THE COMPANIES AND ALLIED MATTERS ACT 2020 - WHAT YOU NEED TO KNOW

PART 1 - SMALL COMPANIES, SINGLE DIRECTOR AND SINGLE-MEMBER COMPANIES

By Udo Udoma & Belo-Osagie

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("CAMA 1990") was initially made law in Nigeria in 1990 as a decree of the military government. For thirty years, there were no significant amendments to the CAMA 1990 and so Nigerian companies had to, essentially, rely on a 30-year old law to govern the way businesses operate in our dynamic and evolving global community. However, this all changed on Friday the 7th of August 2020, when President Muhammadu Buhari gave his assent to the Companies and Allied Matters Act 2020 ("CAMA 2020").

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MORE COMPANIES WILL QUALIFY AS SMALL COMPANIES AND WILL BENEFIT FROM ADDITIONAL INCENTIVES

Under the CAMA 1990, a small company was regarded as a small company if it:

- is a private company limited by shares;
- has no foreign shareholders;
- its directors hold not less than 51% of its shares;
- none of its members is a government, a government agent or nominee;
- has a turnover of not more than N 2 million; and
- has a net asset value of not more than N 1 million.

Under the CAMA 2020, the above criteria is retained with two significant amendments:

- the turnover of a small company should not exceed N120 million; and
- its net asset value should not exceed N 60 million.

What this means is that many companies that previously could not qualify as small companies will qualify under the CAMA 2020, and therefore enjoy the concessions granted to small companies under the Act.

INCENTIVES AND CONCESSIONS FOR SMALL COMPANIES

Under the CAMA 1990, one of the benefits of being a small company was that there was a reduced penalty for failure to

lay and deliver financial statements as required by the Act. In addition, small companies were entitled to deliver a modified form of financial statements to the Corporate Affairs Commission. That was about it!

Under the CAMA 2020, however, small companies continue to enjoy these benefits but are now entitled to several more

benefits and concessions that are aimed at easing the administrative burden imposed on micro, small and medium enterprises (MSMEs), and reducing the costs that were associated with complying with their statutory obligations. These additional benefits are:

1. small companies and single shareholder companies do not have to hold annual general meetings.

2. small companies can have a single director.

3. small companies do not have to have a company secretary.

4. a company seal will be optional (this will apply to all Nigerian companies).

5. small companies do not have to file audited financial statements annually (this will also apply to companies that have not commenced business since incorporation even if they are not small companies).

SINGLE-MEMBER COMPANIES

Under the CAMA 2020, it will be possible for one- person to form a private company. Such companies will be exempt from the provisions of the Act that relate to quorum for meetings and adjournment of meetings.

With this innovation, Nigerian company law has, like other jurisdictions such as England, made it possible for entrepreneurs operating as sole proprietors to register a limited liability company for their business rather than being limited to registering a business name, which was the only option available for sole proprietors under the CAMA 1990.

SINGLE-DIRECTOR COMPANIES

Small companies are permitted under the CAMA 2020 to have a single director. This welcome development will ease the administrative burden and cost of running MSMEs as the entrepreneur who sets up the business can serve as its sole director.

As the company grows, however, and when it ceases to be a small company, it will have to appoint additional director(s) because only small companies will be permitted to have just one director.

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PART 2 – PARTNERSHIP STRUCTURES

By Udo Udoma & Belo-Osagie

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("CAMA 1990") was initially made law in Nigeria in 1990 as a decree of the military government. For thirty years, there were no significant amendments to the CAMA 1990 and so Nigerian companies had to, essentially, rely on a 30-year old law to govern the way businesses operate in our dynamic and evolving global community. However, this all changed on Friday the 7th of August 2020, when President Muhammadu Buhari gave his assent to the Companies and Allied Matters Act 2020 ("CAMA 2020").

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NEW ENTITIES INTRODUCED

Prior to the CAMA 2020, Limited Partnerships ("LPs") and Limited Liability Partnerships ("LLPs") were recognised under the Partnership Law of Lagos State 2009, but not by any federal statute or the laws of other states. While the legislative competence of the Lagos State legislature to enact a law regulating partnerships is not in doubt, there was an ongoing debate about the legislative competence of States in Nigeria to enact laws for the formation of corporate entities such as LLPs. There was also the concern about whether the limitation on the liabilities of partners in an LLP registered in Lagos would be recognised in other states of the Federation.

The new CAMA 2020 has introduced a regulatory framework for LLPs and LPs across Nigeria. The LLP is a legal person that can sue and be sued, hold property in its own name and lawfully do all other acts as any other legal person. LPs do not have the same limited liability status, however, they are permitted to have a general partner who is liable for all debts and obligations of the partnership, while the limited partners enjoy limited liability.

LPs and LLPs that are already registered in Lagos State may, therefore, need to consider re-registering at the Corporate Affairs Commission in order to avoid any challenge to the validity of such structures under state law.

LIMITED LIABILITY PARTNERSHIPS

Features of LLPs:

- Corporate personality, limited liability and perpetual succession;
- Must have at least two designated partners who are individuals (with at least one of them resident in Nigeria). Where all the partners in the LLP are corporate entities, they may nominate individuals to act as designated partners;
- Required to keep proper books of account for each year;
- Contributions of partners in an LLP may include cash or other forms of contribution including services or real property;
- The rights and interests of a partner are transferrable and, consequently, a change in the partnership will not affect the existence, rights or liabilities of the LLP.

LLPs COMPARED WITH COMPANIES

Similarities:

- can sue or be sued in its name;
- can hold or dispose of property in its own name;
- can choose to have a common seal;
- the provisions of the CAMA 2020 relating to reservation of name and change of name also apply to LLPs;
- will also be required to file statutory returns; and
- may be wound up voluntarily or by the Court (though it's a simpler process than for companies).

Differences:

- incorporation process is easier;
- no requirement for LLPs to have a share capital;
- flexibility – The operation of the partnership and distribution of profits is as set out in the Partnership Agreement. This may allow for greater flexibility in the management of the business; and
- method of dissolution is less procedural (no need to appoint a liquidator etc.)

LIMITED PARTNERSHIPS

Under the CAMA 2020, the regulation of LPs is similar to the regulation of LLPs but with certain differences:

- maximum of 20 persons;
- must comprise at least one general partner and one limited partner;
- general partners are liable for all debts and obligations of the partnership;
- the liability of limited partners is restricted to the capital contributed or agreed to be contributed to the partnership under the limited partnership agreement;
- the limited partner does not have the power to bind the firm or participate in the management of the firm, otherwise, he will be liable for all debts and obligations of the firm incurred for the relevant period he acted as a general partner of the firm.

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PART 3 – REGISTRATION OF CHARGES

By Udo Udoma & Belo-Osagie

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NEGATIVE PLEDGE NOW REGISTRABLE

Section 197 of the CAMA 1990 specifies a list of security interests which must be registered with the Corporate Affairs Commission ("CAC") within 90 days of creation. Failure to do so would make the security void against the liquidator and other creditors of the company.

The CAMA 2020 retains the above requirements of section 197 with two significant amendments:

- negative pledges are now required to be registered; and
- registration of a charge at the CAC will constitute constructive notice of the matters specified in the particulars of the charge.

A negative pledge is a restriction that prevents a borrower or security provider from creating a subsequent security interest over any or specified assets, which would have the effect of jeopardising the security in respect of which the negative pledge is given.

There is no requirement under the CAMA 1990 for negative pledges to be registered at the CAC, although in practice many lenders register it to notify interested parties of the existence of the negative pledge. The change made by the CAMA 2020 will help subsequent debt providers and investors better assess the company's ability to deal with its assets. It is expected that going forward, the CAC will take steps to amend the prescribed
form to make allowance for the registration of any relevant negative pledges.

SIGNIFICANT REDUCTION OF FEES FOR REGISTRATION

The cost associated with registering security in Nigeria is prohibitive, with many borrowers and lenders agreeing not to perfect security, or to perfect for only a portion of the debt provided (which creates a significant risk for lenders). The CAC registration fees are a significant portion of these costs - private companies pay 1% of the amount secured while public companies pay 2%. As a result, a portion of debt raised by a Nigerian company has to set aside towards the cost of registering security, rather than being applied towards helping the borrower enhance its business.

Jurisdictions like England have long since reduced registration cost to a minimal flat fee. The CAMA 2020 does not quite achieve this but takes a significant stride in reducing the cost of perfection of security to a level that will provide much needed relief to lenders and borrowers alike. The CAMA 2020 specifies that the total fees payable to the CAC in connection with the filing, registration or release of a charge shall not exceed 0.35% of the value of the charge or such other amount as the Minister may specify in the Gazette. This represents a 65% reduction for private companies and an 82.5% reduction for public companies.

While the CAMA 2020 still provides an avenue for the Minister to increase the relevant fees, we are optimistic that the benefits of easing the process by which Nigerian borrowers, particularly small and medium scale enterprises, can access debt financing, will make this unlikely.

INTRODUCTION OF KEY DEFINITIONS

The CAMA 2020 introduces new definitions to clarify problematic concepts under the CAMA. The term "Book debt" has been defined in the CAMA 2020 to exclude negotiable instruments or marketable security (such as treasury bills and bonds). The CAMA 2020 now clarifies that a charge over treasury bills and bonds are not registrable as a charge over book debts.

The term "security financial collateral arrangements" has also been defined. The CAMA 2020 exempts security financial collateral arrangements from the requirement for registration. What this means is that if security is created over the relevant financial collateral arrangement such as bank deposits and securities, such security will be exempt from registration. The proposed amendment will be of benefit to organisations that trade in financial instruments such as derivatives.

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PART 4 – SHARE BUY BACK AND TREASURY SHARES

By Udo Udoma & Belo-Osagie

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("CAMA 1990") was initially made law in Nigeria in 1990 as a decree of the military government. For thirty years, there were no significant amendments to the CAMA 1990 and so Nigerian companies had to, essentially, rely on a 30-year old law to govern the way businesses operate in our dynamic and evolving global community. However, this all changed on Friday the 7th of August 2020, when President Muhammadu Buhari gave his assent to the Companies and Allied Matters Act 2020 ("CAMA 2020").

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SHARE BUY BACK

A share buyback is a process by which a company acquires some of its issued shares from existing holders, thereby reducing the number of shares in issue and enhancing the value of the shares that remain outstanding after the share buyback process.

Under the CAMA 1990, companies were prohibited from acquiring their own shares, and were only permitted to do so in limited circumstances, such as eliminating fractional shares and complying with a court order. The CAMA 2020 now permits a company to purchase its shares and sets out the requirements for doing so. The effect of this change is that public and private companies now have the option of repurchasing their issued shares provided certain conditions are fulfilled.

Conditions for a Share Buy-Back

Sections 184 – 187 of the CAMA 2020 set out the law in relation to the purchase by a company of its own shares. Under the CAMA 2020, a company can buy back its own shares provided that certain conditions are met:

- The articles of the company must permit it;
- The shareholders of the company must pass a special resolution authorising the share buy-back;
- The shares to be purchased must be fully paid up;
- The shares can only be paid for by the company from its distributable profits;
- The company must publish the share buy back in two national newspapers within seven days after passing the special resolution and creditors or aggrieved shareholders will be entitled to file an action in court to cancel the resolution within six weeks of the newspaper publications;
- The directors must file a declaration of solvency at the CAC within 15 (fifteen) days of the newspaper publications; and
- A company may not purchase its shares if as a result of the purchase, there would no longer be any issued shares of the company other than redeemable shares or treasury shares.

How to execute a share buy back

Pursuant to section 186 of the CAMA 2020, a company may buy back its shares in a number of ways – (1) from shareholders or security holders (on a proportionate basis); (2) from shareholders

pursuant to a scheme of arrangement that is sanctioned by the court; (3) from the open market; or (4) from its employee stock option scheme or any other similar scheme.

TREASURY SHARES

The CAMA 1990 did not specifically provide for treasury shares, except for a reference in the Second Schedule (Format of Balance Sheets). The position of Nigerian company law regarding treasury shares, and the rules governing them, therefore, required greater clarity. Treasury shares are now recognised and provided for in the CAMA 2020.

What are they? Treasury shares are previously issued shares of the company that the company acquires.

A company may not hold more than 15% of its issued shares as treasury shares. Where a company buys back more than 15% of its issued share capital, the company must, within 12 months, dispose of any shares above the 15% threshold. The company can achieve this by reissuing the shares, cancelling the shares or reissuing or cancelling such number of shares as would bring the company's treasury shareholding to the 15% threshold.

What can the company do with Treasury Shares?

A company may:

(a) sell its treasury shares to any person for cash;

(b) transfer them to its share option scheme; or

(c) cancel the shares.

A cancellation of a company's shares will result in a reduction in share capital of the company.

Features of Treasury Shares:

- They are not entitled to dividends or any other distribution (whether in cash or otherwise) of the company's assets (including any distribution of assets to members on a winding up);
- They do not confer a right to attend general meetings; and
- They do not confer a right to vote.

Where a company allots bonus shares to its members, however, treasury shares are also entitled to bonus shares.

SUBSIDIARIES HOLDING SHARES IN PARENT COMPANY

Section 190 of the CAMA permits subsidiaries to hold shares in parent companies. In summary:

- company which is a subsidiary may acquire shares in its holding company where the subsidiary company is concerned as personal representative or trustee;

- a subsidiary may hold shares in a parent company but shall have no right to vote at meetings of the parent company and shall not acquire any future shares in it except on a rights issue; and

- where a public company, or a nominee of a public company, acquires shares in the company, and those shares are shown in a balance sheet of the company as an asset, an amount equal to the value of the shares shall be transferred out of profits available for dividend to a reserve fund and shall not be available for distribution.

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THE COMPANIES AND ALLIED MATTERS ACT 2020 - WHAT YOU NEED TO KNOW

PART 5 – SHARE CAPITAL

By Udo Udoma & Belo-Osagie

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SHARE CAPITAL REDEFINED

Under section 99 of the CAMA 1990, companies were required to have a prescribed minimum authorised share capital. The authorised share capital specified the limit on the minimum amount of shares a company can allot. The shareholders could, however, agree to raise this limit. In practice, the authorised share capital could be set at a level that was much higher than the company's needs at the time.

The concept of the "authorised share capital" has been abolished in the CAMA 2020, leaving behind the well-known concepts of issued share capital under section 124 of the CAMA 2020 and paid up capital. While under section 27(2) of the CAMA 1990, the minimum authorised share capital for a private company was N10,000 and for a public company it was N500,000, by virtue of section 27(2) of the CAMA 2020, a private company must have a minimum issued share capital of N100,000 while a public company must have at least N2 million as its issued share capital.

One effect of the change made by the CAMA 2020 is that companies will no longer be required to have issued at least 25% of their authorised share capital since, by implication, the entire share capital of a company will always be fully issued. In addition, under the CAMA 2020, where a company increases its issued share capital, the increase will only take effect if 25% of its issued share capital (including the increase) is paid up.

RATIONALE

A company is required to pay stamp duty and CAC filing fees whenever it creates or increases its authorised share capital, notwithstanding that all of the shares might not be allotted. This amounts to a front-loading of costs. The removal of the concept of authorised share capital therefore means that, at incorporation, a company will only incur these costs in relation to the actual share capital that it issues. Thereafter, whenever the company wishes to issue more shares, it will simply pass the appropriate resolution to do so, issue the relevant shares, and pay the applicable stamp duty and CAC filing fees in respect of the additional shares issued.

EFFECT ON EXISTING COMPANIES AND IMPLICATIONS FOR EXISTING REGULATIONS

From a regulatory perspective, any regulator that currently relies on the authorised share capital as a benchmark for various compliance thresholds, will need to make consequential amendments to their rules and regulations, such that the relevant thresholds would be based on a company's issued or paid-up share capital, both of which are more reflective of the equity capital of a company. It is also expected that the CAC forms will be amended to delete references to authorised share capital.

With respect to existing companies that may not have issued all of their authorised share capital, the CAMA does not specify a timeframe within which those shares must be issued. We expect this to be dealt with the CAC's regulations that will be issued pursuant to the CAMA 2020.

For existing companies that find themselves below the minimum issued share capital, section 124(3) of the CAMA 2020 requires that they ensure that they issue shares to an amount not less than the minimum issued share capital within 6 months of the commencement of the CAMA 2020.

NEW PROCESS FOR INCREASING SHARE CAPITAL

The CAMA 2020 prescribes a new process for increasing issued share capital. Under section 127 of the CAMA 2020, a company that wishes to increase its issued share capital simply passes a resolution approving the allotment of new shares to named persons. The CAC must be notified of the increase and allotment within 15 days of the relevant general meeting and it is at this point that stamp duty and CAC filing fees are paid on the amount of the increase, and a return of allotment filed.

The CAMA 2020 also sets out the mechanics for dealing with circumstances where a company is unable to notify the CAC within the above-mentioned 15-day period, because the proposed increase/ allotment requires the prior approval of another regulator. In such circumstances, the company is required to notify CAC of this fact within 15 days. Section 127(3) requires that the notice to the CAC be filed along with an affidavit sworn to by a director of the company to that effect, and upon the notification being filed, the 15-day period shall be deemed to be extended to a period terminating no later than 10 days after the approval of the other regulator is obtained. If, however, the relevant approval is not obtained from that other regulator within 48 days of the date on which the company first notified the CAC, the company must file another notice and affidavit with the CAC - and must continue to do so for every successive period of 48 days until the relevant approval is obtained. If the relevant approval is not obtained within 9 months from the date that the CAC was first notified, the increase will be deemed to be null and void.

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THE COMPANIES AND ALLIED MATTERS ACT 2020 - WHAT YOU NEED TO KNOW

PART 6 – NETTING

By Udo Udoma & Belo-Osagie

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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 2020 deals with the subject of netting and is one of the innovations of the CAMA 2020 (the CAMA 1990 does not contain any provisions on netting). Netting is an essential element of many qualified financial contracts such as repurchase contracts and derivatives and is a process by which risk is reduced in financial contracts. In insolvency, the mandatory rules relating to insolvency set-off, preferences and disclaimer are, to some extent, likely to conflict with the netting provisions in these financial contracts. It is, therefore, necessary to protect obligations arising under financial contracts entered into pursuant to netting agreements. The netting provisions of the CAMA 2020 are based on the International Swaps and Derivatives Association, Inc. (ISDA) 2006 Model Netting Act.

PREFERENCES – NEW PARAMETERS

In the absence of netting legislation, there is a risk that any payment made or collateral transferred by an insolvent party to a solvent party during the relevant "preference period" could be voided on the basis that it constitutes a preference. This is relevant as the preference rules were applicable in respect of the insolvency of a Nigerian counterparty by virtue of the CAMA 1990 and section 46(1) of the Bankruptcy Act LFN 2004. These provisions give a liquidator the power to 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. The preference provisions are also retained in section 658 of CAMA 2020, and the section provides that anything done during the "preference period" that gives a creditor, surety or guarantor undue advantage is invalid. This could, therefore, cover payments made, or collateral transferred at this time and therefore could potentially disrupt the netting provision. Chapter 28 of the CAMA 2020, 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 of the non-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 2020 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 and the rule against cherry-picking discussed below.

ENFORCEABILITY OF NETTING AGREEMENTS GENERALLY

To ensure stability in the financial markets, the CAMA 2020 generally confirms the enforceability of netting provisions even if the counterparty is subject to insolvency proceedings. It also provides, subject to the terms of such agreements, that netting provisions cannot be limited by the action of a liquidator or the insolvency law provisions applicable to the insolvent party. CAMA 2020 specifies that the only obligation or entitlement due to or from a party to such netting agreement upon the close-out netting of transactions is its net obligation or entitlement as provided by the relevant netting agreement.

ENFORCEABILITY OF QUALIFIED FINANCIAL CONTRACTS OUTSIDE INSOLVENCY

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 2020 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". This is to ensure that the single agreement nature of netting arrangements is recognised and that close-out netting would therefore not be undermined.

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PART 7 – PRIVATE COMPANIES

By Udo Udoma & Belo-Osagie

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RESTRICTIONS ON TRANSFERS OF SHARES AND ASSETS OF PRIVATE COMPANIES

Under the CAMA 1990, a private company was required, in its Articles, to restrict the transfer of its shares. The CAMA 1990 imposed this requirement without specifying how private companies should do so, thereby giving companies the flexibility to determine how they restrict the transfer of their shares. This was usually done in the form of a discretion given to directors to approve or reject a proposed transfer – this discretion could be absolute or applicable in certain circumstances. Some private companies went further by conferring a right of first refusal on shareholders in respect of any shares that any shareholder wished to transfer to any person or to non-shareholders.

The CAMA 2020 has gone further than the CAMA 1990 in relation to the restrictions that may be imposed on the transfer of shares and assets of private companies. It provides that "subject to the provisions of the articles, a private company may restrict the transfer of its shares and also provide that:

(a) the company shall not without the consent of all its members sell assets having a value of more than fifty percent (50%) of the total value of the company's assets;

(b) a member shall not sell that member's shares in the company to a non-member, without first offering those shares to existing members;

(c) a member, or a group of members acting together, shall not sell or agree to sell more than fifty per cent (50%) of the shares in the company to a person who is not then a member, unless that non-member has offered to buy all of the existing members' interests on the same terms."

The restriction in (a) is new and relates to a proposed disposal of assets of a private company. The restriction in (b) is a right of first refusal in respect of any shares that any shareholder wishes to transfer to non-shareholders, and (c) is essentially a mandatory takeover bid requirement that is triggered where a non-member acquires 50% of a private company. The wording of the CAMA 2020, however, provides companies with enough flexibility to determine whether to include these provisions in their articles, and to indicate, in the articles, whether these restrictions would apply.

Without this flexibility, these restrictions will create concerns for investors, such as private equity investors, that require clarity and assurances regarding their ability to exit their investment as required by the terms of their funds.

ELECTRONIC INNOVATIONS

In recognition of evolving business dynamics, the CAMA 2020 provides that a private company may hold its general meetings electronically provided that such meetings are conducted in accordance with the articles of the company. Other electronic innovations include the following:

i. company records can be maintained in electronic format;

ii. electronic share transfer forms will be accepted by all companies;

iii. in addition to the notice given personally or by post, notice may also be given by electronic mail to any member who has provided the company an electronic mail address;

iv. any document required to be annexed to the annual return may be delivered to the Corporate Affairs Commission ("CAC") either in hard or soft copy;

v. Any document required to be filed with the Commission for registration may be filed electronically; and

vi. any document or proceeding requiring the authentication by a company can now be signed by an electronic signature

COMPANY LIMITED BY GUARANTEE

Under the CAMA 1990, the approval of the Attorney-General of the Federation ("AG Fed") was required in order to register the memorandum and articles of association of a company limited by guarantee ("Ltd/Gte"). This approval was a pre-requisite to the registration of such companies at the Corporate Affairs Commission ("CAC"), and in practice, resulted in significant delays in the process of registration, usually dragging out the registration process for months.

The requirement for the AG Fed's approval is still retained in the CAMA 2020, albeit with specified timelines. Under the CAMA 2020, if all requisite documents have been submitted but the AG Fed does not grant his approval or communicate his refusal within 30 days, the promoters may place an advertisement in 3 national newspapers inviting the general public to make any objections to the incorporation of the company which will be considered by the CAC. If the CAC is satisfied that the memorandum and articles of association of the company are compliant with the CAMA 2020, the CAC will advertise the application in 3 national newspapers, inviting objections from the public to the proposed incorporation. If no objections are received from the public within 28 days from the date of the advertisement (or the CAC receives, considers, but rejects such objections), the CAC can assent to the application and register the company without the consent of the AG Fed.

This alternative streamlined procedure will, therefore, ease the process of registering this type of company, which is usually set up to promote art, science, religion, sports, culture, education, research, charity or other similar non-profit purposes.

One final point. The total amount guaranteed by the members of a Ltd/Gte under the CAMA 1990 is a minimum of N10,000 but under the CAMA 2020, this has been increased to a minimum of N100,000.

ENTRY OF TRUSTS OVER SHARES

Under the CAMA 2020 trust arrangements in relation to shares may now be formally recognised by companies and recorded in the register of members, as well as the records of the CAC

DISCLOSURE OF SIGNIFICANT CONTROL

In the CAMA 1990, persons holding shares amounting to 10% or more of a public company were deemed to be 'substantial shareholders' and were required to make disclosures to the company. In the CAMA 2020, this threshold has been reduced to 5%. In addition, disclosures will now be required of persons with significant control (i.e. persons who hold 5% or more of the voting rights) in private and public companies, as well as limited liability partnerships. Going forward, every person who holds 5% or more of the voting rights in a company must notify the company within 7 days and state the particulars of such control.

The CAMA 2020 also introduces a new statutory register to be maintained by Nigerian companies - a register of persons with significant control.

These innovations of the CAMA 2020 are to promote transparency and strengthen the ability of companies and the government to combat asset shielding.

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THE COMPANIES AND ALLIED MATTERS ACT 2020 – WHAT YOU NEED TO KNOW

PART 8 – TEMPLATE CONSTITUTIONAL DOCUMENTS, SEALS AND COMPANY

By Udo Udoma & Belo-Osagie

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("CAMA 1990") was initially made law in Nigeria in 1990 as a decree of the military government. It was modelled on the English Companies Act 1985. For thirty years, there were no significant amendments to the CAMA 1990, notwithstanding that England has, over the past three decades, amended and replaced its own Companies Act. Nigerian companies had to, essentially, rely on a 30-year old law to govern the way businesses operate in our dynamic and exponentially evolving global community. However, this all changed on Friday the 7th of August 2020, when President Muhammadu Buhari, gave his assent to the Companies and Allied Matters Act 2020 ("CAMA 2020").

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TEMPLATE CONSTITUTIONAL DOCUMENTS

The CAMA 1990 set out templates of articles of association ("Articles") for different types of companies. These were all set out in Table A of the First Schedule and contained provisions relating to classes of shares, meetings and voting. These templates have been deleted in the CAMA 2020 and the CAMA 2020 provides in section 33(1) that the Minister of Trade may, by regulations, prescribe model Articles for companies. In practice, these regulations would be prepared by the CAC and issued to the public after they have been approved by the Minister. This change is progressive as it will ensure that the form of constitutional documents can be amended by the CAC and Minister as required without the need for an amendment of the Act through the formal legislative process.

Section 33(2) and (3) of CAMA 2020 also provides that, different models of Articles can be prescribed for different types of companies, and companies are permitted to adopt all or any of the provisions of model Articles. Section 33(4) provides that in relation to existing companies, any amendment of model Articles by regulations will not affect companies that were incorporated before the amendment takes effect. Section 34 provides that for new companies that are incorporated after the CAMA 2020 was signed into law, upon incorporation, the relevant model Articles in force as at the date of registration of the new company will form part of that company's Articles (even where the company has registered Articles at incorporation), unless the relevant model Articles are specifically excluded or modified.

THE COMMON SEAL

Under the CAMA 1990, every company was required to have a common seal, the use of which had to be regulated by the company's Articles. This seal, which was also usually referred to as the "company seal" was typically affixed to agreements, deeds and other official documents executed by companies. The requirement for every company to have a common seal has been deleted in the CAMA 2020. As a result by virtue of section 98, a company may choose to have a common seal but need not have one.

The CAMA 2020 in section 103 addresses situations where another law or regulation requires a document to be executed under the common seal of a company or prescribes consequences for not sealing. In such circumstances, the CAMA 2020 provides that the relevant document would be deemed to have satisfied the provisions of that law or regulation if the document is signed (a) in the case of a document or proceeding requiring authentication, by a director, secretary, or other authorised officer of the company; or (b) in the case of a document described or expressed as a deed, either by (i) a director and the secretary of the company (ii) at least 2 directors of the company; or (iii) a director of the company in the presence of at least one witness who has attested the signature.

If a company chooses to have a common seal, the design and the use of the seal must be regulated by the company's Articles. The CAMA 2020 also requires that the name of the relevant company must be engraved in legible characters on the seal.

Other entities that are permitted, under the CAMA 2020, to have a common seal, if they so choose, are limited liability partnerships and incorporated trustees.

NEW STATUTORY REGISTERS

The CAMA 2020 in section 320 introduces a new statutory register that must be kept by companies. This register, called the Register of Directors' Residential Addresses, is required to state the usual residential addresses of the company's directors. This register differs from the Register of Directors that section 318 of CAMA 2020 also requires companies to maintain; the Register of Directors only contains information on the "service address" of a director which, in some cases, is the company's registered office. If, however, a director's usual residential address is the same as his service address (as indicated in the company's Register of Directors), then the Register of Directors' Residential Addresses only needs to contain an entry to that effect. Section 321 of the CAMA 2020 provides that If there is any change in the information contained in the Register of Directors or the Register of Directors' Residential Addresses, the company must notify the CAC of such change within 14 days.

To address questions of security, the CAMA 2020 in sections 323 to 329 provides for the restriction on use and disclosure of directors' address. The sections provide that information relating to a director's usual residential address is considered to be protected information and, this information does not cease to be protected information when the director resigns from the board of that company. What this means is that the company cannot use or disclose this information in relation to any director without the consent of the relevant director unless it is for the purpose of (i) communicating with the relevant director (ii) complying with the requirements of the CAMA Bill or (iii) complying with a court order. There are similar restrictions on the CAC's ability to use or disclose such protected information. The CAC may, however, disclose such information to a credit reference agency or to a public authority - subject to any regulations issued by the Minister prescribing conditions that must be satisfied before protected information relating to a director may be disclosed to any such public authority.

The CAMA 2020 in section 119 also introduces a new statutory register to be maintained by Nigerian companies - a register of persons with significant control. In the CAMA 1990, persons holding shares amounting to 10% or more of a public company were deemed to be 'substantial shareholders' and were required to make disclosures to the company. In section 120 of the CAMA 2020, this threshold has been reduced to 5%. In addition, disclosures will now be required of persons with significant control (i.e. persons who hold 5% or more of the voting rights) in private and public companies, as well as limited liability partnerships. Going forward, every person who holds 5% or more of the voting rights in a company must notify the company within 7 days and state the particulars of such control.

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THE COMPANIES AND ALLIED MATTERS ACT 2020 – WHAT YOU NEED TO KNOW

PART 9 – SCHEMES OF ARRANGEMENT

By Udo Udoma & Belo-Osagie

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("CAMA 1990") was initially made law in Nigeria in 1990 as a decree of the military government. It was modelled on the English Companies Act 1985. For thirty years, there were no significant amendments to the CAMA 1990, notwithstanding that England has, over the past three decades, amended and replaced its own Companies Act. Nigerian companies had to, essentially, rely on a 30-year old law to govern the way businesses operate in our dynamic and exponentially evolving global community. However, this all changed on Friday the 7th of August 2020, when President Muhammadu Buhari, gave his assent to the Companies and Allied Matters Act 2020 ("CAMA 2020").

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SCHEME OF ARRANGEMENT – THE CONCEPT

Section 710 of CAMA 2020 defines an "arrangement" to mean "*any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected*". Simply put, a scheme of arrangement is an arrangement between a company and its shareholders or its creditors for the purpose of effecting a transaction which cannot be effected pursuant to any other provision of CAMA.

Examples of transactions that are usually implemented using schemes of arrangement include mergers and corporate restructurings. A scheme of arrangement could also be used in the context of a share acquisition to ensure that the shares sought to be acquired by an investor are acquired from all shareholders on a uniform basis.

The focus of this article is on schemes of arrangement and mergers.

THE PROCESS OF IMPLEMENTING A SCHEME OF ARRANGEMENT OR MERGER

Where an arrangement is proposed between a company and its members, an application is submitted to the Federal High Court ("Court") and, pursuant to that application, the Court will order the company to hold a meeting of its members – commonly referred to as a court-ordered meeting. The resolution required to approve a scheme of arrangement ("Scheme") is a special resolution, that is, a minimum of 75% of the votes cast by members present and voting at the court-ordered meeting.

Under the CAMA 1990, once the Scheme was approved by the shareholders, the Court had the power to refer the scheme to the Securities and Exchange Commission ("SEC") to investigate the fairness of the Scheme and, thereafter, submit a report to the Court. If the Court was satisfied as to the fairness of the Scheme, the Court would sanction the Scheme and, once this is done, the terms of the scheme become binding on all the shareholders of that company. The Scheme became effective when a certified true copy of the Court order was registered with the Corporate Affairs Commission.

RE-INTRODUCTION OF PROVISIONS RELATING TO MERGERS, SHARE ACQUISITIONS AND OTHER FORMS OF CORPORATE RESTRUCTURING

The CAMA 2020 re-introduces provisions prescribing the process for (i) effecting mergers and other forms of arrangements; and (b) acquiring the shares of dissenting shareholders.

The background to this is that when the Investment and Securities Act 1999 ("ISA 1999") was passed, it repealed Part 17 of the CAMA 1990. Some of the repealed provisions included sections 591 to 593 of CAMA 1990 which dealt with schemes of arrangement. Specifically, section 591 dealt with reconstruction and merger of companies, section 592 dealt with powers to acquire shares of dissenting shareholders and section 593 dealt with the right of dissenting shareholders to compel the acquisition of their shares. The text of these three sections were deleted from the CAMA 1990 and re-enacted as sections 100 to 102 of ISA 1999.

When the Investment and Securities Act 2007 ("ISA 2007") repealed the ISA 1999, however, only sections 101 and 102 of the ISA 1999 made it into the ISA 2007 - as sections 129 and 130; section 100 of the ISA 1999 was omitted. The effect of this omission was that there was no longer a statutory basis for the market practice that had developed in Nigeria, in relation to the process by which schemes of mergers and other forms of reconstruction, were carried out (that is to say, the process of applying to the court for an order to convene meetings to approve the scheme and, ultimately, to sanction the scheme and make a wide range of orders relating to the transfer of rights and liabilities under the scheme).

The Federal Competition and Consumer Protection Act 2018 ("FCCPA") was signed into law on 30th January 2019. One of its effects was the repeal of sections 118 – 128 of the ISA 2007 dealing with mergers and acquisitions. Unlike the previous repeal of Part 17 of the CAMA 1990 and the repeal and re-enactment of the ISA 1999 as the ISA 2007, the text of the repealed ISA 2007 provisions was not reproduced in the FCCPA. Fortunately, the CAMA 2020 re-introduces the texts of the previous sections 591 – 593 of the CAMA 1990 (which are very similar to sections 100 – 103 of the ISA 1999).

This re-introduction is significant for several reasons:

a) it will ensure that there is no lacuna in the process of effecting a scheme of arrangement and that the law once again sets out clearly the process by which all forms of schemes can be effected;

b) there will once again be statutory backing of the right to invoke the Court's jurisdiction to make orders for various matters to be dealt with in the context of a merger such as the transfer of rights, assets and liabilities from one company to another, the allotment of any shares or other interests and matters incidental or consequential to the Scheme;

c) the process for dealing with dissenting shareholders in a scheme (i.e. sections 129 and 130 of the ISA 2007) has been reunited with the provisions that set out how to conduct a scheme (i.e. the repealed section 591 CAMA 1990 and section 100 ISA 1999); and

d) as a consequence of the above, the CAMA 2020 contains a complete set of provisions for the conduct of schemes of arrangement including schemes of mergers.

The framework for implementing schemes was re-introduced with two important changes. Firstly, the merger becomes effective and binding on the companies once it is sanctioned by the Court and, therefore, even before the Court sanction is filed at the CAC. The Court sanction must, however, be filed at the CAC within 7 days. Secondly, section 711 does not empower the Court to refer the scheme of merger to the SEC to consider the fairness of the scheme – which section 715 does. Consequently, while it is possible to structure a scheme under both sections 711 and 715, schemes structured under s. 715 can be referred by the Court to the SEC to determine the fairness of the scheme and, schemes under s.715 do not become effective until the Court order sanctioning the scheme has been filed at the CAC. Certain companies (for example, private and unregulated companies) may, therefore, consider implementing mergers or other forms of arrangement or reconstruction using the simplified framework prescribed in section 711 of the CAMA 2020.

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THE COMPANIES AND ALLIED MATTERS ACT 2020 – WHAT YOU NEED TO KNOW

PART 10 – COMPANY ADMINISTRATION

By Udo Udoma & Belo-Osagie

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("CAMA 1990") was initially made law in Nigeria in 1990 as a decree of the military government. It was modelled on the English Companies Act 1985. For thirty years, there were no significant amendments to the CAMA 1990, notwithstanding that England has, over the past three decades, amended and replaced its own Companies Act. Nigerian companies had to, essentially, rely on a 30-year old law to govern the way businesses operate in our dynamic and exponentially evolving global community. However, this all changed on Friday the 7th of August 2020, when President Muhammadu Buhari, gave his assent to the Companies and Allied Matters Act 2020 ("CAMA 2020").

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COMPANY ADMINISTRATION

The CAMA 2020 has introduced company administration into the body of Nigerian company law. Administration is a process that involves the appointment of an administrator to manage the company's assets, with a view to rescuing the whole or part of the company's undertaking as a going concern. As an alternative or a precursor to winding up, administration provides the possibility for a company to survive its financial troubles and continue trading as a going concern. Immediately the appointment of an administrator takes effect, no legal action (including legal proceedings, execution, distress etc.) may be instituted or continued against the company or the company's property, except with the permission of the Federal High Court (the "Court") or the consent of the administrator. This moratorium protects the company from enforcement proceedings and legal action from its creditors, thereby enabling the administrator focus on implementing measures that are aimed at rescuing the company.

Even though the rescue of the business is the primary objective of administration, an administrator may pursue some other course such as achieving a better result than the creditors as a whole than would be likely if the company were put into liquidation or realising property in order to distribute to secured or preferential creditors if the administrator is of the opinion that it is not reasonably practicable to rescue the company or that the other objectives will yield a better result for the company's creditors. The administrator may in fact decide that it is best that the company be wound up or explore a compromise with creditors through a creditors' voluntary arrangement.

HOW DOES A COMPANY GO INTO ADMINISTRATION?

A company can go into administration upon an order of the Court appointing an administrator. An application for an administration order can be made by:

i. the company;
ii. its directors;
iii. one or more creditors of the company;
iv. the designated officer of the Court appointed to act as receiver;
v. a liquidator;
vi. the holder of a floating charge in special circumstances; or
vii. a combination of any of the persons listed in (i) to (iv) above.

Administration can also be commenced out of court. This happens where an administrator is appointed by either the company itself, its directors or the holder of a floating charge that meets the stipulated conditions.

Where an appointment is made out of court, the person that appointed the administrator is required to file a notice of appointment, and such other documents as may be prescribed, with the Corporate Affairs Commission (the "CAC"), and in some instances, the person is also required to file a notice of appointment and such other documents as may be prescribed, with the Court.

THE ADMINISTRATOR

The administrator must be a qualified insolvency practitioner, whose remuneration and expenses are payable out of property, which is in the administrator's custody, in priority to the claims of holders of a floating charge. Two or more administrators may be appointed jointly or concurrently. It is noteworthy that the administrator is not an agent of the person that appoints him; upon appointment, an administrator becomes an officer of the court and an agent of the company. An administrator is required to perform his/her functions as quickly and efficiently as possible.

PROCESS OF ADMINISTRATION

Within 60 days of appointment, the administrator is required to prepare a detailed schedule of assets and submit a copy to the person who appointed him. The administrator is also required to send a notice of their appointment to the company, obtain a list of the company's creditors, and send a notice of their appointment to each creditor of whose claim and address the administrator is aware. The administrator is also required to publish a notice of appointment at the CAC, not later than 14 days of his appointment.

The administrator may issue a notice to an officer (or former officer), any founder or any employee (or former employee) of the company, requiring such person(s) to provide a statement of the affairs of the company. Having considered the state of the company's affairs, the administrator would circulate a proposal to the creditors for achieving the purpose of the administration. Where the proposal is not approved by the creditors, the administrator will apply to the Court for further direction.

EFFECTS OF ADMINISTRATION

While a company is in administration:

- every business document issued by or on behalf of the company or the administrator, as well as the company's website, must state the name of the administrator and clearly indicate that the company is in administration;
- no resolution may be passed for the winding up of the company, and no order may be made for the winding up of the company, except in limited circumstances;
- all pending winding up petitions will either be dismissed or suspended, except in limited circumstances;
- a receiver appointed by the holder of a floating charge will vacate office;
- no steps shall be taken to enforce security over the company's property or to repossess goods in the company's possession under a hire purchase agreement, except with the permission of the administrator or the court;
- a landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with the consent of the administrator or the permission of the court;
- the administrator may remove or appoint a director, whether or not the appointment is to fill a vacancy;
- neither the company nor an officer of the company may exercise management powers without the consent of the administrator; and
- the administrator is empowered to take custody of all the property to which he thinks the company is entitled.

Bringing administration to an end

The appointment of an administrator expires at the end of a period of one year from the date on which the appointment took effect, except where it is extended by the court for a specified period (prior to expiration) or extended for a period not exceeding six months with the consent of each secured creditor of the company (and qualified preferential creditor(s) where applicable). Prior to the expiration of the administrator's term (or any extension thereof), the court may, upon an application by the administrator or a creditor, order the cessation of the appointment of the administrator. Administration will also come to an end before the statutory period, where the administrator files a notice at the Court and the CAC, stating that the objective of the administration has been sufficiently achieved. Depending on the circumstance, an administration may also end through a public interest winding-up or upon the application of a creditor. Depending on the circumstance, an administration may lead to a creditors' voluntary liquidation or the dissolution of the company.

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THE COMPANIES AND ALLIED MATTERS ACT 2020 – WHAT YOU NEED TO KNOW

PART 11 – COMPANY VOLUNTARY ARRANGEMENTS

By Udo Udoma & Belo-Osagie

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COMPANY VOLUNTARY ARRANGEMENTS

The CAMA 2020 has introduced company voluntary arrangements (''CVA'') into the body of Nigerian company law. A CVA is an alternative arrangement available to companies facing financial challenges, that can be used by companies to conveniently structure the repayment of debts to their creditors. The provisions of the CAMA 2020 on CVAs are modelled primarily after the UK Insolvency Act 1986, including all subsequent related legislation (''UK legislation''). Although the CAMA 2020 does not define a CVA, in practice in the UK, CVAs are described as a form of business rescue arrangement which allows a company in financial difficulties to propose to its creditors to enter into an agreement with them regarding the repayment of all, or a part, of its debts over an agreed period of time. CVAs, in some respects, are similar to a scheme of arrangement. A fundamental difference between a CVA and a scheme of arrangement is that CVAs are contractual in nature and require the approval of the creditors and members of the company to take effect. A scheme of arrangement, on the other hand, involves the courts, and requires orders of the court to convene meetings and to sanction the resolutions passed at such meetings. Furthermore, the CAMA 2020 introduced the concept of a statutory 6-month moratorium under a scheme of arrangement under s. 715, during which period, no winding up petition or enforcement action by any creditor shall be entertained against the company. This feature is not available under a CVA.

FEATURES OF CVAs

- CVAs represent a shift from the traditional mindset that the only option available to an insolvent company is to be wound up. The primary objective of a CVA is to restore a company to profitability so that it may be able to meet its financial obligations to its creditors under the CVA.

- Unlike other company rescue options (such as administration) a CVA allows directors to remain in control of the affairs of the company while the company continues to conduct its business.

- The approval by creditors of a company to a CVA only binds the Company and all unsecured creditors (including unsecured creditors that do not agree to the CVA). Secured creditors who do not consent to the CVA, on the other hand, are not bound by the CVA and can enforce their security notwithstanding of the CVA.

MORATORIUM

In order for a potential restructuring or reorganisation to have the best odds for success, it is necessary for a moratorium to be put in place. A moratorium prevents the company's creditors from instituting or continuing any insolvency proceedings or legal processes against the company during the period of the CVA, thereby giving the company – and its creditors – an opportunity to agree on a plan to restructure the company and/or its debts without having to deal with the constant threat of enforcement action by certain creditors.

A statutory moratorium does not apply to CVAs under the CAMA 2020. In the absence of a statutory moratorium, and in the course of negotiating the terms of the CVA, creditors (including unsecured creditors) that are not part of the CVA may still enforce their rights as they choose without regard to the majority of the creditors who are in support of the CVA. This is similar to the situation in the UK where there is no statutory moratorium applicable to CVAs except in relation to "small eligible companies" and companies in administration; both of these categories of companies enjoy an automatic moratorium once they embark on a CVA. It is interesting to note that a statutory moratorium is also applicable in the CAMA 2020 where a company enters into administration. The experience in the UK has shown that a CVA proposal works best when initiated within the framework of administration unless there are compelling reasons for avoiding administration.

PROCEDURE

The CAMA 2020 outlines the process for implementing a CVA:

A CVA proposal is made to the creditors by the directors of the company, or by the administrator or liquidator, as applicable.

The proposal is made through a person appointed by the directors, administration or liquidator of the company (as applicable) to act as a nominee for the purpose of supervising the implementation of the CVA. The nominee must be qualified to act as an insolvency practitioner.

Within 28 days of receiving the notice of the proposal for a CVA, the nominee must submit a report to the Federal High Court stating whether, in his opinion, meetings of the company and of its creditors should be summoned to consider the proposal, and the date, time and place at which he proposed the meetings to be held.

The above requirement for the nominee to submit a report to the Court only applies where the company is not in administration or winding up. Where the company is in administration or winding up, the nominee may proceed to summon the necessary meetings without recourse to the Court. The meetings of the members and creditors are to be held separately.

The CVA proposal may be approved with or without modifications, provided that the proposal itself or any subsequent modification does not affect the right of a secured creditor to enforce its security or the priority and rights of preferential creditors except with the concurrence of the secured creditor or preferential creditors concerned.

The CAMA 2020 does not provide for the voting threshold for the approval of a CVA at the creditors' and members' meetings and this is a significant lacuna in the CAMA 2020. It only provides that "…each of the meetings shall be conducted in accordance with the rules." The CAMA 2020 defines the term "rules" to include "rules made by the Chief Judge of the Federal High Court for the purpose of section 616 (i.e. Delegation to liquidator of certain powers of court) or 683 of the CAMA 2020 (i.e. Information as to pending liquidations and disposal of unclaimed assets) and all incidental forms together with rules made by the Corporate Affairs Commission." There is, however, no specific indication of the rules being referred to in the CAMA 2020 so, perhaps, the provisions of the current Winding Up Rules, 2001, could be relied on. The Winding Up Rules provide for a simple majority approval of creditors and contributories (i.e. 50% + 1 vote) for a resolution to have been deemed to be passed. Under the UK Insolvency Rules, 1986, approval of a CVA requires the majority in excess of three-quarters (by debt value) of the creditors present in person or by proxy at the creditors' meeting, and a simple majority approval of the members present in person or proxy at the members' meeting. For clarity, it is recommended that the CAC, in its regulations, should confirm that the rules applicable to voting in relation to a CVA shall be the Winding Up Rules 2001. The CAC could also specify the voting threshold applicable to voting in relation to a CVA.

Where the decision taken at the creditors' meeting differs from that taken at the members' meeting, the Court may, on application by a member, order that the decision of the members' meeting shall prevail or make such other order as it thinks fit. This position applies in similar circumstances in the UK.

The decision relating to the approval of a CVA has effect if it has been taken by both meetings summoned, or by the creditors' meeting alone, but in the latter case the decision is subject to an order of the court made on application as mentioned in the preceding paragraph above. The company shall be liable to pay the creditors the amounts approved under the CVA.

The CVA can be challenged in Court on the grounds of unfair prejudice or material irregularity (or both) in relation to either of the meetings, and where such application is made, the Court may revoke or suspend any decision approving the CVA or direct the nominee to summon further meetings to consider a revised proposal with regard to the CVA.

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THE COMPANIES AND ALLIED MATTERS ACT 2020 – WHAT YOU NEED TO KNOW

PART 12 – DIRECTORS UNDER THE CAMA 2020

By Udo Udoma & Belo-Osagie

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In the course of a 12-part series, Udo Udoma & Belo-Osagie will provide a review of the provisions of the CAMA 2020, highlighting changes that have been introduced into the body of Nigerian company law by this ground-breaking legislation.

DIRECTORS UNDER THE CAMA 2020

The CAMA 2020 has made several changes in relation to the regulation of directors. The most significant of these are highlighted in this final part of this series.

1. SEPARATION OF THE ROLES OF THE CHAIRMAN AND THE CHIEF EXECUTIVE OFFICER OF A PUBLIC COMPANY

The chairman of a public company is now prohibited from also acting as the chief executive officer (the "CEO") of the same company. This is in line with Principle 3.2 of the Nigerian Code of Corporate Governance 2018 (the "NCCG") which states that the chairman of the board should be a non-executive director and should not be involved in the day-to-day operations of the company (which should be the primary responsibility of the CEO and the management team).

2. INDEPENDENT DIRECTORS

Section 275 of the CAMA 2020 introduces several important changes with respect to the appointment of independent directors of public companies.

Number of Independent Directors

Every public company must now have a minimum of three independent directors.

Who can be appointed as an independent director?

Specific criteria must be met before a person can qualify for appointment as an independent director. These are that in the two years preceding his nomination as an independent director, the relevant director and/or such director's relative(s):

1. were not employed by the company;
2. did not make to, or receive from, the company, payments exceeding NGN 20 million;
3. did not own (directly or indirectly) more than 30% of the shares of an entity that received such a payment (referred to in paragraph (ii) above) from the company or act as a partner, director or officer of an entity that made to, or received from, the company payments exceeding the specified amount;
4. did not own (directly or indirectly) more than 30% of the shares of the company; and
5. were not engaged (directly or indirectly) as an auditor of the company.

The 30% shareholding threshold contained in the CAMA 2020 differs from the provision of the NCCG which stipulates that an independent director should not hold more than 0.01% of the paid-up share capital of the company. What this means is that persons holding not more than 30% of the shares of a public company (a significant percentage given that the shares of public companies are typically widely held) could still qualify for appointment as independent directors notwithstanding the stricter requirements of the NCCG.

As the CAMA 2020 is a statute and takes precedence over the provisions of subsidiary legislation such as the NCCG, it is not yet clear how these provisions will be harmonised in practice.

Anyone who controls the majority of the board must nominate the three independent directors

The CAMA 2020 also states that anyone who has the power to nominate the majority of the members of the Board must nominate at least three persons as independent directors. Consequently, if a controlling shareholder of a public company has the right to nominate more than half of the members of the Board, three of the persons that such a shareholder

nominates must be persons that satisfy the requirements for appointment as independent directors, and shall be appointed as such by the company.

It appears that the reasoning behind this provision is to prevent the ability of a controlling shareholder of a public company to control the Board.

3. MULTIPLE DIRECTORSHIPS

The CAMA 2020 requires any person that is proposed to be appointed as a director of a public company to disclose, at the meeting where he is to be appointed, any position he holds as a director in any other public company.

The CAMA 2020 also introduces a limit on multiple directorships of public companies by stating that no person can be a director in more than five public companies at the same time. Any person who is currently a director in more than five public companies is required to resign from some of those board positions in order to ensure compliance with this requirement, and must do so by the annual general meeting of the relevant companies that takes place after a period of two years from the commencement of the Act. Put simply, such directors should seek to comply within the next two years.

Directors in default after the expiration of the two-year timeframe will be liable to a daily penalty in an amount to be specified in the regulations that will be issued by the Corporate Affairs Commission (the "CAC") and will also be required to refund all remuneration and allowances paid to them as a director in each company exceeding the limit of five companies prescribed by CAMA 2020.

There is no restriction on the number of private company boards that a director can be appointed to.

4. REGISTER OF DIRECTOR'S RESIDENTIAL ADDRESS AND USE AND DISCLOSURE OF PROTECTED INFORMATION

The CAMA 2020 now requires all companies to keep a Register of Directors' Residential Address which must contain the usual residential address of the company's directors. This register differs from the Register of Directors that section 318 of CAMA 2020 also requires companies to maintain because the Register of Directors only contains information on the "service address" of a director which, in some cases, could be the company's registered office. If, however, a director's usual residential address is the same as his service address (as indicated in the company's Register of Directors), then the Register of Directors' Residential Addresses only needs to contain an entry to that effect.

In order to protect the privacy of directors, the CAMA 2020 classifies information relating to the residential address of a director as "protected information". This information does not cease to be protected information when the director resigns from the board of the company. Accordingly, the company cannot use or disclose this information in relation to any director without the consent of the relevant director unless it is for the purpose of (i) communicating with that director (ii) complying with the requirements of the CAMA 2020 or (iii) complying with a court order.

There are also restrictions on the CAC's ability to use or disclose such protected information. The CAC is permitted to use the protected information for communicating with the director in question but the CAC may only disclose such information to a credit reference agency or to a public authority - subject to any regulations issued by the Minister of Trade and Investment prescribing conditions that must be satisfied before such protected information may be disclosed to any such public authority.

5. REMOVAL OF A DIRECTOR IS NOW A BASIS FOR DISQUALIFICATION

CAMA 2020 retains the procedure for removal of directors outlined under the Repealed CAMA. A key change, however, is that directors who are suspended or removed from office by the company in accordance with section 288 of CAMA 2020 will be disqualified from being directors of other companies.

6. ATTENDANCE AT BOARD MEETINGS NOW A FACTOR IN RE-ELECTION

The CAMA 2020, in section 284(2) makes the attendance record of a director one of the factors that should be taken into consideration when a director presents himself for re-election. Where any director is to be considered for re-election at a general meeting of a company, the record of his attendance at the meetings of the board during the year preceding the proposed re-election is required to be made available to the members at the general meeting where he is to be re-elected.

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