

THE COMPANIES AND ALLIED MATTERS ACT 2020 – REFORMS FROM A FINANCE PERSPECTIVE.

September 21, 2020.

On the 7th of August 2020, the Nigerian President, Muhammadu Buhari, gave assent to the Companies and Allied Matters Act, 2020 (the “New Act” or “CAMA 2020”), which enacts the CAMA 2020 and repeals the Companies and Allied Matters Act 1990 (the “1990 CAMA”). Although the provisions of the New Act are yet to be fully implemented in practice by relevant agencies such as the Corporate Affairs Commission (“CAC” or the “Commission”), we believe that the New Act will become fully implemented once it is published in the Federal Gazette.¹

The New Act will have significant impact on finance transactions in Nigeria. This article, therefore, provides a synopsis of some of the changes and novel provisions introduced in the New Act which will impact on finance transactions in Nigeria going forward. This information will be particularly useful for foreign investors and financial institutions looking to provide or obtain loan for the financing of projects and business operations in Nigeria.

¹ This is in tandem with Section 3 (2) of the Acts Authentication Act 1962.

² CAMA 2020 defines “security financial collateral arrangement” to mean “an agreement or arrangement, evidenced in writing, where: (a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker; (b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations; (c) the financial collateral is delivered, transferred,

THE CAMA 2020 – THE CHANGES FROM A FINANCE PERSPECTIVE

The salient provisions of the New Act which we consider pertinent to the Nigerian finance sector are as follows:

Exclusion of security financial collateral arrangements from registration at the CAC

Unlike the 1990 CAMA, the New Act excludes security financial collateral arrangements (the “SFCA”), or any charge created over the same, from documents that are registerable at the CAC. This is a significant improvement on the provisions of the old law which was silent on the issue. Whilst the New Act defined SFCA², it did not define what is meant by “financial collateral” to which the SFCA relates.

Nevertheless, it appears settled that financial collaterals include cash in deposits, securities/shares et al. Furthermore, guidance may be taken from similar arrangements contained in the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) (“EU Regulation”). The EU Regulation defines financial collateral to include “cash” (money in any currency, credited

held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute equivalent financial collateral or withdraw excess financial collateral shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; and (d) the collateral-provider and the collateral-taker are both non-natural persons.”

to an account) and financial instruments (shares, bonds and other securities).

Accordingly, per the terms of the CAMA 2020, it follows that it is now clear that security documents such as account charges, charges over financial instruments etc., will not need to be registered at the CAC for efficacy.

Furthermore, the New Act introduces a definition for book debts and clearly excludes a charge over negotiable instruments and marketable securities such as treasury bills from the ambit of the definition. This makes it clear that charges over securities will also not be deemed as book debts for the purposes of registration at the CAC.

We hope that the CAC will issue guidelines to clearly direct the market on these issues in the coming months.

Reduction of filing fees for registration of Charges

One of the most significant changes in CAMA 2020 is the reduction of the fees payable for creating charges over a company's assets. As provided under the New Act, the total fees payable to the Commission in connection with filing, registration or release of a charge shall not exceed the sum of 0.35% of the value of the charge or such other amounts as may be specified by the Minister in the Federal Government Gazette. This is a significant improvement on the 1990 CAMA regime where a percentage (1% or 2% for private and public companies respectively) of the secured sum is paid.

This will provide additional comfort to both lenders and borrowers alike and will act as incentive to perfect security interests for full value in the Nigerian market.

Amendments to the use of common seal and acceptance of e-signatures for authenticating documents

Another novel introduction in the New Act is that finance documents (including deeds) do not need to bear the common seal of a company to be binding (unless required by a company's articles). CAMA 2020 further sets out an acceptable procedure for executing deeds which also includes a new process which is that **a sole director may now sign deeds in the presence of at least one witness who shall witness the signature.** This adds to the current procedure where two directors or a director and secretary are required to sign such documents.

Furthermore, companies can now validly authenticate documents through e-signatures of a director, secretary or other authorised officer of the company.

E-Filings

Under the New Act, the CAC will now accept electronically filed documents. In addition, certified true copies of electronically filed documents will be admissible in evidence in Courts as same will have equal validity as the original documents filed with the Commission. This is a significant improvement and will mean that electronic documents, which were erstwhile acceptable under the Evidence Act, have now been reaffirmed as acceptable, by the New Act.

We believe this introduction will aid cross border deals as electronic documents will now suffice for perfection purposes in Nigeria and parties will not need to send in physical documents containing wet-ink signatures.

Provision of financial assistance to shareholders

The erstwhile provision of the 1990 CAMA restricts (in extensive terms) a company and its subsidiaries from providing any form of financial assistance in connection with the purchase of its shares. In summary, the New CAMA introduces, three significant provisions to the old law as follows:

- Firstly, the term financial assistance has been extended for additional clarity by the provision of a definition as to what is meant by “net assets” and when a company’s net assets may be said to have been materially reduced in the context of financial assistance. The New Act sets a 50% threshold to guide on when reduction in net assets will be regarded as material. Furthermore, the new law defines net assets as the “aggregate of the company's assets less the aggregate of its liabilities”; and these liabilities include any charges or provision for liabilities in accordance with the applicable accounting standards applied by the company in relation to its accounts;
- Secondly, activities flowing from court orders such as pursuant to a scheme of merger will not be regarded as constituting financial assistance; and
- Thirdly, private companies will no longer be restricted from providing financial assistance if (i) said assistance will not

reduce the company’s net assets, or if reduced, said assistance will not be provided from distributable profits; (ii) the financial assistance is approved by shareholders of the company by special resolution in a general meeting and (iii) the directors of the company file a statutory declaration in a form to be prescribed by the CAC.

We consider that these new provisions will further assist in consummating acquisition finance transactions in the Nigerian market as lenders will normally like to reach the assets/cash flows of the target for repayments.

Fixed vs Floating Charge: Notice and Priority

There have also been some changes to the provisions on priority of fixed and floating charges.

- Under 1990 CAMA, a fixed charge has priority over a floating charge on the same property, unless the terms on which the floating charge was granted prohibited the company from granting another charge having a higher priority and the person in whose favour the fixed charge was to be granted had notice of this prohibition. In furtherance of this provision, CAMA 2020 now provides that a person is deemed to have notice (constructive notice) of a prohibition in a floating charge where such notice indicating its existence is registered with the Commission.

The effect of the amendments is that notice of the floating charge on a company’s record at the Commission will be deemed notice of

prohibition from creating a fixed charge over the same property. We will expect the Commission to provide practice directions in this regard in the coming months

- In addition, the New Act preserves the priority of a fixed charge over other debts, including preferential debts, which hitherto ranked ahead of a fixed charge during liquidation.

This would mean that lenders may now need to prioritise holding a fixed charge security over borrower's tangible assets to ensure their security interest is effectively preserved during liquidation.

Secured Creditors and Insolvent Companies

Under the 1990 CAMA, bankruptcy rules apply in certain cases during the course of winding up of insolvent companies. However, the New Act introduces a proviso which clearly preserves the power of any secured creditor to realise or otherwise deal with his security during the winding up of an insolvent company registered in Nigeria.

The implication of this is that New Act has now clearly stated, as a general principle, that secured lenders will be able to realise their security interest over duly perfected security during insolvency.

³ In this regard, CAMA 2020 indicates that a company enters into a transaction with a person at an undervalue if the company makes a gift to that person or enters into a transaction with that person on terms that provide for the company to receive no consideration, or enters into a

Fraudulent Preference

The New Act has made some changes impacting on the rule against fraudulent preference under Nigerian law. The provisions of the new law have amplified on the provisions of the old law, by among other provisions, clearly stating that fraudulent preference will not apply **in the absence of an intention to grant that person (e.g a lender) an undue advantage over others.**

Whilst this is a welcome development, lenders will still need to take necessary precautions – particularly as it relates to conducting thorough due diligence before advancing loan facilities and taking security over assets of companies. To ensure an up-stamp is not caught by the fraudulent preference provisions, lenders should consider creating an up-stamping regime that is timely, reviewed yearly and adequately secures their risk exposure at each given period of review.

Liquidation and Administrators application to avoid transactions at an undervalue

Following the desire to bring Nigeria's company law in alliance with international best practice, the CAMA 2020 has introduced provisions relating to transactions at an undervalue³.

These provisions allow an administrator or liquidator to apply to the court for an order to avoid any transaction made at an undervalue if it, among other things, occurs within two years before administration or liquidation.

transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

Accordingly, to ensure transactions are not voidable as an undervalue, finance parties will need to take caution that loan facilities are negotiated on arm's length basis.

Introduction of Netting Agreements Provisions

Another important introduction made in the New Act is the recognition of netting agreements. This is particularly useful for specialised financial contracts such as derivatives, repos, swaps among others as there was always a concern as to how netting arrangements will be treated during insolvency. The new law states, inter-alia, that the provisions of a netting agreement are enforceable in accordance with their terms, including against insolvent parties and shall not be stayed, avoided or otherwise limited by the action of a liquidator or any other applicable laws affecting insolvent parties.

Accordingly, it is now clear that netting arrangements will survive during a party's insolvency under Nigerian law.

Introduction of Administration provisions

A significant introduction useful for finance parties in the CAMA 2020 is the option to appoint administrators rather than liquidators or receivers. Under the new law, an administrator may be appointed by the Court, the holder of a floating charge, or by the company or by the directors of the company – to manage the business affairs of the company with the intention to, inter alia, rescue the company or its undertaken from being wound up and to the benefit of the creditors.

The introduction of an administration procedure under the new law is beneficial to creditors that intend to facilitate the repayment of debts without the company going into liquidation.

Conclusion

Overall, we note that the changes introduced in the New Act is a step towards the right direction in ensuring Nigeria's company law is in kilter with international best practices. Particularly we welcome the development on e-signatures and e-filings. The New Act also reduces the exorbitant fees which parties have to pay to perfect charges and provides lenders with more efficient options at realising advanced loan facilities where borrowers become insolvent. Once fully implemented, we believe that this will further improve the ease of doing business in Nigeria as well as perhaps, improve the terms in which borrowers may access funding in Nigeria.

This article should not be taken as purporting to provide legal advice on any matter. Kindly send an email to enquiries@odujinrinadefulu.com if you need further legal advice in respect of the issues highlighted.

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