AN OVERVIEW OF THE COMPANIES AND ALLIED MATTERS ACT 2020: PROSPECTS AND CHALLENGES

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Abstract

The Companies and Allied Matters Act 2020, is Nigeria's major and most significant business legislation in three decades. This piece of legislation repealed and replaced the Companies and Allied Matters Act of 1990. The latter hindered business development and limited foreign investment in Nigeria. The objective of this paper is to highlight and analyze the new provisions of the law and forecast its implications for businesses in Nigeria. The doctrinal method of legal research was adopted in this paper. The paper finds that the extant new law introduced novel provisions that are in line with international best practices. The paper concludes by stating that law-making process must be timely, robust and consistent with present day realities.

Key words: Companies, Companies Legislation, Company Law Reform, CAMA, Nigerian Corporate Law.

1. Introduction

Economic regulation plays a pivotal role in a competitive and growing economy by providing a stable and predictable regulatory framework to facilitate efficient investment and sustainable growth.[1] This is achieved by building a stable and transparent regulatory environment with a long track record of regulatory decision making. It is pertinent to state that piece meal, adhoc, unanticipatedand stale changes in law and policy making are likely to erode investor confidence and increase the cost of doing business in Nigeria.[2]

2. Brief History of Companies Act Legislation in Nigeria

Before 1876, there were no local laws governing the operations of companies in Nigeria. The companies in operation were mostly foreign and operated with their foreign status.[3] In 1876, the Supreme Court Ordinance was promulgated for Lagos Colony which was under the British Crown. The Act made the common law, the doctrines of equity and the statutes of general application which were in force in England applicable to Lagos Colony.[4] After the amalgamation of the Northern and Southern Protectorate in 1914, the Supreme Court Ordinance of 1914 came to cover the whole of Nigeria and also with a

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[1] M. Rickets, "Economic Regulation: principles, History and Methods Available at https://www.researchgate.net, assessed on 8th August, 2020.

[2] Department for Business Innovation and Skills, "Principles for Economic Regulation 2011. Available at https://www.assets .publishing.service.gov.uk accessed on 8th August, 2020.

[3] O. Orojo, Companu Law and Practice in Nigeria (South Africa: Lexis Nexis, 2008). P. 16.

[4] *Ibid*

provision making the common law, the doctrines of equity and the statutes of general application in England, applicable to the whole of Nigeria[5].

In 1912, the Companies Ordinance was enacted being the first local statute to provide for incorporation of companies by registration.[6] The ordinance later extended to the rest of the country. It became chapter 38 of the Laws of Nigeria, 1948 edition and Chapter 37 of the Laws of Nigeria, 1958 edition. The ordinance was amended in 1941 and 1854[7]and in 1963, was designated Companies Act, continuing in operation till 1968 when a new Companies Act repealed it.[8]The companies Act of 1968 made some novel provisions, however it was criticized that it was a little more than the putting together of some of the sections of the replaced 1963 Act.[9]In 1987, the Nigerian law reform Commission was formed and following the consideration of the consultative Assembly on company law in 1988, the Companies Act of 1968 was repealed by the Companies and Allied Matters Act 1990.[10] The new Act not only made provisions for companies but also for business names and incorporated trustees; thus it was divided into three major parts. The 1990 Act endorsed common law principles and doctrines of equity with necessary amendmentswhere desirable.It also established the Corporate Affairs Commission was to administer the Act.[11]

3. The Company and Allied Matters Act 2020

Since the Companies and Allied Matters (Amendment) Decree of 1991[12] till the year 2020 no other amendmentwas made to the aged legislation. The 1990 Companies Act became grossly inadequate to regulate the growth of economic activities in Nigeria's fast developing economy.Nigerian Companies have essentially been required to rely on a 30-year-old law to govern the way local businesses operate. This consequently hindered investors from investing in the economy and slowed down the pace and ease of doing business in Nigeria.

On Tuesday 15th May, 2018, the Senate of the Federal Republic of Nigeria passed the Companies and Allied Matters Act, 1990 (Repeal and Re-enactment) Bill 2018.[13] The bill consolidated proposed amendments from two related bills.[14] The House of

[5]*Ibid*
[6]*Ibid*
[7] Companies (Amendment) Ordinance of 1941 and the Companies (Amendment) Ordinance 1954.
[8] Y.H Bhadmus, Bhadmus on Corporate Law Practice, (Enuju, Chenglo Publishers, 2009). P.4
[9]*Ibid, P. 5*
[10] Cap
[11] The Companies and Allied Matters Act was later contained in Chapter C20, Laws of the Federation of Nigeria, 2004.
[12] J.O. Orojo*op Cit P. 21*
[13]W.K.Obayomi, Keny Highlights of the CAMA Bill, 2018. Available at https://www.kpmg/ng/en/home, accessed on 8th August 2020.
[14]Companies and Allied Matters Act Cap C20 LFN 2004 (Amendment) Bill, 2016 and the Companies and Allied Matters Act, Cap C20 LFN 2004 (Amendment) Bill, 2017.

Representatives on the 4th of March 2020 again passed the bill which was later concurred by the Senate on 10th March 2020.[15] Consequently, on August 7, 2020, President Muhammadu Buhari signed into law the Companies and Allied Matters Act 2020[16]. The new CAMA is Nigeria's most significant business legislation in three decades and it introduced novel provisions will promote ease of doing business in Nigeria. The new law also provides for a robust framework that addressed some of the legal and regulatory bottlenecks which have made doing business in Nigeria difficult particularly for micro, small and medium Enterprises[17].

3.1 Major Innovations of the 2020 CAMA Act:

a. Inclusive Corporate Affairs Commission Board

The Board of the Corporate Affairs Commission[18] which is charged with administering the Act now has representative of the Institute of Chartered Secretaries and Administrators of Nigeria and the Nigerian Association of Small and Medium Enterprises[19]. Before now, this was not so. This inclusion will give room to allow inputs from professional company secretaries who deal with CAC regularly, an avenue to make meaningful contributions to the administration of the Act.

b. Single member/Shareholder Companies

Section 18(2)[20] makes provision for the establishment of a private company with only one (1) member or stakeholder. This is in contrast with the provisions of erstwhile CAMA, which required a minimum of two (2) persons to form and incorporate a company[21]. This provision will enable sole proprietorships to register as companies and benefit from the limited liability protection that companies enjoy. It is pertinent to state that micro, small and medium enterprises are the power house of the Nigerian economy, collectively employing about 60 million Nigerians, yet only about 14% of them are registered under CAMA.[22] This provision is also significant for multinational companies and other holding companies, who can now be the only shareholder in their Nigerian subsidiaries. Single member companies is consistent with several other jurisdictions such

[15]Senate passes the CAMA Bill 2020, Available at https://www.proshareng.com. Assessed on 8th August 2020

[16]J. Agbakwuru, Buhari signs Amended Companies and Allied Matters Bill CAMA 2020, available at https://www.vanguardngr.com , accessed on 8th August, 2020

[17]*Ibid*

[18]Hereinafter referred to as CAC

[19]Section 2(b) IV and V of the Companies and Allied Matters Act 2020. Hereinafter referred to as CAMA, 2020

[20]CAMA, 2020

[21]Section 18, CAMA LFN 2004

[22] CAMA 2020: 15 Business – friendly provisions in Nigeria's New Companies and Allied Matters Act, Available at https://www.premiumtimesng.com. Accessed on 8th August, 2020

as England, India and Singapore, which provides that a company can be formed by one or more persons[23].

c. Right of First Offer and Other Restrictions

Section 22(2) a and b[24] introduced the statutory right of first offer for private companies. This implies that subject to the provisions of the articles of association, a member of a private company is prohibited from transferring shares in the said company to a non-member, without first offering the shares to existing members. In addition, a private company cannot, without the approval of all its shareholders, sell assets having a value of more than 50% of the total assets of the company[25]. Also a shareholder or a group of shareholders acting in concert, cannot agree to sell more than 50% of the shares of the company to a non-shareholder without the non-shareholder consenting to buy the shares of the other existing shareholders on the same terms[26].

d. Introduction of statement of compliance

Section 40(1),[27], introduced the statement of compliance which can be signed by an applicant or his agent, confirming that the requirements of the law relating to registration have been complied with. Before now, only a legal practitioner was required to sign a statutory declaration of compliance, which forms part of the incorporation documents[28]. The position presently is that anybody not necessarily a legal practitioner can sign the statement of compliance. Thus, the implication is that a legal practitioner is not needed to incorporate a company which was before now exclusively done by them and partly Chartered Accountants and chartered secretaries or firm of any of the above who are accredited with CAC. It is humbly submitted that this provision may tamper with the quality of work done before incorporating a company as well as increase sharp and shady practices with respect to incorporation of companies.

e. Authorized share capital replaced with minimum share Capital

The capital requirement for companies is referred to as "authorized share capital". The concept of "authorised share capital" has now been replaced with "minimum share capital"[29]. With minimum share capital, promoter(s) of a company need not pay for shares that are not needed at a specific time. In line with charges made in other jurisdictions such as England, a company is no longer required to have an authorised

[23]*Ibid*
[24] CAMA 2020
[25]*Section 22 (2) C of CAMA 2020*
[26]*Ibid*
[27]*Ibid*
[28] See Section 35(3) of 1990 Cap C20 LFN 2004
[29]Section 27(2) CAMA 2020

capital that specifies the limit on the maximum amount of shares a company can allot[30]. The rationale behind this, is that the requirement of paying stamp duty and CAC filing fees whenever it increases its authorised share capital notwithstanding that all the shares might not have been allotted, amounts to a front-loading of costs. Presently, the concept of minimum issued capital implies that if a company has met the minimum share capital requirement, it will be required to only pay the stamp duty and CAC filing fees with respect to the minimum issued share capital only[31]. If the minimum issued share capital is increased in future, stamp duty and filing fees will only be paid in respect of the additional shares issued.

The minimum issued share capital requirement was increased from N10,000 (Ten Thousand Naira) to N100,000.00 (Hundred Thousand Naira) for private companies[32] and from N500,000.00 (Five Hundred Thousand Naira) to N2,000,000.00 (Two Million Naira) for Public Companies[33]. In addition to the above, exclusion of the provision requiring subscribers to the Memorandum to subscribe to a minimum of 25% of the authorised share capital in the erstwhile CAMA was made[34]. Henceforth, subscribers to the memorandum of association are not required to subscribe to 25% of now the minimum share capital.

f. Exemption from the Appointment of Company Secretary

Section 330(1)[35], now makes it optional for private companies to appoint a company secretary. The above section reads, "Except in the case of small company, every company shall have a secretary|. Presently, the appointment of a company secretary was mandatory for every company[36]. This exemption of company secretary for small companies will go a long way to help reduce the cost of running a business in Nigeria, as a business owner/shareholder can also carry out the duties of a company secretary. It is pertinent to note that the statutory requirements of class of persons who can be appointed the secretary of a public company still remains[37].

g. *Register of secretaries*

Section 292(1) of the repealed Act[38] required every company to have a register of secretaries and directors at its registered office. Section 336[39] makes it mandatory for

[30]S. Duru, T. Bashir & T Oyebanjo, Nigeria: Companies and Allied Matters Act 2020: Reforming provisions that impact the Nigerian Business Community, Available at https://www.banwo–Ighodalo.com accessed on 10th August, 2020
[31]*Ibid*
[32]See Section 27(2) a CAMA 2020.
[33]*Ibid*
[34]Section 27(2) b of CAMA 1990, LFN 2004
[35]CAMA 2020
[36]See Section 293 (1) CAMA 1990, LFN 2004
[37]Section 295 of CAMA 1990, LFN, 2004
[38]CAMA 1990, LFN 2004

every public company to maintain a register of secretaries and sections 337 and 338[40] provides for the required particulars in the register or secretaries. The exclusion of private companies from keeping a register of secretaries will also reduce the operational cost of small businesses.

h. Disclosure of significant control and Beneficial Ownership

Section 119 and 120[41], provides that persons who hold significant control in any type of company are required to disclose particulars of such control to the relevant companies within seven days of acquiring such significant control. The company must inform the commission within one month of receipt of the information, disclose the information in their annual returns to the commission and update their register of members with the appropriate details. This provision is aimed at increasing transparency and combating of asset shielding. Under the repealed Act,[42] obligation to disclose beneficial interest was limited to where such interest was acquired in a public company. The new CAMA did not distinguish between disclosure required by a public company and a private company[43].

i. Merger of Incorporated Trustee

Section 849 of the new Act[44], provides for merger between two or more associations with similar aims and objects under such terms and conditions as may be prescribed by the CAC. There was no provision of this merging of incorporated Trustees with similar objects in the repealed law. This provision will help harmonize as well as reduce the creation of multiple incorporated trustees with similar objects.

Also, Section 831 of the new CAMA provides for the treatment of any two or more associations having the same trustees to be treated as a single association. This is without prejudice to the provisions of Section 849 of CAMA 2020. This provision is expected to facilitate effective operations. This provision will also promote accountability and enforcement of compliance, as well as establish a nexus between associations for the purpose of determining control and ultimate ownership of property[45].

j. Common seal now optional

The procurement of a common seal is no longer a mandatory requirement according to Section 98.[46] Before now, every company to be regulated by the Articles of Association

[39]CAMA, 2020
[40]*Ibid*
[41]*Ibid*
[42]CAMA 1990, LFN 2004
[43]CAMA 2020: Reforming provisions that Impact the Nigerian Business Community, Available at https://www.proshare ng.com accessed on 11th August 2020.
[44]CAMA 2020
[45] S. Duru, T. Bashir & T. Oyebanjo, *Op cit*
[46]CAMA 2020

of the company[47]. Though, the requirement of company seal is no longer mandatory for companies, it would be desirable for companies to have one, as it authenticates documents emanating from the company. However, a company is free to adopt an alternative mode of authorization. In some other jurisdictions, a company seal is optional too. For example, section 9 of the Companies and (Amendment) Act 2015 of India, made common seal optional, it went further to provide an alternative mode of authorization for Companies who do not wish to have a common seal[48]. According to this amendment, if a company does not have a common seal, then the authorization shall be done by: two directors or one director and the company secretary (if the company has appointed a company secretary).[49]

k. Acquisition by a company of its own shares (shares Buyback)

Section 184(1) provides for the procedure for the acquisition by a company of its shares and Section 186 outlines the persons from whom a company may buy back its own shares which are: (i) The existing shareholders or security holders on a proportionate basis; (ii) the existing shareholders in a manner permitted pursuant to a scheme of arrangement sanctioned by the court; (iii) the open market and (iv) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or any other similar scheme. Where a company buys back its shares, payment for the share buyback shall be made from the distributable profits of the company.[50]

l. Share Certificate

Due to the amendment in Section 98 of CAMA[51], which makes a common seal optional, CAMA, 2020 now provides that a share Certificate may either be (a) issued under the company's seal (where the company has a common seal or (b) signed as a deed by the company[52].

m. Authentication Via Electronic Signature

Section 101[53], provides that a document requiring authentication by a company may be signed by a director, Secretary or other authorized officer of the company, and need not be signed as a deed unless otherwise specifically required by CAMA 2020. This same Section went further to provide that electronic signature is deemed to satisfy the requirement under this Section. This is in tandem with modern technological developments, as well as the provisions of the Evidence Act, 2011.

n. Exemption from Audit Requirement

[47] See Section 74 of CAMA 1990, LFN 2004
[48] Meaning and features of a company, Available at http://www.toppr.com accessed on 11th August 2020.
[49] *Ibid*
[50] Section 185 of CAMA 2020
[51] *Ibid*
[52] CAMA 2020
[53] CAMA 2020

Section 402[54], exempts small companies and companies that have not carried out business since incorporation (other than an insurance company or a bank or any other company as may be prescribed by the CAC) from requirements of the as may be prescribed by the law relating to the audit of accounts in respect of a financial year. Before now, every company whether private or public was required under the law to appoint an auditor or auditors at its Annual General meeting to audit the financial statements of the company[55]. This particular provision of exempting small companies and companies that have not transacted business since incorporation (with the exception of those prescribed by CAC) will help small businesses to grow, as well as ease the burden of compliance to many statutory requirements.

o. Display of Audited Accounts on Websites

Section 374(b)[56], now requires every public company to keep its audited accounts displayed on its website. This provision is in line with the existing requirement of the Nigerian Stock Exchange and the securities and Exchange Commission. This provision also enhances transparency, as well as afford prospective investors the opportunity to make informed decision. There was no such provision in the repealed CAMA.

p. Introduction of Alternative to Attorney General's consent

Section 26 (4)[57] maintained that the consent of the Attorney General of the Federation is still a primary pre-requisite for the grant of registration of a Company Limited by guarantee. It is pertinent to note that an alternative to the Attorney General's consent has been introduced. In the event that the AG does not grant authority to the promoters within thirty (30) days (where there are no objections or other cogent reasons for refusal)[58]. The promoters are permitted to place an advert in three (3) national dailies and invite objectives within twenty-eight (28) days. Where there are no objections, the new CAMA empowers the CAC to assent to the application and register the company without the A.G's consent, after advertising the application in three national dailies[59].

It is important to note that the repealed Act required all Companies Limited by guarantee not to be registered with a share capital[60]. This provision has now been deleted from the new CAMA 2020. It is not clear whether the intention is for companies limited by guarantee is now required to be registered with share capital and the applicable authorized share capital under the new regime.

q. Introduction of Limited Liability Partnerships (LLPs)

[54]*Ibid*
[55]See Section 357 of CAMA 1990, LFN 2004
[56]CAMA 2020
[57]*Ibid*
[58] Section 26(5), CAMA 2020
[59]Section 26(6) (7) & 8 CAMA, 2020
[60]See Section 26(2) CAMA 1990 LFN 2004

Under the new CAMA 2020, Limited Liability Partnership as a business structure[61]. This was not the not the case under the repealed law. The novel provision is in line with international best practices and also in line with what is obtainable in other jurisdictions, such as the United Kingdom and the United States of America. It is pertinent to note that it is only Lagos State that has its partnership law in Nigeria. Under the erstwhile Act, partnerships were not considered a body corporate with separate legal entity, and thus the liability of such partnerships were not recognized under then CAMA.

r. Electronic filing, Electronic share transfer and Electronic meetings for private companies.

Section 861[62] provides that certified true copies of electronically filed documents are admissible in evidence, with equal validity with original documents. In addition, Section 176(1) provides that instruments of transfer of shares shall include electronic instruments of transfer. Before now, the old CAMA required the transfer of shares to be made by instrument of transfer (paper/physical document)[63] and meetings of companies were physical meetings. Present day realities have shown that reliance on will be seen as highly redundant in this era of electronic communication.

Given the present-day realities and the emergence of corona virus pandemic across the globe, it has become imperative that both public and private companies should hold their meetings virtually (if it is impracticable to do so physically). This is in line with emergency business and lifestyle adjustments globally necessitated by the coronavirus pandemic[64]. Thus, the new CAMA did not take this into consideration. During the pandemic, the centres for Disease Control and Prevention in different countries prohibited large, in-person gatherings in an effort to prevent the spread of coronavirus[65].

s. Enhancement of minority shareholder Protection and Engagement

Section 265(6) restricts companies from appointing a director to hold both the office of the Chairman and Chief Executive Officer of a private company. The new CAMA, explicitly prohibits both offices stated above to be held by the same person. The separation of these two (2) roles is in accordance with the Nigerian code of Corporate Governance 2018 and International best practices.

t. Minimum Directors

Section 271(1)[66] exclude small companies from the requirement of having a minimum of two (2) directors. This implies that a small company is permitted to have only one (1)

[61]See Section 746-810 of CAMA, 2020
[62] CAMA 2020
[63]See Section 151 of CAMA 1990 LFN 2004
[64] M. Albano, S. Flow, and F Odell, "Virtual Annual meetings and corona virus", Available at https://www.orpgov.law.harvard.edu accessed on 12th August, 2020
[65]*Ibid*
[66]CAMA 2020

director. This was not the case in the repealed law. Every company was before now required to have at least two directors[67]. Permission granted to small businesses to have only one director is step taken in the right direction as this would reduce running cost for small businesses.

u. Independent Directors in Public company

Section 275(1)[68] provides that every public company must now have atleast three independent directors. Presently, the SEC code of Corporate Governance[69]and the Nigerian Code of Corporate Governance[70], provides that companies should have a minimum of one independent director. This provision of CAMA 2020 creates a higher threshold for this requirement and companies will be mandated to meet this higher requirement of three independent directors regardless of the SEC rules and the Nigerian Code of Corporate Governance.

There was no provision of appointment of independent directors in public company under the erstwhile CAMA.

[67]See Section 246 of CAMA 1990, LFN 2004
[68]CAMA 2020
[69]Rule 5.5.(C) Code of Corporate Governance for Public Companies, available at https://www.sec.gov.ng. accessed on 11th August, 2020
[70]The Nigerian Code of Corporate Governance 2018. Available at https://www.assets.kpmg.com Accessed on 11th August, 2020.