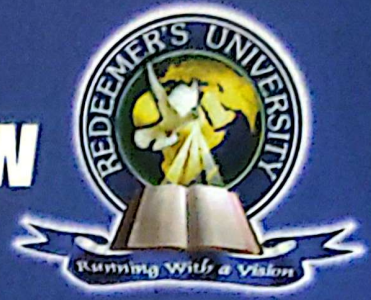




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JUXTAPOSING THE REPEALED CAMA 1990 WITH THE CAMA 2020: AN EFFECTIVE LEGISLATION TO GOVERN CORPORATE ENTITIES IN THE EVER-DYNAMIC BUSINESS ENVIRONMENT IN NIGERIA?

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Abstract

The Companies and Allied Matters Act (CAMA) 2020, signed into law on the 7th of August 2020 by the Nigerian President to govern and regulate corporate bodies in Nigeria, has been unanimously adjudged as the country's most revolutionary piece of business legislation in decades and a timely needed respite for the promotion of good corporate governance in Nigerian Corporate Entities, including the private sector and small-scale businesses. The method applied in this paper is the doctrinal method, by juxtaposing major provisions of the repealed CAMA 1990 with those of the CAMA 2020. It discusses some of the key changes and innovations which make the CAMA 2020 unique and relevant to the realities of modern business operations and management. It also took into consideration, certain developments as they affect the governance of corporate entities, especially after the Covid-19 pandemic, which is still ravaging many parts of the globe, especially the recent outbreak of the omicron version of the pandemic. It x-rays some of the relevant provisions of the companies' regulations 2021 published by the Corporate Affairs Commission in the governing of corporate entities. It concludes by trying to answer the question as to whether the new Act is effective enough to address the challenges of company operations in the ever-dynamic business environment in Nigeria. It also recommended what to do to make the good law a better one.

Keywords: The Repealed CAMA 1990; The new CAMA 2020; Corporate Affairs Commission ("the Commission"); The Commission's Companies Regulations 2021; Effective Legislation.

1.0 Introduction

The Nigerian business environment has, for the past thirty years, operated under the now-repealed Companies and Allied Matters Act (CAMA) 1990 (later cited as CAMA, Cap C20 LFN 2004). The CAMA

1990, which started as a Decree in 1990¹ effectively governed the Nigerian business regime. The repealed Act provides guidelines and the structures that have kept the business framework running since 1990, after the repeal of the Companies Act of 1968. However, with the advent of electronic commerce, a paperless working environment, more complicated business' operations, a borderless global economy, other dynamic realities of doing business, and most recently, the effects of the covid-19 pandemic, coupled with other emerging events in the corporate sector, the CAMA 1990 became outdated with the attendant difficulties in running businesses. The difficulties in operating and transacting businesses subsequently led to the agitations for the Act to be repealed or re-enacted. The Nigerian President eventually signed the CAMA 2020 into law on the 7th of August, 2020.

The CAMA 2020 repeals the thirty-year-old CAMA 1990, later cited as Cap. C20, LFN 2004. The CAMA 1990 has survived past repeal efforts with President Buhari withholding assent to the 8th National Assembly's CAMA bill in May 2018. The CAMA 2020 re-enacts the usual company law principles for the incorporation and management of companies while introducing some new provisions such as limited partnerships, limited liability partnerships, incorporation of trustees of certain communities, registration of business names, bodies, associations; and other related matters.

The new law, widely adjudged by business analysts and many legal practitioners as the most revolutionary piece of business legislation in Nigeria, comes across as the needed respite for the private sector and small-scale businesses. The amendments were also aimed at promoting investments that will allow small businesses and startups to thrive, lower costs, and ease regulatory burdens. The changes included in the new law will mean that most of the over seventy-five thousand private companies limited by shares established annually in Nigeria will be able to incorporate more easily. Also, small companies will no longer be required to have a company secretary or hold Annual General Meetings (AGM), and the requirement for statutory declaration of compliance has also been removed. The CAMA 2020 has also reduced the minimum share capital required¹ for companies to be registered. This reduction in

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¹ It was promulgated as a Decree by the Ibrahim Babangida's military administration in Nigeria.

minimum share capital will encourage more investments in small companies.

2.0 Structure of the New CAMA 2020.

The new CAMA 2020 is divided into seven Parts (A – G) and 870 Sections. This is unlike the CAMA 1990, which had just three main parts.² Outlining the seven parts of the CAMA 2020, Part A deals with the administration and composition of the body responsible for registration, which also functions as a regulator, that is, the Corporate Affairs Commission ('CAC'). Part B has 29 Chapters which stipulates the lifecycle of companies their incorporation through to liquidation. Part C, which comprises of eleven chapters, is novel, as it provides for Limited Liability Partnership. Part D, which is also novel, comprises twelve chapters. It provides for Limited Partnership. Part E makes provisions for the registration of Business Names, while Part F provides for the registration of Incorporated Trustees. Lastly, Part G makes provisions for the Administrative Proceedings Committee, a quasi-judicial body, in its first chapter and covers general miscellaneous matters in its other chapter.

2.1 Major Innovations in the CAMA 2020.

There are many key changes that make the CAMA 2020 unique and innovative when juxtaposed with the repealed CAMA 1990. Some of the novel provisions of the new Act are highlighted below: From a dispute resolution point of view, the CAMA 2020 now makes it a condition precedence that before the commencement of a suit against the Corporate Affairs Commission ("the Commission"), there must be a pre-action notice issued and served on it.³ The section also provides for restriction on levy of execution on the Commission. The Act proceeds to outline the details which the notice must contain.⁴ This was non-existent in the repealed CAMA 1990.

A significant change in the CAMA 2020 is the provision that one person may now incorporate a private company provided the provisions of the Act are complied with.⁵ Unlike the CAMA 1990 that strictly provided for a minimum of two persons before a company can be formed,⁶ the

² These are parts A, B and C, with Part A alone comprised of 18 subparts and 613 sections.

³ CAMA 2020, section 17.

⁴ CAMA 2020, section 17 (2).

⁵ CAMA 2020, section 18.

⁶ See section 18 of the repealed 1990 CAMA which provides for any two or more persons in the formation of a company.

CAMA 2020 provides for the establishment of a private company with only one member or shareholder.⁷ As laudable as this section appears, the inherent danger is that the death of the founder of the Company, in some cases, may signal the end of the Company unless a formidable and enduring structure is in place.

CAMA 2020 also introduced some restrictions with respect to the transfer of shares and assets.

Regarding the transfer of shares, the CAMA 2020 has introduced a statutory right of the first offer.⁸ This is the right of first refusal in the transfer of shares of a Private Company. In essence, subject to the provisions of a company's Articles, a member of a private company cannot transfer his shares to a non-member, without first offering the said shares to existing members. Also, a company cannot sell assets with a value more than 50% without the approval of all its shareholders. Furthermore, a shareholder or a group of shareholders, acting in concert, cannot agree to sell more than half (50%) of the shares of the Company to a non-shareholder unless the non-shareholder agrees to buy the shares of other existing shareholders on the same terms.

The CAMA 1990 restricts the transfer of the shares of private companies in their articles of association, though the form of the restrictions was not outlined. However, the CAMA 2020 has gone further than this. Section 22(2) (b)-(c) of CAMA 2020 provides for rights of first offer for all shareholders before shares are sold to non-shareholders. The sale of a majority equity stake is also subject to the remaining shareholders' rights. Opinions differ as to whether the provisions of section 22(2)(a)-(c) are default, mandatory or optional. If mandatory, these provisions could significantly extend transaction timelines and investors will need mechanisms to mitigate their impact. It may also impact funding and existing shareholder rights. There may be need to review existing agreement to ensure alignment with these provisions. Companies may also need to amend their articles of association to specifically exclude these restrictions where necessary. CAMA 2020⁹ makes provision to the effect that a private company shall not sell assets which has the value of more than fifty percent of a company's assets without the consent of all its shareholders. CAMA 2020¹⁰ also provides that a shareholder of a private company is prevented from selling his shares in the company to

⁷ CAMA 2020, section 18 (2).

⁸ Emphasis supplied. See CAMA 2020, section 22.

⁹ CAMA 2020, section 22 (2) (a).

¹⁰ CAMA 2020, section 22 (2) (b).

outsiders without first offering the shares to existing shareholders. This is commendable in order to give priority to existing shareholders who might be interested in acquiring more shares of the company. Also, shareholders shall not act together to sell fifty percent shares in a private company to an outsider (non-existing shareholder) except the outsider has agreed to buy the shares of all the existing shareholders on the same terms.¹¹

Thus, whilst the repealed CAMA 1990 makes provision to the effect that private companies shall, by their Articles, restrict the transfer of their shares,¹² the CAMA 2020 went further to define the extent of such restriction, in that it provides for the right of first refusal as noted above. This appears to be a remarkable improvement on CAMA 1990 in that it makes transferability of shares in private companies possible, and the restrictions placed on the extent of transfer are to avoid abuse of the process.

Regarding assets transfer, on the combined reading of sections 342(2) and 22(2)(a) of the CAMA 2020, 'major asset transactions'¹³ which involves assets or rights representing 50% or more of the book value of the company's assets require shareholder approval. CAMA 1990 was silent as to the requirement of shareholder approval for the disposal of significant assets. There is, however, an obvious contradiction between the approval thresholds stated in sections 342(2) of CAMA 2020 (which provides for a 75% threshold) and 22(2)(a) (which provides for unanimous consent) for asset transactions. Time will tell how this conflict will be addressed whenever the opportunity comes for the Courts to pronounce on it.¹⁴

On Companies Limited by Guarantee, under the repealed CAMA 1990, the Attorney-General's consent was required for registering Companies Limited by Guarantee.¹⁵ This provision is retained under the CAMA 2020. However, the 2020 Act stipulates a time frame of 30 days within which the Attorney-General may authorise the registration of the Company.¹⁶ This is also a monumental relief for persons seeking to

¹¹ CAMA 2020, section 22 (2) (c).

¹² See section 22(2) of the repealed CAMA 1990.

¹³ These are transactions outside the ordinary course of business.

¹⁴ Chinyerugo Ugoji, "CAMA 2020 and the implications for the private equity industry" (23 Sep 2020) <<https://www.avca-africa.org/newsroom/afri-spective-blog/2020/cama-2020-and-the-implications-for-the-private-equity-industry/>> accessed 11 Jan. 2022.

¹⁵ See section 26(5) of the repealed CAMA 1990.

¹⁶ CAMA 2020, section 26.

register a company limited by guarantee. It places a time frame and further expands on steps to be taken at the expiration of the 30 days where the Attorney-General did not authorise the registration.

The new CAMA 2020 also replaces the concept of 'Authorised Share Capital' with 'Minimum Share Capital.'¹⁷ Whereas the CAMA 1990 places an authorised share capital of a private company at ten thousand naira,¹⁸ the CAMA 2020 prescribes the Minimum Share Capital of a private company as one hundred thousand naira, and that of a public company which was formerly five hundred thousand naira is pegged at two million naira. This is a great improvement on the repealed CAMA 1990 in that it factored in the depreciation in naira value that has occurred from 1990 to date.

Also, the power of the Commission has been enhanced, in that it has now been empowered to cancel or withdraw a reserved name if it subsequently discovers that such name is identical to that already assigned to an existing company or so nearly resembles it as to be likely to deceive.¹⁹ This must however be done before the issuance of a certificate of incorporation. The CAMA 2020, however, is silent on what to do if it discovers such irregularities after the certificate of incorporation had been issued. CAMA 2020 also empowers the Minister²⁰ to prescribe model Articles of Association with different model articles stipulated for different categories of companies.²¹ However, a company is permitted to adopt all or select provisions of the model articles.

The new Act also did away with the mandatory provision of the Declaration of Compliance signed by a Legal practitioner or attested before a Notary Public.²² Thus, an applicant or his agent may sign the statement of compliance, and same would be sufficient for the purposes of registration. Specifically, the new Act introduces the Statement of Compliance which can now be signed by an applicant or his agent to confirm that necessary requirements of the law as to registration have been complied with.²³ This provides an alternative to the requirement to

¹⁷ CAMA 2020, section 27(2) (a).

¹⁸ See section 27(2) (a) of the repealed CAMA 1990.

¹⁹ CAMA 2020, section 31 (3).

²⁰ This means the Minister charged with the responsibility for trade. See CAMA 2020, section 868 (1).

²¹ CAMA 2020, section 33.

²² CAMA 2020, section 40.

²³ CAMA 2020, section 40 (1).

submit a Declaration of Compliance. Thus, a Statement of Compliance is no longer required to be signed by a lawyer. The likely danger here, of course, is that an agent in this regard may not be as meticulous as a lawyer would have been before signing the declaration of compliance, and this may defeat the objective of such declaration.

The CAMA 2020 empowers CAC to withdraw, cancel or revoke a certificate of incorporation when it discovers that said certificate was fraudulently, unlawfully or improperly procured.²⁴ It also do away with the mandatory requirement of a company possessing a common seal.²⁵ It makes the requirement an option as opposed to the mandatory nature it held under the CAMA 1990.²⁶ Because of the amendment in section 98 of CAMA 2020, which makes the requirement for a common seal optional, the new Act now provides that a share certificate may either be (a) issued under the Company's seal,²⁷ or (b) signed as a deed by the Company.²⁸ While on the one hand, this provision simplifies the process of signing by a corporate body, on the other hand, the process of such signature becomes porous and susceptible to fraud when, in some cases, the common seal of a company is not affixed.

2.2 Authentication through Electronic Signature

In line with modern technology and developments, as well as the provisions of the Evidence Act, 2011, the new Act makes provisions to the effect that an electronic signature is deemed to satisfy the requirement for signing.²⁹ It also provides that the register of transfers shall include electronic registers.³⁰ Additionally, the CAMA 2020 provides that a document or proceeding that requires authentication by a company may be signed by either by a director in the company, the secretary, or other authorised officer, and *need not be signed as a deed*,³¹ unless it is expressly required by CAMA 2020.³² Also, an electronic signature is now deemed an acceptable mode of such authentication.

²⁴ CAMA 2020, section 41 (7).

²⁵ CAMA 2020, section 98.

²⁶ See section 74 of the repealed CAMA 1990.

²⁷ This applies where the Company has a common seal.

²⁸ Emphasis mine.

²⁹ Emphasis mine.

³⁰ CAMA 2020, section 176 (1).

³¹ Italics supplied.

³² CAMA 2020, section 101.

2.3 Disclosure of significant control and beneficial ownership

Whilst under the repealed CAMA 1990, the disclosure of beneficial interest was limited to instances where the interest was acquired in a public company; the CAMA 2020 makes no distinction between disclosure required by companies, whether small, private or public. The CAMA 2020 provides that persons who hold significant control in *any type of Company*³³ are mandated to disclose particulars of such control to the relevant companies within seven days of acquiring such significant control.³⁴ Specifically, the CAMA 2020 introduces new transparency provisions, requiring entities to disclose the capacity in which shares are held.³⁵ Thus, such disclosure is required by all companies, private or public. Any person having significant control over a company is mandated to notify the Company in writing about the particulars of such control. The timeline for doing this is within seven days of becoming such a person. The Company is under obligation to notify the Commission, which is mandated to maintain a register of such persons. All affected companies must disclose the information in their annual returns to the Commission within one month of receipt of the information, and update their registers of members with the appropriate details. These amendments are meant to increase transparency and combat asset shielding. The amendments are particularly significant because the Commission may mandate the disclosure of beneficial interests in a company, regardless of the manner in which the interests are held.³⁶ It thus appears that shareholding by trust arrangements is now permissible under CAMA 2020, and the Commission may be notified of such trusts. The new CAMA2020 provides for valid electronic transfer of shares.³⁷

2.4 The Threshold of Substantial Interest

The CAMA 2020 also provides that a person is deemed to be a substantial shareholder in a public company, if such a person holds under his name or by his nominee, shares in the company's shares, which entitles him to exercise at least five per cent³⁸ of the unrestricted voting rights at any of the general meetings of Company.³⁹ The Company in question is under obligation to notify the Commission, where (i) any

³³ Emphasis mine.

³⁴ CAMA 2020, sections 119 and 120.

³⁵ CAMA 2020, section 119. It requires such disclosure to be made either as a beneficial owner or as a nominee of an interested person.

³⁶ In other words, such disclosure may be required regardless of whether such interests are held through nominal holders or in trust.

³⁷ CAMA 2020, section 175(1).

³⁸ Emphasis mine.

³⁹ CAMA 2020, section 120(2).

person becomes a substantial shareholder, within fourteen days of receiving the notice from the substantial shareholder, or when he becomes aware that a person is a substantial holder; and (ii) any person ceases to be a substantial shareholder, within fourteen days of becoming aware of such cessation.⁴⁰

2.5 Power to allot Shares

The power to allot shares is still vested in the Company's shareholders, whether private or public. However, the CAMA 2020 now limits the authority to delegate to directors, the powers to allot, to only shareholders of private companies, subject to any direction or condition that may be imposed in the Company's Articles or by the general meeting of the Company.⁴¹ Obviously, the power to allot shares cannot be exercised by directors, unless specifically authorised by the company's articles or at a general meeting of the shareholders. In other words, the authority to delegate the power to allot shares can no longer be exercised by shareholders in public companies. Thus, the power to allot shares in public companies remains subject to the relevant provisions of the Investment and Securities Act.⁴²

2.6 Creation of Security and Financing of Transactions

2.6.1 Floating Charges

Under the CAMA 2020,⁴³ a person is deemed to have notice of a prohibition in a floating charge where a notice regarding its existence is duly registered with the Commission. This implies that where such notice is not, or has not, been registered with the Commission, a person can claim ignorance of such notice. Also, the new Act provides that, notwithstanding any provision in the new Act or any other contradicting law, the holder of a fixed charge shall have priority over the Company's various debts including preferential debts.⁴⁴

2.6.2 Power to Vary Rights

The CAMA 1990 already provided that the rights of a class of shares may be varied, subject to the written consent of the holders of three-quarters of the issued shares of that class, or with the authority of a special resolution that has been passed at a separate general meeting of the holders of the shares of the class.⁴⁵ In the CAMA 2020 however, it

⁴⁰ CAMA 2020, section 121 (3).

⁴¹ CAMA 2020, section 149.

⁴² CAMA 2020, section 149 (2).

⁴³ CAMA 2020, section 204

⁴⁴ CAMA 2020, section 207.

⁴⁵ CAMA 2020, section 166 (1) (b).

appears a distinction has been created. This is because a provision has been made to the effect that the rights may only be varied with the written consent of the holders of three-quarters of the issued shares of that class, or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class *where the Articles of the Company do not provide for the variation of those rights.*⁴⁶ Also, the new Act provides that any proposed amendment or inclusion of a provision in the Articles of a company concerning the (variation of) rights attached to a class of shares, shall be by the written consent of the holders of three-quarters of the issued shares of that class.⁴⁷

2.6.3 Trust Deeds

Notably, the provision of CAMA 1990, which disqualifies a substantial shareholder of a company from acting as trustee of a debenture trust deed, has not been replicated in the CAMA 2020. It would, thus, appear that substantial shareholders can now act as trustees in a debenture trust deed that involves the company. This is a further boost to business transactions as it gives substantial shareholders more stake in the company's business.

2.6.4 Financial Assistance by Company for acquiring its ownshares

The CAMA 2020 has enlarged the definition of 'financial assistance' regarding the acquisition of its own shares to include 'any other financial assistance rendered by a company, the net assets of which are thereby reduced by up to half (50%), or which has no net assets.'⁴⁸ Whilst 'net assets' was not defined in CAMA 1990, the term has now been expressly defined in the CAMA 2020⁴⁹ to mean the "*aggregate of the company's assets less the aggregate of its liabilities.*" These liabilities are inclusive of any charges or provisions for liabilities in line with the applicable accounting standards applied by the Company. Furthermore, the exemptions to the financial assistance rule have now been expanded under the new Act.⁵⁰ The enlargement of the definition of financial

⁴⁶ Italics supplied.

⁴⁷ CAMA 2020, section 166.

⁴⁸ CAMA 2020, section 183 (1) (a).

⁴⁹ CAMA 2020, section 183 (3).

⁵⁰ Section 183 (3) (a) - (f) of CAMA 2020 such that a company shall not be prevented from rendering financial assistance where:

(i) "*it is done in pursuance of an order of the court under a scheme of arrangement; a scheme of merger or any other scheme or restructuring of a company done with the sanction of the Court*";

assistance in this context has the tendency of enhancing the financial position of a company by making its operations more transparent.

2.6.5 Company acquiring its own Shares (Share Buyback)

The CAMA 2020 also provides for the procedure for the acquisition by a company of its shares.⁵¹ It also outlines the persons from whom a company may buy back its own shares as (a) the existing shareholders or security holders on a proportionate basis; (b) the existing shareholders in a manner permitted pursuant to a scheme of arrangement sanctioned by the court; (c) the open market; and (d) by purchasing the securities issued to the company's employees pursuant to a scheme of stock option or any other similar scheme.⁵² In the case of a company buying back its shares, payment for such shares that have been bought back shall be made from the company's distributable profits.

2.6.6 Registration of Charges created by Companies

The CAMA 2020 also stipulates the total fees payable to the Commission regarding the filing and other amounts as the Minister may specify.⁵³ This provision introduces a drastic reduction in the fees payable for the registration of charges as the same previously cost ₦10,000 for every ₦1,000,000 (i.e., 1%) or part thereof in case of private companies and ₦20,000 for every ₦1,000,000 (i.e., 2%) or very part thereof in case of public companies. Thus, the section⁵⁴ reduces the filing fees for registration of Charges with the total fees payable to the Commission for filing reduced to 0.35% of the value of the charge. This translates to a projected 65% reduction in the associated cost payable under the CAMA 2020.

The new Act also stipulates the amount to be paid to the Commission for filing charges.⁵⁵ It pegs the fee at 0.35 % of the value of the charge. This has the tendency of the cost of filing charges to up to 65% compared to the cost under the repealed Act. The section now imposes an obligation on the Commission to enter in the register of charges, a notice showing

(ii) "its principal purpose in giving the assistance is not to reduce or discharge any liability incurred by a person for the purpose of the acquisition of shares in the company or its holding company, or the reduction or discharge of any such liability, but an incidental part of some larger purpose of the company, and the assistance is given in good faith in the interests of the company".

⁵¹ CAMA 2020, section 184 (1).

⁵² CAMA 2020, section 186.

⁵³ CAMA 2020, section 222.

⁵⁴ CAMA 2020, section 222 (12).

⁵⁵ CAMA 2020, section 223 (12).

the existence of any provisions in a floating charge which prohibit or restrict the Company from granting any further charge which ranks in priority to, or *pari passu* with, the floating charge.

Any company having a single shareholder is also exempted from the mandatory requirement to hold an Annual General Meeting under the CAMA 2020.⁵⁶ Thus, with the exception of small companies and single-shareholder companies, all statutory and annual general meetings of a company be held in Nigeria.⁵⁷ This contrasts with the situation under the CAMA 1990 where all companies irrespective of size and type are required to hold Annual General Meeting.

The CAMA 2020 also makes provision for the validity of virtual or electronic meetings for private companies as long as the meeting is held in accordance with the provisions of the Companies' Articles.⁵⁸ This differs from the CAMA 1990 where all meetings for both private and public companies are to be physically held.⁵⁹ This is a positive change as it was not so provided for in the repealed Act. It also drastically cuts down cost and would be continuously relevant as the world is daily advancing technologically. Cost and distance would no longer serve as a barrier for holding meetings, with the benefit of full participation at such meetings from any location within and outside the shores of the country, at minimal costs. This is particularly relevant today given the disruptions caused by the Covid-19 pandemic to company operations around the world. It also appears to be in conformity with global standard in this regard.

The CAMA 2020 also provides rescue for insolvent companies by introducing a framework for rescuing a company in distress and to keep it a going concern as against allowing such entity to become insolvent. It also makes provisions regarding Company Voluntary Arrangements,⁶⁰ Administration,⁶¹ and Netting⁶² in this regard.

On the powers and duties of the Chairman of a general meeting, CAMA 2020 provides that the chairman of a public company shall not act as the CEO of same Company.⁶³ This provision encourages minority protection

⁵⁶ CAMA 2020, section 237 (1).

⁵⁷ CAMA 2020, section 240 (1).

⁵⁸ CAMA 2020, section 240 (2).

⁵⁹ See sections 211 to 216 of the repealed CAMA 1990.

⁶⁰ CAMA 2020, sections 434 to 442.

⁶¹ CAMA 2020, sections 443 to 549.

⁶² CAMA 2020, sections 718 to 721.

⁶³ CAMA 2020, section 265 (6).

as well as good corporate governance practice. The 2020 Act also restricts multiple directorships in public companies as opposed to the repealed CAMA 1990, where there was no such restriction. The CAMA 2020 prohibits a person from being a director in more than five public companies at the same time.⁶⁴ This is a great improvement on the repealed Act because of the likely reduction in cases of conflict of interest and issues with loyalty and commitment. It will also make such a director create time for the board's business where he is a director, thereby improving board effectiveness and promoting good corporate governance practices.

Under the CAMA 2020, private companies are no longer required or mandated to appoint a company secretary⁶⁵ as opposed to the repealed CAMA 1990, which makes it a mandatory requirement.⁶⁶ While this provision eases the management of a private company on the one hand, on the other hand, the perceived danger is that in the absence of a secretary, a company may not be able to effectively comply with some provisions of CAMA 2020 and the applicable code of corporate governance. The ease with which a company is run should not be sacrificed for good corporate governance.

Another novel provision in the CAMA 2020 is that every public company must publish its audited accounts on its website.⁶⁷ This is to improve openness, transparency and accountability which are the hallmarks of good corporate governance. This provision was conspicuously absent in CAMA 1990.

The CAMA 2020 also increases the amount of turnover for a small company from two million naira to not more than one hundred and twenty million naira and an asset value from an amount not exceeding one million naira to a value not exceeding sixty million naira.⁶⁸ It should be borne in mind that the concept of a small company was one of the novel provisions in the CAMA 2020 as there was no such provision or category of company in the repealed CAMA 1990.

The CAMA 2020 also introduces exemption from audit requirement for a small company as defined in Section 394 of the Act and any other company that has not carried on business since its incorporation, from

⁶⁴ CAMA 2020, section 307(1).

⁶⁵ CAMA 2020, section 330 (1).

⁶⁶ See section 293 (1) of the repealed CAMA 1990.

⁶⁷ CAMA 2020, section 374 (6).

⁶⁸ CAMA 2020, section 394. This section defines the qualification of a small company based on these criteria.

carrying out an audit in respect of a financial year.⁶⁹ Thus, Small companies or any company having a single shareholder are no longer compelled to appoint auditors at the annual general meeting for auditing purposes. While this appears to be a welcome development as it will avoid unnecessary burden on the companies in this category, the inherent danger is the possibility of financial fraud in the absence of audit, except some other measures are put in place to make up for this lacuna.

The new Act makes provisions for restriction on a company's distributable profits by restricting the company's profits available for payment of dividends only to, the Company's accumulated, realised profits⁷⁰ less the company's accumulated, realised losses (so far as not previously written off in a lawfully made reduction or re-organisation of capital).⁷¹ This implies that any part of a company's profits used for purpose of capitalisation shall not count when determining the amount of profits available for the payment of dividend in a particular financial year. Also, losses incurred by a company as a result of a legally valid share capital reduction or business re-organisation, shall not impair the amount of profits which are available for dividend payment in a financial year. The CAMA 2020 now includes a proviso,⁷² which contemplates that when a company is being wound up, only a fixed charge holder⁷³ will henceforth be able to enforce security, sequester, attach or levy execution on the company's assets. On application of bankruptcy rules in certain cases, the CAMA 2020 now introduces a proviso to the effect that nothing shall affect any secured creditor's power to realise or otherwise deal with his security during the winding up of an insolvent company that is registered in Nigeria.⁷⁴

The CAMA 2020 also makes provision for merger between two or more associations⁷⁵ with similar aims and objects under the terms and conditions which the Commission has prescribed.⁷⁶ This provision was not in the repealed CAMA 1990. Its import is that it will prevent unnecessary proliferation of Incorporated Trustees. However, we submit

⁶⁹ CAMA 2020, section 402.

⁷⁰ So far, such realized profits have not been previously utilised by distribution or capitalisation.

⁷¹ CAMA 2020, section 427.

⁷² CAMA 2020, section 577.

⁷³ Or any other validly created and perfected security interest other than a floating charge holder. See CAMA 2020 section 656.

⁷⁴ CAMA 2020, section 656.

⁷⁵ Incorporated Trustees.

⁷⁶ CAMA 2020, section 849.

that such terms and conditions by the Commission must be favourable to each of the merging entities so as to prevent crisis and avoid possible future demergers or unbundling.

The CAMA 2020 also establishes an Administrative Proceedings Committee under the appellate supervision of the Federal High Court.⁷⁷ The CAMA 2020 empowers the Commission, pursuant to its regulations, to require that regarding an application for the approval of CAC for the registration of a Company, Limited Liability Partnership, Limited Partnership, business name or incorporated trustee, that an applicant first seeks the approval of a specified Government Department or other body.⁷⁸ On the admissibility of electronically filed documents, the CAMA 2020 made the certified true copies of electronically filed documents to be admissible in evidence as well as having the same validity as the original documents.⁷⁹

The CAMA 2020 makes provision⁸⁰ for the qualification of a person to act as an insolvency practitioner. Such qualifications include any person with a degree in accountancy, law, or such other relevant course from any recognised tertiary institution, and with a minimum of five years post-qualification experience in insolvency matters. Other compulsory requirements include a certificate of membership issued by the Business Recovery and Insolvency Practitioners Association of Nigeria,⁸¹ or membership of any other professional body recognised by the CAC, permitted to act by or under the rules of that body; and granted authorization by the Commission.

2.6.7 Arrangement or Compromise between two or more Companies

The court is empowered by CAMA 2020 to order separate meetings of companies on the application in summary of any of the companies to be affected, where under a scheme proposed for a compromise, arrangement or reconstruction between two or more companies or the merger of any two or more companies, the whole or any part of the undertaking or the property of any company concerned in the scheme is to be transferred to another company.⁸² Members of the companies representing at least 75% in value of the share of members being present and voting either in person or by proxy at each of the separate meetings must agree to the

⁷⁷ CAMA 2020, section 851.

⁷⁸ CAMA 2020, section 853.

⁷⁹ CAMA 2020, section 860 (1) and (2).

⁸⁰ CAMA 2020, section 705 (1).

⁸¹ BRIPAN.

⁸² CAMA 2020, section 711.

scheme before the court can sanction same. The repeal by the FCCP Act of sections 118 - 128 of the ISA,⁸³ created a gap in the procedure for conducting same. This identified gap has now been filled by section 711 of CAMA 2020, which provides a legal framework for mergers.

2.6.8 Scheme or contract involving the transfer of shares in a company

Under the CAMA 2020, where a scheme or contract, not being a take-over bid under the Investment and Securities Act which involves the transfer of shares or any class of shares in a company to another company, has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of at least 90% in value of the shares of the Company (other than shares already held at the date of the offer by a nominee for the transferee company, or its subsidiary), the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire its shares.⁸⁴ This section, which was not provided for in the repealed CAMA 1990, now replicates the existing provisions of Section 129 of the ISA.

3.0 Scheme of Arrangement: Moratorium on Creditors Voluntary Winding Up.

The CAMA 2020 provides that no winding up petition or enforcement action by a creditor, whether secured or unsecured, shall be entertained against any company or its assets that has commenced a process of arrangement and compromise with its creditors for six months, from the time that the relevant company, through affidavit, provides all the requisite documents⁸⁵ for such arrangement or compromise, to the court.⁸⁶ Notwithstanding, a secured creditor may, through application to the court, filed within 30 days of notice of the arrangement and compromise, discharge the six months' moratorium period if certain conditions set out under the new Act⁸⁷ are met;⁸⁸ and provided that the

⁸³ These are the sections which hitherto provided a legal framework for conducting mergers.

⁸⁴ CAMA 2020, section 712.

⁸⁵ CAMA 2020, section 717 (1).

⁸⁶ CAMA 2020, section 717.

⁸⁷ See CAMA 2020, section 717 (2).

⁸⁸ (a) a document setting out the terms intended to be proposed to the creditors in an arrangement or compromise;

(b) a statement of the company's affairs containing the particulars of the company's creditors and its debts and other liabilities and of its assets;

Company, upon the approval or consent, shall file a further affidavit bringing to the notice of the court of the dissipation of the said asset.

3.1 The concept of Netting

The CAMA 2020 also introduces the concept of "Netting."⁸⁹ Specifically, CAMA 2020 states that the provisions of a netting agreement are enforceable in accordance with their terms, including against an insolvent party, and, where applicable, against a guarantor or other person providing security for a party and shall not be stayed, avoided or otherwise limited by: (a) the action of a liquidator, (b) any other provision of law relating to bankruptcy, re-organisation, composition with creditors, receivership or any other insolvency proceeding an insolvent party may be subject to; or (c) any other provision of law that may be applicable to an insolvent party, subject to the conditions contained in the applicable netting agreement.⁹⁰

3.2 Introduction of Limited Liability Partnerships

Another novel provision of the CAMA 2020 is the provision of Limited Liability Partnerships, which would essentially run as a company.⁹¹ The Company must be registered with two partners. It must also have a separate, different personality from its partners. Thus, its operations are very similar to a private company. The reasonable inference from this is that just like private companies, the maximum number of members of limited liability partnership is fifty. This is similar to what obtains under the Companies Act 2006 in the United Kingdom.

3.3 Introduction of Limited Partnerships

This is a novel provision in the 2020 Act.⁹² A limited partnership generally distinguishes General Partners from Limited Partners. The 2020 Act provides for their obligations and liabilities in the partnership configuration. A general partner bears the obligations and liabilities that arise from the partnership, whereas the limited partner contributes the capital for the partnership. This is also similar to what obtains under the 2006 Companies Act in the United Kingdom. The CAMA 2020 empowers CAC to, by order, suspend the trustees of an association and in their place, appoint an interim manager or managers to manage the

(c) such other information as the Court may require; and

(d) a statement that the company desires a protection from a winding up process pending the completion of the arrangement or compromise.

⁸⁹ See generally, CAMA 2020, sections 718 – 721.

⁹⁰ CAMA 2020, section 721.

⁹¹ See generally, CAMA 2020, sections 746-787.

⁹² See generally, CAMA 2020, sections 795-810.

affairs of an association.⁹³ The trustees of an association is also obligated to submit to the Commission, a bi-annual statement of affairs of the association, as the Commission shall specify in its regulations.⁹⁴

4.0 Hierarchical jurisdiction between the Federal Competition, the Consumer Protection Commission and the Corporate Affairs Commission.

The CAMA 2020 equally provides for the merger of associations. It states that two or more associations with similar aims and objects may merge under terms and conditions as the Commission may prescribe by its regulation.⁹⁵ It is important to note that the Federal Competition and Consumer Protection ("FCCP") Act of 2018 establishes a hierarchical jurisdiction between the FCCPC and any relevant government agency in a regulated industry, in which case, the FCCPC takes precedence over and above such relevant government agency when it comes to matters of mergers or business combination.⁹⁶ In addition, any regulation by the Commission on mergers will equally be subject to Guidelines jointly issued by the FCCPC and the Securities and Exchange Commission ("SEC") on the matter. Presently however, it is not clear if the merger of associations would be subject to the jurisdiction of the FCCPC. Indeed, the definitions attaching to terms such as "*associations*", "*undertakings*" or "*business enterprises*" will be a major determinant in settling the jurisdiction of the FCCPC in this regard.

The CAMA 2020 equally makes provision for electronic filing, electronic share transfer, and e-meetings for private companies. It provides that certified true copies of electronically filed documents are admissible in evidence, with equal validity with the original documents.⁹⁷ This differs from the provisions of the CAMA 1990 where only physical documents are provided for. The global trend of e-commerce must have been considered by the legislature in enacting this section of the Act. The CAMA 2020 also provides that instruments of transfer of shares shall include electronic instruments of transfer.⁹⁸ This is an improvement on the CAMA 1990 that only provided for paper filing.

⁹³ CAMA 2020, section 839 (1).

⁹⁴ CAMA 2020, section 845 (1).

⁹⁵ CAMA 2020, section 849. The Regulation refers to here is the Companies Regulations 2021 issued and published by the Corporate Affairs Commission (CAC).

⁹⁶ Section 105 of the Federal Competition and Consumer Protection ("FCCP") Act of 2018.

⁹⁷ CAMA 2020, section 861.

⁹⁸ CAMA 2020, section 176(1).

5.0 Conclusion

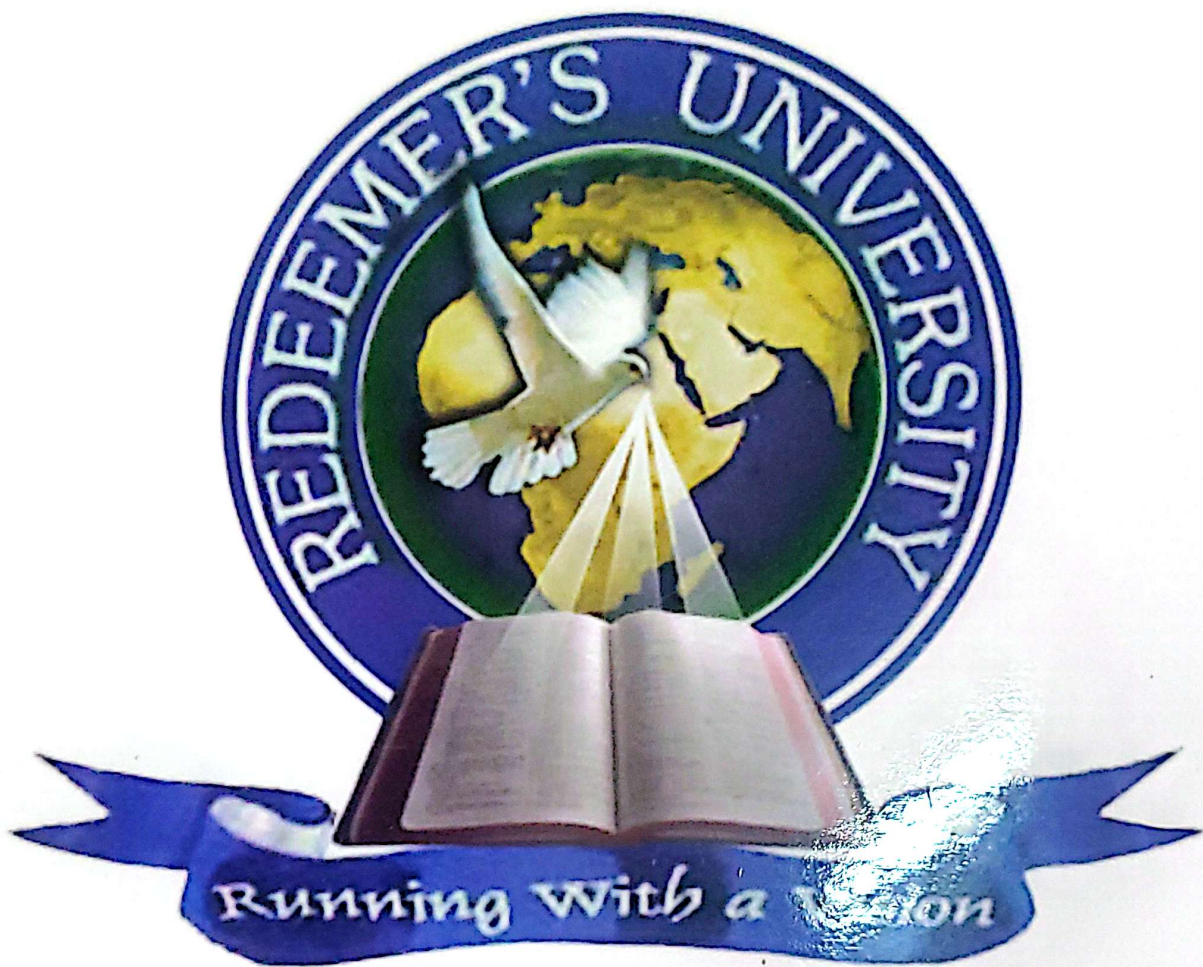
Considering the substantial changes which CAMA 2020 has made to Nigeria's corporate law regime, especially the fact that it changes the usual manner many companies and businesses operate on a day-to-day basis, it is apt to examine the key changes and innovations brought by the Act. The CAMA 2020 is undeniably a progressive development in the Nigerian business and economic landscape and a significant boost to the Ease-of-Doing-Business (EoDB) in Nigeria. The CAMA 2020 provides a robust framework for reforming identified onerous legal, regulatory, and administrative bottlenecks which, for three decades, have made the transactions of businesses in Nigeria substantially difficult.⁹⁹ The introduction of limited partnership and limited liability partnership as special purpose vehicles of conducting businesses are welcome development, as it raises the bar and bring Nigeria to the same level with the situation in most developed countries like the United Kingdom. The CAMA 2020 is a remarkable improvement on the repealed CAMA1990. It is also a step forward in fulfilling the desired anti-corruption reform in Nigeria. It is also noticeable in most parts of the provisions of the new Act that as much as possible, the insertion of a particular amount as a fine or penalty is avoided. This is another wonderful innovation in that it is a way of making the Act relevant for a long time because of the volatility of the Naira Value. In the repealed CAMA, The Naira value stated as fines or penalties makes a mockery of the intention of the lawmakers. For instance, a fine of N100 in today's Nigeria makes no meaning. What the new Act did by making reference to the Corporate Affairs Commission's Companies' Regulations 2021 is a welcome development. In most cases, penalty clauses usually read '...are liable to fine or penalty as stipulated in the Companies Regulation of the Commission. It is easier for the Commission to revise or amend its regulations than for the CAMA 2020 to be subjected to frequent reviews on the ground of instability in Naira's value. We hope that Nigerian business operations will tremendously improve with the innovations brought by the new Act. The CAMA 2020 has been described as a law that will assist in the fight against corruption by a Civil Society Centre.¹⁰⁰

⁹⁹ This is more pronounced in Micro, Small, and Medium Enterprises (MSMEs).

¹⁰⁰ The Civil Society Legislative Advocacy Centre (CISLAC). The Centre said the law enforcement and anti-corruption agencies had often failed to identify the real owners profiting from strategic Nigerian-registered business entities active in the oil and gas sector, defence, construction, and others. Still, with the new law, things would change.

6.0 Recommendations and Conclusion

There is no doubt that the provisions of the CAMA 2020 have significant improvement over the repealed CAMA 1990. However, many of the provisions geared towards making business transactions can be counterproductive, such as having a one-member company or one-director company. Some other provisions may act as hindrances towards the realization of good corporate governance which is the goal of every company worldwide. For instance, small and private companies are excused from the requirement to have a company secretary. This may hinder the compliance level of such companies because of the important roles played by company secretaries as the chief compliance officers in some cases. Such provisions should be expunged and the *status quo* in the repealed CAMA 1990 in these areas should be sustained. Some controversial sections of the CAMA 2020 should also be reconsidered. For instance, section 839 on suspension of trustees and appointment of interim managers has been heavily criticized as having the tendency to infiltrate religious bodies and make them susceptible to control by those outside the particular faith. This is capable of igniting religious violence in a secular and heterogeneous country like Nigeria. This and similar provisions that are unpopular and are not majorly business-oriented should be abrogated from the new CAMA 2020. Overall, however, CAMA 2020 is a good law and it will be a better one if these controversial sections can be amended or repealed as the case may be.



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