure of the company. In this case, the company will cease to carry on its business except so far as may be required for the beneficial winding up of the company. It should be noted that the company still remains a corporate entity with its corporate powers (unless its articles provide otherwise) or until it is finally dissolved.

However any transfer of shares without the sanction of the liquidator, and any alteration on the status of members of the company made after the commencement of a voluntary winding up shall be void, as provided under the Section 461 of the Company and Allied Matters Act.[15]

1.5 COMPULSORY WINDING UP

There are certain grounds upon which a company can be wound up compulsorily. A company's inability to pay its debts is a common ground for presenting an originating summons for compulsory winding up. A company is deemed to be unable to pay its debts if:

- A creditor having a claim against the company for more than S$10,000.00 has served a written demand requiring payment, and the debt is not paid within 3 weeks;
- Execution of a judgment obtained by a creditor against a company remains unsatisfied in part or in whole; or
- It is proved to the Court's satisfaction that the company is unable to pay its debts.[16]

[13] ibid
[14] ibid
[15] http://www.supremecourt.gov.sg/rules/court-processes/civil-proceedings/other-civil-proceedings-and-processes/company-winding-up-proceedings

The following parties can file an Originating Summons to wind up a company compulsorily:

- The company itself;
- A creditor of the company;
- A shareholder of the company;
- A liquidator;
- A judicial manager; or
- Various Ministers on grounds specified under the law.

2.0 Main Effects of a Compulsory Winding Up Order

When a company is wound up compulsorily by the Court, the winding up is deemed to have commenced at the time of presentation of the Originating Summons for winding up. Upon the commencement of winding up, the company's officers have no power to carry on the business of the company. The liquidator takes over control of the company.[17]

Within 14 days of the winding up order, the directors and the secretary of the company must deliver a statement of the company's affairs to the liquidator, who must then make a report to the Court. The statement of affairs contains details of the company's assets and liabilities, and enables the liquidator to carry out investigations into the affairs of the company.[18]

After the Originating Summons for winding up is presented, the company, its creditors or its shareholders may apply to restrain any pending proceedings against the company. Once the winding up order is made, no action against the company may be commenced or continued without the leave of the court. Any disposition of the company's property and any transfer of its shares after the commencement of winding up shall be void unless the Court orders otherwise.[19]

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[16] *Badejo v. Minister of Education (1996) 9-10 SCN3 51 at page 91*.
[17] ibid
[18] *Format Produce And Shipping Line Ltd v. Establishment De Commerce General (1971) A.N.L.R. 250*
[19] The Court Fees payable for the filing of documents in respect of Compulsory Winding Up Proceedings may be found in the **Second Schedule** of the Companies (Winding Up) Rules.

If no declaration of solvency is filed or if the liquidator is satisfied that the company is unable to pay its debts within the specified period of 12 months after the commencement of winding up, the winding up will proceed as a creditors' voluntary winding up.[20]

No originating summons is filed in Court for the voluntary winding up of a company. This is dealt with by the Accounting and Corporate Regulatory Authority (ACRA) instead.

2.1 Main Effects of Voluntary Winding Up

From the commencement of winding up, the company shall cease to carry on its business. However, the corporate powers of the company shall continue until the company is dissolved. The company's shareholders cannot transfer their shares in the company without the sanction of the liquidator.

By Section 409 of CAMA[21], a company shall be deemed to be unable to pay its debt if:

a.)A creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2,000 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 or to secure or compound for it to the reasonable satisfaction of the creditor; or

b.)Execution or other processes issued on a judgement, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or

c.)The court, taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debts.[22]

The court may deem a company has been able to pay its debt if the debt is disputed bonafide and there is no evidence that the company is insolvent[23]; also that there was no evidence of due demand for payment.''[24]

[20] ibid
[21] Cap C20 LFN, (2004)
[22] ADO IBRAHIM & COMPANY LTD V. BENDEL CEMENT COMPANY LTD (S.C. 284/2001) [2007] NGSC 114 (13 APRIL 2007);

2.2 Effect of Commencement of Winding Up

Upon commencement of winding up, there shall be no disposition of the property of the company, including things in action and any transfer of shares, or alteration in the status of the members of the company, unless the court orders to the contrary.[25] Where a company is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of winding up shall be void.[26]It should also be noted that after a winding up order has be issued by the court, such order can still be stayed. This is not a form of appeal, but a re-visitation/review of the entire proceedings leading to the setting aside of the order in the interest of justice.[27]

THE CASE OF ADO IBRAHIM & COMPANY LTD V. BENDEL CEMENT COMPANY LTD (S.C. 284/2001) [2007] NGSC 114 (DELIVERED ON 13 APRIL 2007);

The appellant herein was the petitioner at the Federal High Court, Benin City with the respondent as respondent to the petition. In the petition which was filed on the 21st November, 1995, the petitioner averred that the respondent was incorporated under the Companies Act in the month of June, 1964 with its registered office at No 6 Reservation Road, Benin City. The nominal Capital of the respondent Company was ₦20 million divided into 10,000,00 shares of ₦2.00 each. The appellant claimed to be a member of the respondent holding 20% of its share capital having acquired 22,000 shares of the respondent's nominal share capital on the 27th March, 1965. The Government of the then Bendel State, held 80% of the respondent's Share Capital. Appellant averred further that he was a creditor to the respondent and as a lessor, he assigned to the respondent the unexpired term of his Mining Lease ML 17825 by an agreement dated 30th April, 1973. Appellant claimed that he had only two members in the respondent's Board of Directors which consisted of 15 Directors.

The appellant averred further that since he acquired the said shares in 1976, the respondent had neither declared any profit nor distributed any dividend. The respondent, he averred, operated with colossal loss.

In relation to the Mining Lease referred to above, the appellant claimed that the lease expired on 28th September, 1990 but the respondent continued to extract limestone from the area covered by the lease which he applied for a renewal in accordance with the Minerals Act. Appellant maintained that from the said expiry date to the end of December, 1992, the respondent had extracted from the said ML 17825 a total of 364, 704 tonnes of limestone for which appellant

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[23] Tate Industries Plc v Devcom M.B. Ltd Supra, Addo Ibrahim & Co.Ltd v B.C.C Ltd (2007) 13 NWLR (pt 1058) SC 538

[24] The court process must be predicated on service of 3 weeks demand notice – S. 409 (a) CAMA

[25] Section 413 CAMA.

[26] Section 414 CAMA.

[27] Section 438(1) CAMA empowers the Federal High Court to stay winding up. The court may on application either by a liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed.

was to have earned ₦120 per tonne. The appellant made a claim for this sum but following negotiations, between the appellant, the respondent and Edo State Government, it was agreed that the respondent shall pay the sum of ₦7.0 million. Appellant averred further that the respondent was rescued by its majority share holder, the Edo State Government, which subsequently paid to the appellant the sum of ₦ 3.0 million. The outstanding balance of ₦ 4.0 million had neither been paid by either the Edo State Government or the respondent itself despite several demands by the appellant. Appellant finally averred that the respondent is irredeemably insolvent and is presently indebted to several other persons.

In an affidavit opposing the petition, the respondent denied many of the appellant's averments. Notable among such denials are that it is not true that the appellant was a creditor of the respondent Company. On the 14th December, 1995, the appellant filed an application before the trial court for leave to advertise the petition. The application was fixed for hearing by the trial court on 30th January, 1996. However, before the application for leave to advertise the petition was heard, the respondent filed a motion on Notice on the 1-9th December, 1996. This motion on Notice, which the respondent referred to as "the Preliminary objection", sought inter alia to restrain the petitioner from further prosecution of the petition and for an order dismissing the said petition on the sole-point that it was incompetent having been presented on the basis of a debt bona-fide disputed.

The contention of the petitioner was that the petition was brought in two capacities to wit: (i) as a creditor and (ii) as a contributory. The learned trial Judge upheld the petitioner's contention in respect of his capacity as a contributory and struck out his contention as a creditor. Dissatisfied, the respondent filed his notice and Grounds of appeal to the court below. The court below in its judgment of 4th April, 2001 found against the respondent (then appellant) in favour of the petitioner that he was entitled to present the petition as a contributory. The court below, however, went on at that stage to consider the competency of the petition under the just and equitable ground. The petition was accordingly struck out. The petitioner was dissatisfied with the decision of the court below and he filed his Notice and Grounds of Appeal to this court.

In this court, the parties did not file their respective briefs within the time permitted by the rules. They subsequently sought for and obtained extension of time on various dates within which to file their respective briefs of argument out of time.

The court below in its judgment stated, inter alia, as follows:-

"It is therefore clear that the Petitioner presented the petition in a dual capacity namely as a creditor and as a contributory being a shareholder of 20% of the share capital or 22,000 shares. On the authorities therefore, the fact that the paragraphs of the Petition relating to indebtedness or insolvency have been removed from the petition will not completely obliterate the Petitioner's right to petition. I agree with the submission of learned Counsel for the Respondent that the Petitioner could still have a capacity to present the petition as a contributory even after the paragraphs relating to his being a creditor have been struck out. However, different considerations apply where the ground being relied upon in the petition is that it is just and equitable to wind up the company.

The petition ought to show:-

1. That as a contributory the Petitioner has no other remedy apart from the winding up.

2. That the Petitioner is not acting unreasonably

3. That there will be assets for distribution (i.e. that he has something to benefit or interest in the winding up).

4. That the petition is not opposed by the majority shareholders."

Where a contributory brings a petition under this head as was found by the trial court and where the trial court is of the opinion that the Petitioner is entitled to the order of winding up, it must make the order unless it appears to the court that some other remedy is available to the Petitioner and that he is acting unreasonably in seeking a winding up order instead of pursuing that other remedy (*S.411 (2) of CAMA*). Other contingents to the making of such order include, inter alia, the following:-

(i) the contributory must allege and prove that there will be assets for distribution.

(ii) that the petition is opposed by a majority of contributories. In this case the court will refuse to make that order unless the main objects of the Company have failed or became impracticable or that the substratum of the company was gone, e.g. where the Company is making a loss or is deeply indebted.

(iii) an order will be made where it is shown that the conduct of the majority is such as to constitute an oppression to the petitioning minority.

See: *Generally Re-Rica Gold Co. (1879) 11 Ch. D. 36; Re-Willcoks (1973) 2 All E.R. 73; Re-German Date Coffee Co. (1882) 20 Ch. D. 169, Re-Middle borough Assembly Rooms Co. (1880) 14 Ch. D. 104.*

The finding of the trial court was that the appellant was a contributory to the respondent and not a creditor and by that status; he was entitled, to present his petition for the winding up of the respondent Company. A contributory has been defined to be every person liable to contribute to the assets of a company in the event of its being wound up and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories. See *section 567 first schedule of CAMA contained in Cap. C.20 of LFN, 2004.* For the above holding by the trial court, it is apt to quote what the learned trial Judge said:-

"that being the case I hold that the Petitioner as a shareholder of the Respondent Company is entitled to present a petition pursuant to the provision of *section 410 (l)(d) of the Decree*."

The Court of Appeal further, in his reasoning process, Akaahs, JCA with whom other Justices on the Panel that heard and determined the appeal agreed stated inter alia.

"The affidavit in opposition shows that the petition is being opposed by the majority shareholders. The Petitioner has not shown in the petition that it has no other remedy apart from the winding-p of the Company; nor has it shown that there will be assets for distribution. The petition must therefore either allege and the evidence must establish there is a probability of surplus assets for a return to the contributories …….. or else it must be shown that there are other cogent reasons for the making of the order ……. The petition as it stands cannot be based on the ground that it is just and equitable to wind up the Company. I therefore resolve issues 1, 2 and 4 of the appeal in favour of the appellant."

Again in the case of *Badejo v. Minister of Education (1996) 9-10 SCNJ, 51* this court held that the Court of Appeal, in circumstances of this nature, did not need any further address from

Counsel before it could strike out the suit in the High Court as it did in this matter. It is to be recalled that the whole of this case was resolved on affidavit evidence. After all, it is the duty of an appellate court to consider and give the necessary appraisal to all the pieces of evidence forming part of the record before it. See *IBWA v. Pavex International (supra).* It is on that strength that the court below considered the totality of the appeal before it including the suit pending at the trial court and arrived at the decision which gave rise to this appeal.

It is my view that the judgment of the court below is unassailable. I have no reason to tamper with it. This appeal lacks merit and is hereby dismissed by me. I affirm the decision of the court below. The respondent is entitled to ₦10,000.00 costs against the appellant.

Reviewing the above case, the Appellant presented his petition as a creditor and contributor, however the Appeal Court held that he is not a creditor but a contributor to the liability of the company in the event it liquidates. The Appeal court proceeded to state the conditions to be considered for the court to wind up a company through the petitioned filed like in the review case and held that the petitioner/ appellant has not met the conditions, moreso, he has not shown that he has no other means he could be compensated and that there remains assets to be shared to all contributors. Also all this points out to the summary that the petition was not brought on a just and equitable ground.

3.0 Liquidation, Dissolution and Winding Up in United States of America

The term liquidation, dissolution and winding up a company in the United States are different but related in practice and theory. Ending a company's existence can sometimes be a bit of an ordeal because there are multiple ways of doing it.

Liquidation is the process of ending a company's existence and redistributing company's assets to creditors and owners Liquidation is also referred to as dissolution and the terms are used interchangeably, but technically they describe different actions and their meaning is not the same. In other words, liquidation is seen as a last legal resort for a stressed company, while dissolution is the first step in closing a business. The liquidation process involves selling the assets of the company or converting them into cash or cash equivalents, which are then distributed to creditors and any shareholders or company members.[28]

Based on the availability of funds, the sale proceeds are distributed in the following order: creditors, debt security owners, preferred shareholders and lastly common shareholders. In

[28] https://malesculaw.com › difference-between-liquidation-dissolution-and-win..

the case of dissolution, shareholders or owners do not receive any proceeds, whereas in case of liquidation, the shareholders or owners receive proceeds from the company if there are enough assets, after paying the debts owed to the creditors of the company. Dissolution is the procedure that ends a company's existence as a legal entity.[29]

In other words, the existence of the company is terminated, and the process is carried out by filing documents to dissolve the company as a business entity. Dissolution can be either voluntarily or involuntary and is not the last act in the life of any partnership, limited partnership, limited liability company or corporation. Unless exceptions apply, a company's dissolution commences the winding up of the company's affairs and leads to the company's ultimate termination.

In the United States dissolution varies from state to state. In Florida and in most states, legal entities must be dissolved through formal action and by sending the required filings to the responsible agency. If the company is not legally dissolved, it remains obligated to file reports and pay taxes. Winding up the affairs represents another step after the dissolution process starts
The winding up process is not a simple one and it involves actions such as notifying creditors of the company, closing out bank accounts, canceling business licenses, permits and assumed names, paying the creditors, paying taxes and filing final reports.[30]

Winding up a company is a legal process governed by the business and corporate laws of each state and the company's governing documents (articles of association, operating agreement, articles of incorporation, bylaws or operating agreement). It is a process involved in dissolving the company and before liquidation is on the horizon. While winding up, a company ceases to do business as usual. Once the winding up process starts, a company can no longer pursue business as usual. The only action a company may attempt to take is to complete the liquidation and distribution of its assets. At the end of the process, the company is dissolved and ceases to exist.

In conclusion, before a company ceases to exist, the company must wind up its affairs. "Winding up" and "liquidation" do not represent the same action. Essentially, the winding up process deals

[29] ibid
[30] https://malesculaw.com › difference-between-liquidation-dissolution-and-winding up of company in china//last accessed 27th September, 2019

with actions ending the business affairs and terminating company obligations before liquidation. In contrast, liquidation deals with selling the company's assets and turning them into cash and cash equivalents which are then distributed to creditors and owners pursuant to priority of claims as provided for in the U.S. Bankruptcy Code.

4.0 COMPANY WINDING UP AND LIQUIDATION IN CHINA

In the People's Republic of China ("PRC"), winding up is broadly divided into insolvency winding up and winding up by dissolution. Under the winding up by dissolution, there can be voluntary liquidation or compulsory liquidation. The current legislation on insolvency winding up includes the Enterprise Insolvency Law of the PRC enacted in 2006.[31]

As to winding up by dissolution in PRC, relevant provisions can be found in Chapter 10 of Company Law 2013 and Provisions (II) of the Supreme People's Court on Certain Issues Concerning the Application of the Company Law of the PRC 2014 (" Company Provisions (II)"), which was drafted for issues concerning the liquidation of enterprise legal person. INSOLVENCY LIQUIDATION According to the Insolvency Law of the PRC, insolvent liquidation has to be instituted in the court by the debtor, the creditor or the person responsible for liquidation. The debts will be subjected to liquidation after the declaration of insolvency by the court. [32]

The grounds for the debtor to make an application to the people's court for insolvency liquidation are provided in art 2(1) of the Insolvency Law of the PRC: Where an enterprise legal person cannot pay off its debts due and its assets are not enough for paying off all the debts, or it apparently lacks the ability to pay off its debts, the debts shall be liquidated according to the provisions of the Law. The people's court will declare the debtor's inability to settle its debts after satisfaction of the following statutory conditions:

1. Debtor-creditor relationship has been legally established.

2. Time limit for repayment of the debt has expired.

3. Debtor has not fully settled the debt.

[31]Insolvency Law of the PRC"), Provisions (I) & (II) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Insolvency Law of the PRC promulgated in 2011and 2013 ("Insolvency Provisions (I)& (II)

[32] ibid

As for the meaning of "apparently lacks the ability to pay off its debts", article 4 of the Insolvency Provisions (I) provides: Where a corporate debtor falls under any of the following circumstances, the people's court will determine that the debtor apparently lacks the ability to pay off its debts, even though the book value of its assets exceeds that of liabilities. (1) It is unable to repay a debt due to serious lack of funds, realize any assets or any other reason; (2) It is unable to repay a debt because the whereabouts of its legal representative is unknown and there is no other person in charge of asset management; (3) It is unable to repay a debt even after enforcement by the people's court; (4) It is unable to repay a debt because it has suffered losses for a long time and has difficulty in making up losses; or (5) any other circumstance which leads to the debtor's insolvency.[33] When the debtor cannot pay off its debts, the creditor is also entitled to make an application to the people's court for the debtor's reorganization or insolvency liquidation.

4.1 Company Liquidation in China: Key Challenges to Winding up Company in China

Where a buyer cannot be found, or the income from a sale does not measure up to the remaining liquidation value of the assets, the most common alternative is to wind-up the business. Liquidation refers to the voluntary termination of the company's operations and its formal termination. After layoffs of employees, selling remaining assets and settling any debts, the company's registrations with the various government departments can be cancelled, and lastly, the remaining capital will be returned to the investor.

The greatest benefit to voluntary liquidation, from an investor's point of view, is the high level of control over the company in its final phase. The shareholder will appoint the team that deals directly with all outstanding issues, thereby allowing the shareholder to influence and control the process with minimum dependence on any third parties. This process, however, is not without challenges either. In practice, liquidating a company is time-consuming, demands considerable effort and, in many cases, may be costly as well. One rule of thumb: the longer the company has been operating and the more complex its business, the more challenges its liquidation will present and the greater the effort needed to overcome these challenges.[34]

4.2 Liquidation Committee/Group

[33] https://malesculaw.com › difference-between-liquidation-dissolution-and-winding up of company in china//last accessed 27th September, 2019

[34] ibid

Upon rendering the decision to enter into liquidation, after having obtained approval and registering the liquidation with the competent authorities, the shareholders must appoint a liquidation committee comprised of at least three members. The liquidation committee will be charged with the responsibility of the liquidation process, and as such will be making most of the decisions. The law sets few requirements on the composition of the liquidation committee of a limited liability company, although local authorities may have their own demands. In some cases, for example, the Chairman of the board of directors or another director of the company is asked to be included.

By law, the shareholders are to appoint a liquidation committee[35] to deal with liquidation procedures, which ultimately reports back to the shareholders. The following approaches are common:

- The shareholder is actively involved with the liquidation committee, which operates rather as an extension of the shareholder.
- The shareholder leaves the liquidation to a professional liquidation committee, which takes decisions as per its authorization and reports back only after the liquidation has been completed. This is particularly useful where there are multiple shareholders.

Within the liquidation committee, its chairman usually has the authority to represent the company towards third parties (including government departments). It may be more convenient to appoint as chairman someone who is present in China, or at least can be made available in case explanations to creditors and authorities are required.

In practice, the priority of most shareholders is to appoint members that will represent their own interests, although in fact, the members of the liquidation committee have a fiduciary duty towards the company and its creditors (including, but not limited to, its shareholders), and may be held accountable if any laws, administrative regulations or the company's articles of association are violated or breached. Should any member of the liquidation committee cause losses to the company or any creditor intentionally or due to gross negligence, he or she may be held personally liable for such losses.

This is one reason why the liquidation committee sometimes includes independent lawyers or accountants to bring in the necessary expertise and carefully balance responsibilities to the various parties involved, though such expertise may also be retained in an advisory role.

[35] This in Nigeria are referred to as receivers, liquidators or managers.

Including a manager with a thorough understanding of the company's business dealings and is familiar with (former) employees, suppliers, customers and government authorities is usually useful as well. Unfortunately this is not always feasible, as many investors prefer to relocate commercial managers to more productive positions, leaving the liquidation for legal or financial staff to deal with. If so, it is of paramount of importance to ensure that these persons have sufficient access to the company's information in order to organize the liquidation in an efficient way and avoid too many surprises.

Once the liquidation process has officially commenced, the liquidation committee should first assert its control over the company by taking physical possession of the company's stamps, licenses and access to bank accounts, and by ordering the halt of any new business initiatives. In fact, the company by law must refrain from all business activities except clearing up existing orders and selling any remaining inventory. Steps should then be taken to resolve outstanding commercial matters, such as terminating employment agreements and commercial relationships, collecting on or writing off debts, selling off assets and paying creditors; to deal with reporting requirements, including the liquidation report and the audit report; and to arrange for government approvals and de-registration procedures. All these matters are generally within the purview of liquidation committee, though under supervision of or with permission from the shareholder.

4.3 Liquidation/ Winding up Fillings/ Petitions

Normally it is a foreign investor's right to decide on the liquidation of its wholly-owned subsidiary in China. In practice however, many government authorities insist that such decision is supported by the company's board of directors (or executive director).

Under the Chinese company law, the decision to liquidate a company may be taken by shareholders representing at least two-thirds of the voting rights, though many companies adopt the articles of association, which stipulates that the decision to liquidate must be taken unanimously by either the shareholders or the company's directors, or both groups. In practice, irrespective of the rules, many local authorities will in any event insist on a unanimous decision to minimize the risk of a shareholder's dispute.[36]

[36] www.rplawyers.com › articles › company-liquidation-in-china-key-challenges//last accessed on 27th September, 2019

If the desired quota cannot be obtained, shareholders representing at least 10% of the voting rights may file a lawsuit against the company for its dissolution, but only where the shareholders have been deadlocked for at least two years; where long-time conflict between the company's directors is combined with serious operational or management difficulties; or where, in the face of such difficulties, the company's continuous existence threatens to cause major damage to the interests of the shareholders.[37] In addition, shareholders may file a lawsuit for the company's dissolution under other conditions stipulated in the articles of association, or where the business license expires. In fact, there have been few examples of enforced dissolutions, and so there is a great measure of uncertainty regarding how China's courts will respond to such applications. To date, most filings for liquidation have been initiated on a voluntary basis.

4.4 Challenges Faced in Winding Up of a Company

One of the most contentious steps in the liquidation process is to lay off employees. Liquidation presents a lawful ground for terminating employment contracts, but this does not imply that all costs pertaining to employees will thereby be discharged (see Chapter 11 on Employment). Severance pay, calculated with reference to their salary and the number of years that the employee has worked for the company, is due and can generally be paid immediately upon termination of the employment relationships.

Employees need not to be laid off all at once. Oftentimes a company will do well to retain a small team of key employees to assist the liquidation committee in resolving outstanding issues. Two common examples of employees often retained for some time are the sales manager, who is familiar with the company's customers and may therefore be in a better position to collect on outstanding accounts; and the accountant, who with his or her knowledge of the company's accounting books could greatly facilitate the company's financial closing.[38]

While employees may be paid off first, the liquidation committee should legally refrain from paying off other creditors until after the liquidation report has been approved. First it should terminate existing commercial relations, try to collect on outstanding debts, and liquidate any remaining assets into cash. The liquidation committee is entitled to pursue any debts of the

[37] ibid

[38] www.rplawyers.com › articles › company-liquidation-in-china-key-challenges//last accessed on 27th September, 2019

company, and may file lawsuits against debtors on the company's behalf. However, there is a drawback to this opportunity. Where a company has already entered into liquidation, its debtors oftentimes see little benefit in paying up; while lawsuits to pursue such debtors may be expensive and will prolong the liquidation; as long as the litigation is not settled, the company cannot be liquidated.

A better alternative is sometimes to transfer any credits to a third entity, which will then take over the rights to file a lawsuit against the debtor. This can be practical, but only if the shareholder has a convenient vehicle available (e.g., another subsidiary in China), and if the debts are big enough and the evidence is strong enough to make their pursuit relatively easy.[39]

When the liquidation committee attempts to sell its remaining assets, it may confront a similar problem: a potential buyer will offer less than its worth in the knowledge that the company must sell the assets. For this reason, many investors will decide to resolve certain commercial matters before the liquidation officially commences. Legally the selling of assets within one year before commencement of the liquidation can be challenged by creditors who suffer losses due to such actions. But as long as there are sufficient funds to pay all the company's creditors, these activities are usually condoned.[40]

When liquidating a company in Shenzhen, a large amount of outstanding debts had to be written off to keep the company from going into bankruptcy. The tax authorities, however, argued that the write-offs should be regarded as income, on which corporate income tax should be paid. This threatened to put further stress on the company's dwindling assets, and bankruptcy loomed. Since the tax authorities did not want to force the company into bankruptcy, they finally agreed to a compromise, which left the company with just sufficient funds to pay off liquidation costs and non-affiliated creditors. Soon thereafter, the company was successfully liquidated.[41]

On the other hand, if funds are insufficient to pay off all creditors, then any creditor unhappy with the liquidation committee's performance may file for the company's bankruptcy. The threat of bankruptcy is meant to encourage the investor and the liquidation committee to resolve any

[39] ibid
[40] ibid
[41] www.rplawyers.com › articles › company-liquidation-in-china-key-challenges//last accessed on 27th September, 2019.

debts in a proper way; in practice, investors may even partially or fully write-off of debts to affiliates. A large part of the business of foreign-invested companies has traditionally been with affiliated entities abroad, and where the company is insolvent, such debts are often the first to pile up. Because in bankruptcy the investor will unlikely be able retrieve much of its investment anyway, writing off the subsidiary's debts to stave off bankruptcy can be considered. Note that when making such a decision, an investor should also consider the tax consequences of such a write-off: tax authorities may deem the amount written off as income, in which case it will be subject to corporate income tax (after deduction of losses).

A useful case directive issued by the PRC Supreme Count arises from the case of Lin Fangqing v. Changshu Kailai Industry Co., Ltd and Dai Xiaoming[42]. The directive provided useful guidelines on "difficulty in operations and management": It should be judged by comprehensive analysis of its operations. Although it is profitable, the board of shareholders has malfunctioned for a long time, and its internal management is in deadlock with regulatory obstacles and it has fallen into deadlock. Therefore, the people's court can decide to dissolve it when other conditions required by Company law and relevant judicial interpretations have also been satisfied. Under winding up by dissolution, there can be voluntary liquidation or compulsory liquidation. Voluntary Liquidation When the company is to be dissolved due to any of the above mentioned circumstances (1), (2), (4), (5), the company has to form a liquidation group to commence the liquidation within 15 days.

Negotiating with the tax authorities in particular, and with other government departments in general, is the most challenging part of the liquidation process. The various relevant supervising departments have the authority to require the company to resolve of any and all outstanding issues before they approve de-registration; therefore, at this point skeletons can often come out of the closet. Most common are unpaid taxes, though issues relating to social insurance, foreign exchange, customs duties, missing board resolutions and approvals are also common. Many of these issues tend to take the liquidation committee by surprise, especially if they occurred a long time ago; moreover with the company's pending dissolution, the liquidation committee has little bargaining power to negotiate with these authorities, even if their demands seem unreasonable.

[42] Gazette of the Supreme People's Court of the Peoples Republic of China, 12 (2012)

Most important, this increases the cost of the liquidation, which is something that investors must be prepared for. [43]

The challenge of negotiating with government officials exemplifies the biggest drawback of liquidation as an exit strategy. In voluntary liquidation, the company is presumed to have sufficient assets to cover its debts – perhaps excluding debts that can be easily written off, such as those to affiliates. But while this presumption may ring true at the start of the liquidation, the situation may change as outstanding credits become uncollectible, and creditors – including employees, suppliers and government departments – start making their claims. If the financial pressure becomes too great, there may be no better alternative than to file for bankruptcy – which places the company in the hands of the court.

5.0 Conclusion

The term "dissolution" refers to the systemic closing down of a business entity, while "winding up" refers to the selling of assets and payment of debts prior to closing a business. Dissolution and winding up, as well as other aspects of closing a business, often require the assistance of a legal professional. The terms liquidation, dissolution and winding have often been seen as one and the same, however, this paper had clearly distinguished them in respect of giving an insolvent company a befitting burial.

Moreso, the jurisdictions discussed has similar mode of how a company can be wound up. However, we can see from the paper that the laws relating to winding up of companies applies across the length of both Nigeria and China while in the United States, the laws are regulated by different states in the US.

Also, a common feature among the three jurisdiction is that a person or body is usually appointed either by the shareholders or the court which is usually called the Receiver/liquidator/ manager and in China, Liquidation group/committee as the case may be who oversees that all debts accrued to the company is paid and that the shareholders partake in the left-over of the assets belonging to the company before being finally wound up.

[43] www.rplawyers.com › articles › company-liquidation-in-china-key-challen