

COMPANIES & MARKETS

The Companies and Allied Matters Act (Repeal and Re-Enactment) Bill 2019 – What you need to know (Part 6 - Netting)

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BACKGROUND

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 (CAMA) was enacted in Nigeria as a decree of the military government in 1990, and in the past 28 years, there have been no significant amendments to the CAMA. This is, however, all set to change if the Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2019 (CAMA Bill), which was passed by the Nigerian Senate on 15th May 2018 and by the House of Representatives on 17th January 2019, is passed into law. In this series, Udo Udoma & Belo-Osagie will provide insights and digestible excerpts on the effect of key changes proposed by the CAMA Bill.

WHAT IS NETTING?

Netting is the process by which risk is reduced in financial contracts by aggregating two or more obligations or payments and offsetting them against each other in order to achieve a reduced single net obligation. Chapter 28 of the CAMA Bill deals with the subject of netting and is one of the innovations of the CAMA Bill (the CAMA does not contain any provisions on netting). Netting is an essential element of many qualified financial contracts such as repurchase contracts and derivatives. Derivatives are used in the financial market to hedge risks. In insolvency, the mandatory rules relating to insolvency set-off, preferences and disclaimer are, to some extent, inconsistent with netting. It is, therefore, necessary to protect obligations arising under financial contracts en-

tered into pursuant to netting agreements. The netting provisions of the CAMA Bill are based on the International Swaps and Derivatives Association, Inc. (ISDA) 2006 Model Netting Act.

PREFERENCES – NEW PARAMETERS

Under section 495(1) of the CAMA and section 46(1) of the Bankruptcy Act LFN 2004, a liquidator can invalidate any payment made by an insolvent party to a creditor within 3 months of its insolvency if it was made with a view to giving that creditor a preference over other creditors. Chapter 28 of the CAMA Bill, however, provides that the liquidator of an insolvent party may not avoid a payment or transfer of collateral under a netting agreement on the grounds that it constitutes a preference by the insolvent party to the netting agreement, unless there is evidence that the non-insolvent party made such payment or transfer with intent to hinder, delay or defraud an entity indebted to the insolvent party. This provision seeks to ensure that any payment or transfer of collateral made by the insolvent party under the netting agreement during any “preference period” is not treated as a preference, and would, therefore, not be void.

SINGLE AGREEMENT

Chapter 28 of the CAMA Bill reinforces the single agreement nature of a netting transaction, which is often set out expressly in netting agreements and, to that extent, reinforces the general affirmation of the enforceability of netting agreements in the insolvency of a party.

PROHIBITION OF TERMINATION

To ensure stability in the financial markets, the CAMA Bill provides

that a liquidator will not be able to prevent the termination of any qualified financial contracts or the acceleration of any payment owed under these qualified financial contracts.

ENFORCEABILITY OF QUALIFIED FINANCIAL CONTRACTS

Despite the fact that derivatives are legitimate financial contracts, there are certain elements of their structure that could appear to be similar to gaming contracts. To avoid the risk of legitimate financial contracts being treated, under the law, as gaming contracts, the netting provisions in the CAMA Bill provide that a qualified financial contract shall not be void or unenforceable by reason of laws relating to gaming, gambling, wagering or lotteries.

CHERRY-PICKING

The netting provisions also prevent a liquidator from accepting, pursuant to the netting agreement, only those contracts that benefit the insolvent party and disclaiming (under section 499 of the CAMA) the contracts that do not favour the insolvent party in a manner often referred to as “cherry-picking”.

Udo Udoma & Belo-Osagie actively participated in the drafting of the CAMA Bill. Corporate Partner, Ozofu 'Latunde Ogiemudia was the chairperson and Managing Associate, Christine Sijuwade was a member of the Technical Advisory Committee set up by the office of the Senate President to advise on the CAMA Bill and the bill to amend the Investments and Securities Act 2007.

Business Event



L-R: Tonia Smart, ambassador, Chartered Insurance Institute; Keith Richard, Managing Director of Engagement/CEO Personal Finance Society, Chartered Insurance Institute; Eddie Efekoha, president/chairman of council, Chartered Insurance Institute of Nigeria; Jeremy Mullen, accreditation manager, Chartered Insurance Institute, and Richard Borokini, director general, Chartered Insurance Institute of Nigeria, during the 2019 CII/CIIN work study program in London.



L-R: Gbenga Awomodu, marketing lead, Information Technology & Mobile (IM); Adetunji Taiwo, head, (IM) both of Samsung Electronics West Africa; Reminisce, Samsung brand ambassador and Solomon Osibeluwo, master trainer, Samsung Electronics West Africa, during the Launch of The Newest Galaxy A Series Smartphones into the Nigerian Market at Samsung Experience Store, in Lagos. Pic by Pius Okeosisi



L-R: Kevin Biranee- Deputy General Manager, Thomas Isibor- Head, ACCA Nigeria and Demola Odeyemi- Executive Director, at the ACCA Approved Employer Certificate Presentation to GT Bank PLC- for Platinum Approval for Trainee and Professional Development.



L-R: Prosper Okonkwo, CEO, APIN Public Health Initiatives; Isaac Adewole, minister of health, and Jay Osi Samuels, director of laboratory services, during a visit to the Minister in build-up to the presentation of the book, Turning the Tide: AIDS in Nigeria in Abuja.