AN ANALYSIS OF THE BILL PASSED BY THE SENATE TO REPEAL AND AMEND THE COMPANIES AND ALLIED MATTERS ACT 1990

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INTRODUCTION

It is common knowledge that there is a strong link between a country's 'ease of doing business ranking' and its economic prosperity. According to the 2018 World Bank Doing Business (WDBD) Ranking Index, Nigeria ranks 145 out of 190 economies. While this is an improvement as against the previous position of 169 in 2016 and 2017, it is still not the best the country can get.

This index is a resource which serves as reference for private sectors and others interested in investing in a country. One of the things measured by the Index is the ease or difficulty of doing business in a country. It may therefore be said that the content and operation of a country's business legal framework is instrumental to its ranking on the Index. Companies and Allied Matters Act (CAMA) 1990 is critical to this ranking because it is about the most critical piece of legislation that affects the business climate in Nigeria. It sets out the legal basis by which companies are formed, operated and managed.

Where the provisions of CAMA are effective and at par with international standards, a business friendly economy is built, small and medium-scaled enterprises thrive and investors are encouraged to invest in the country. Conversely, where the framework is out-dated, growth is inhibited and investor confidence is undermined.

The Nigerian Aspiration in ten(10) years is to be amongst the top fifty(50) economies on the Ease of Doing Business Rankings. This can only be achieved by reducing and gradually removing critical bottlenecks and bureaucratic constraints to doing business in Nigeria. One of this is by making the laws guiding doing business in Nigeria less burdensome for small and medium scale enterprises.

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On the 15th May, 2018, the 8th Senate passed the repeal and re-enactment of the Companies and Allied Matters Act (CAMA) and it has largely been considered by many as one of the biggest business reform bills passed in Nigeria in the past 28 years.

This paper would point out some of the major changes the Bill puts forth in comparison with the 1990 Act as well as examine the impact of these changes on the Business Climate in Nigeria.

1. GOVERNING BOARD OF THE COMMISSION(Clause 2-8)

The Bill provides for a Governing Board of the Commission which shall govern the activities of the commission. The bill also provides for the functions of this Board. This is as opposed to the provision of the 1990 Act (hereinafter referred to as 'the Act') which simply provides for the membership of the commission. While it may seem that constitution of 'membership of commission' under the Act and 'governing Board of the commission' under the Bill is essentially the same, there are a few notable changes.

i. The representative of the accountancy profession would now be appointed by the Minister after consultation with the Institute of Chartered Accountants of Nigeria and the Association of National Accountants of Nigeria. This is as opposed to the provision of the Act where this was done on the recommendation of only the Institute of Chartered Accountants of Nigeria.
ii. There also, is a new inclusion among the representatives. The governing Board will now include one representative of the Institute of Chartered Secretaries and Administrators of Nigeria, appointed by the Minister on the recommendation of the Institute.
iii. There will also be a representative of the Nigeria Association of small and medium Enterprises, which would be appointed by the Minister on the recommendation of the Association.
iv. The bill also now states that the representatives of stated Federal Ministries should not be below the rank of director. The Federal Ministries whose representatives shall be in the governing Board now include the Ministry of Industry, Trade and

Investment and the Ministry of Justice. The ministry of commerce which was in Act is no longer included in the Bill.

v. The Bill now goes beyond the previous provision regarding tenure of office for members of the commission (now governing Board) to state conditions in which it can be said that there exists a vacancy on the board. These conditions include where a member dies, completes his tenure of office, is removed in accordance with stated provisions, resigns from office in accordance with stated provision or ceases to hold office in accordance with stated provisions. The bill also goes ahead to state what should be done in case of a vacancy.

vi. The bill also states the functions of the commission as well as the functions of the board of the commission. One of the major functions of the Governing Board is to constantly review the function of commission to meet with the International World. One of the major functions of the commission is to ensure compliance of concerned entities with the Act.

2. PRE-ACTION NOTICE(CLAUSE 17)

A very notable provision in the Bill is the provision stating that no suit shall be commenced against the commission before the expiration of 30 days after a written notice of intention to commence the suit shall have been served upon the commission by the intending plaintiff or his agent. The provision further states what the content of the notice shall be. The implication of this is that when the Bill is passed into law, a suit commenced, after the coming into effect of the law, against the commission without the three months pre-action notice will be incompetent as this would rob the court of Jurisdiction. This raises several questions. First, of what use is pre-action notice? What is the rationale behind the stated period? What happens where the claimant seeks urgent relief from the court and the essence of the suit would have been destroyed if he had to wait for three months?

These are questions that should be asked and answered before the true essence of this provision can be understood. While it may seem that the provision for pre-action notice is to discourage malicious suits against the commission and to provide ample time for the commission to prepare for any suit to be brought against it, its importance seems to be one-sided as the other party’s interest is not well considered.

3. FORMATION OF COMPANY

i. RIGHT TO FORM A COMPANY(CLAUSE 18)

Another notable change the Bill puts forth is that one person can now form and incorporate a private company by complying with stated provisions in respect of the registration of such companies. This is as opposed to the previous provision that any type of company can only be formed and incorporated by two or more persons.

ii. COMPANY LIMITED BY GUARANTEE(CLAUSE 26)

In the Bill, there exists a new provision regarding registration for companies limited by Guarantee. Upon satisfaction by the commission that an application for registration has met with the requirement for the formation of such a company, the application shall be advertised in a prescribed form in three national daily newspapers. This is to invite objections, if there are any, to the incorporation of the company. Such objections would then be treated accordingly

Also, the limit of the liability of members of the company in case the company is wound up is now N100,000 as opposed to the previous requirement of N10,000. Therefore, there is a proposed upward review.

4. MINIMUM ISSUED SHARE CAPITAL(CLAUSE 126)

One of the major components of the Memorandum of Association both under the Act and the Amendment and Re-enactment Bill is the share capital. While under the Act, the language used was ‘authorised share capital’, the bill uses the language ‘minimum issued share capital’. Thus, under the Act, a part of the authorised shares could be issued and another part unissued. In actual fact, Section 99(1) of the CAMA 1990 provides that at the time of registration, not less than 25 per cent of the capital shall be taken by the subscribers of the memorandum.

However, by the language of the Bill, what is provided for is the minimum issued share capital meaning the totality of the share capital must be issued. Where a company seeks to increase its share capital, it can easily be done by passing a resolution stating so and paying the appropriate stamp dues and other relevant dues. Asides this difference, there is an upward review of the amount stated under the Act.

While the Act provided for N10,000 for private companies and N500,000 for public companies, the Bill now provides for N100,000 for private companies and N2,000,000 for public companies.

5. FINES AND FORM FORMATS (CLAUSE 28, 120 etc.)

One of the major shortcomings of the CAMA 2004 is the range of fines prescribed by the Act which seem to be almost immaterial in recent times and with the current value and purchasing power of the Nigeria Currency. This is one of the things the Bill will correct if passed into Law. As evident in the Bill, most fines are now as stated by the Commission. In other words, the commission now has the discretion to determine these fines. An advantage of this is that the commission can be dynamic in amounts to be paid as fines as times change and according to the value of the Nigeria Currency. One danger of this is the arbitrary use of the discretion given to the commission to determine the fines to be paid.

Again, form formats e.g. form of memorandum of association are no longer restricted to the format stated in the Schedule of the Bill, the commission also now has power to prescribe regulations to guide the format of these forms. By the operation of this provision, dynamism is encouraged and the Commission can take necessary steps as it deems fit.

6. NAME OF COMPANY(CLAUSE 29-31)

One of the notable changes regarding this subject under the Bill is that where a company follows the prescribed procedure regarding change of name, such change shall be published by the commission in a national daily newspaper and on its website. This is as opposed to the provision under the Act which requires a publication by the commission in the Gazette. This is again evidence that the Bill seeks to embrace more the use of technology in the light of modern realities.

Also, reservation of names can now be done online once the commission receives an application to the effect. This is unlike the Act which provides that such reservation can only be done by a written application. Again, the commission now has the power to cancel an application for reservation of name if it discovers that such reserved name is identical with

the name of an existing company or so nearly resembles it as to be likely to deceive. Where also a company changes its name, the commission can approve such name (the name no longer in use) for use and reservation by another interested company after a period of 60 days from the date of approval of the change of name. In other words, once a company ceases to use a name, it can now be used by another company 60 days after such change takes effect.

7. EXPLICIT REQUIREMENTS

This is another commendable provision the Bill puts forth. The Bill contains very explicit provisions regarding documents needed for registration. Thus prospective companies will not be in doubt or confusion as to what is required of them to become registered. Also, the Bill contains explicit provisions regarding requirement to be fulfilled b companies who want to change their statuses (e.g. from being Public to being a private company).

8. UNNECESSARY REQUIREMENTS FOR SMALL COMPANIES(Clause 238, 241, e.t.c.)

The Bill has ‘abolished’ some requirements and it can be said that the rationale behind the abolition of such requirements is to encourage small and medium scale business and make operations easy for them. Of a truth, virtually all the abolished requirements are unnecessary for small companies, therefore making such abolition justifiable.

One of these is the requirement of having a Company secretary. Under the Act, a company, public or private must have a company secretary. However, the Bill puts forth that a company secretary is no longer mandatory for the operation of a company.

Also, a company seal is no longer necessary. Thus, a company can choose whether or not to have a company seal. Apart from this being an encouragement for small companies, it is in tandem with International standards as many developed countries of the world have since moved on from the use of company seals. However, where a company decides to have a

company seal, the design and use of such seal shall be regulated in the articles of the company and it shall have the company's name engraved in legible characters on the seal.

The provision goes ahead to state how deeds and documents can be validly executed by the company and also provides that where a document requires that a document be executed under the common seal of a company, it is deemed that such requirement is satisfied once it is signed or executed in accordance with the requirements for execution.

Again, the requirement of at least one annual general meeting for all companies under the Act is no longer the same under the Bill, the Bill now excludes, from this compulsory requirement, small companies and/or companies having a single shareholder.

It is also no longer compulsory for private companies to hold 'physical meetings' as by the provision of the Bill, such companies may now hold meetings electronically.

9. USE OF TECHNOLOGY

It is also worthy of note that this Bill well embraces the use of technology evidenced by the following

- Reservation of names can be done electronically
- Documents can be signed electronically
- Company registration can be done electronically
- Electronic meetings for private companies
- Companies are now encouraged to keep electronic copies of their financial accounts in addition to keeping original hard copies. This however seems like formalizing what is already existent in many companies.

This is commendable as it will ensure that interested persons can register their businesses from anywhere in the world, storage of document is better done and ease of access to such documents when needed is guaranteed. This is also a long-overdue change given the realities of the modern world.

While this is a welcome development, several measures would have to be put in place by the commission to ensure the effectiveness of these provisions especially as regards registration

and reservation of name to ensure that sensitive data are not tampered with by miscreants and that portals for registration and reservation of names are available at all times.

10. RESOLVING INSOLVENCY (Clauses 432-443, 444-550, 719-722 of the Bill)

This bill introduces a company rescue and insolvency legal regime which has the major aim of rescuing companies from insolvency through inclusion of an insolvency framework.

The new insolvency provisions include

- **Administration**

  This serves as a sort of rescue mission or mechanism for insolvent entities and allows such entities to carry on business. An advantage of this is that the appointed administrator is appointed to act in the interest of the company and not as in the case of receivership where he acts in the interest of the person that appointed him. Such companies can keep running under the supervision of an administrator for the period of 12 months. The bill provides for guidelines regarding the appointment of an administrator as well as conditions to be fulfilled before an administrator can be appointed by the court. An administrator can also be appointed by the company or directors of a company in line with the provisions of the Bill.

- **Netting Provisions**

  Introducing netting provisions as a means of mitigating credit risks associated with over-the-counter derivatives, promotes financial stability and investor confidence in the Nigeria financial sector.

- **Company Voluntary Arrangement**

  This is a procedure that allows directors of a company to make proposals to creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. The proposal allows one person to act in relation to the voluntary arrangement either as a trustee or otherwise for the purpose of supervising the implementation of the proposal.

The Nominee must be someone who is qualified to act as an insolvency practitioner in relation to the company. It basically helps in quicker and less burdensome settlement of debts. The Bill contains very detailed provision regarding how the proposal will work and the procedure to be followed in drawing up the arrangement.

Also, the power of a public company to allot its shares is made subject to the provisions of the Investment and Securities Act (ISA)

11. SHARES AND ALLIED MATTERS (CHAPTER 8)

Under the Act, shares can be issued at a discount as well as at a premium i.e. half the share's value and double the share's value respectively. However, the Bill, if passed into law will no longer allow shares to be issued at a discount while they may still be issued at a premium. The rationale behind this could be that the nominal value of the shares of most companies is so low that the provision for issuance of shares at a discount is almost redundant (N1 for private company and 50kobo for public companies)

Also, by the provision of the Bill, only private companies would be able to provide financial assistance for the acquisition of its shares subject to conditions stated in the Bill. Under the Act, all companies, without exceptions, are prohibited from providing financial assistance for the acquisition of its own shares. The conditions precedent to the operation of this provision in the Bill are strict enough and thus, the provision is not likely to be abused.

Also, the Bill allows a company to buy back its own shares for any purpose subject to the conditions stated in the Bill. Under the Act, a company could only do such for stated limited purposes. The court is further given powers under this clause as it is stated that the ability of the company to proceed with the share buyback shall depend on the order of the court where applicable. The Bill also states persons from which a company can buy back its shares. All of the above shows that the conditions needed to claim this section are strict enough which would protect the provision from abuse.

12. DIRECTORSHIP AND ALLIED MATTERS(Clause 277, 306)

Under this Bill, some fundamental changes have been introduced regarding Directorship.

Under the Act, Directors were only required to disclose their ages where they are 70 years and above as stated in Section 252 of 1990 CAMA. However, the Bill now provided that in addition to this declaration, any prospective director of a public company shall disclose any position he holds as a director in any other public company at the meeting in which he is proposed for appointment as a director. The clause also states penalty for failure to disclose such. In my opinion, this is in a bid to further strengthen the Directors' duty to avoid conflict of interest.

Also, the Bill provides that while a person is allowed to hold more than one directorship, no one is allowed to be a director in more than five public companies. For those who already are, the Bill provides that at the next Annual general meeting of the companies after the expiration of two years from the commencement of the Act; resign from being a director from all but five of the companies. This is a rather new development and it could be said that the rationale behind this is that given the enormous duties of and expectations from directors(especially of public companies), for efficiency, a person should have a limit on how many companies he can be a director in.

Again, it is worthy of note that the particulars of directors to be registered is more explicit under the Bill than it is under the Act. Thus, there is little or no unclear provision regarding this.

13. SMALL COMPANIES(Clause 392)

The Bill seemed to use the phrase 'small companies' more than the Act. This is a pointer to the fact that there is a focus on small businesses and that the legal framework seeks to make it easier for these businesses to easily carry out operations in Nigeria. Thus, the Bill contains a clearer description of what a small company is, that is, the features that qualify a company as a small company. One concern about this however is that the qualifications can only be met by a company already in existence such as turnover, net assets value, e.t.c. which are only ascertainable after a company has been in existence for at least one year. This leaves one with the question of how a new company can qualify as a small company so as to claim some of the provisions that apply to small companies such as provisions regarding company secretary, annual general meetings, ownership, directorship e.t.c.

14. ANNUAL RETURNS (Clause 409-423)

The Bill like that Act also has very detailed provisions regarding annual returns. However, one fundamental difference is the penalty for non-compliance with the provisions. Under the Act, in is Section 378, it is provided that the penalty for non-compliance is ₦1000 fine each to be paid by the company and every director or officer of the company who is in default and ₦100 in the case of a private company.

Under the Bill, the penalty for non-compliance is now to be prescribed by the commission. Also, where the company fails to file annual returns for a consecutive period of 10(ten) years, this shall be a ground for striking the name of the company off the companies register.

15. WINDING UP(CHAPTER 20)

Asides that generally, the provisions of the Bill regarding winding up procedures are much more explicit, clear and detailed, there also are a few notable changes under provisions relating to winding up of companies. Some of them would be mentioned briefly here:

- Cases in which a company can be wound up by a court now include a circumstance where the condition precedent to the operation of the company has ceased to exist.
- Given that one of the conditions under which a company can be wound up includes where a company is deemed to be unable to pay its debt, it is important to ascertain when a company is deemed to be unable to pay its debt. Under the Act, it means that such a company is indebted in a sum exceeding ₦2000. However, the Bill now provides that a company is deemed unable to pay its debt when it is indebted in a sum exceeding ₦200,000. This, in my opinion, is more sensible given the current value of the Nigeria Naira.
- List of preferential payments which should be given priority over other debts in case of winding up has been revised under the Bill to include these
    i. Deductions made from the remuneration of employees and contributions of the company under the Pension Reform Act, 2014
    ii. Contributions and obligations of the company under the Employees' Compensation Act.
- The bill also now clearly states conditions under which the Commission can strike off the name of a company from the register of companies. Under the Act, such action by

the commission would be preceded by a letter of inquiry by the commission to the company in question after which the Act then states what the commission can do in the event of receipt of response or failure to respond by the company in question. However, the Bill allows the commission to go ahead in striking off a company's name provided the conditions in the Bill have been met. Also, there is the opportunity for an aggrieved person(s) to seek redress in court.

16. LIMITED LIABILITY PARTNERSHIP(LLP) AND LIMITED PARTNERSHIP (LP)(CLAUSE 738-786)

This is one of the most laudable additions the bill puts forth. This is the creation of a new corporate identity for interested groups of people. By virtue of a limited liability partnership, an entity can have the form of a partnership with the separate legal entity by virtue of incorporation.

LLP and LP generally combine the benefit of a corporate structure such as limited liability companies with those of partnership structure such as limited liability companies with those of a partnership structure ad it may best be described as a hybrid between an incorporated company and a partnership.

By virtue of the corporation cover, just like it is with a company, the LLP has perpetual succession and has a separate legal identity from its partners. It can own and acquire property in its own name and the relationship between partners is guided by the LLP agreement. For a limited partnership to exist there must be a minimum of two partners and there must also be designated partners whose duties and powers are provided for in the bill. The bill also states rules guiding their selection and change where needed. Generally, the LLP is liable for acts of its partners except where the partner who acted had no authority to do so and the third party knew about this absence of authority or does not believe the partner who acted to be a partner. Also, by virtue of the bill, the partners are not liable except for personal wrongful acts or omission.

The bill is also very clear on contribution of partners, annual returns, assignment of partnership rights, investigation of the LLP, winding up and foreign LLPs.

For LPs, partnership cannot exceed twenty. There also must be one or more partners called general partners. They are liable for all debts and obligations of the firm. At the time if entering the partnership, limited partners contribute or agree to contribute a sum as capital or property and shall not be liable to the partnership beyond their contribution.

It must be mentioned here that this is not new in Lagos state as the state in 2009 amended the Partnership Laws of Lagos State 2003 to provide for Limited Liability Partnerships. This was in response to the need for a more dynamic form of partnership to take care of the increase in Litigation resulting in personal liability by partners and the consequent threat to partnership firms and their partners. Thus, this form of partnership was set up to provide a limitation of liability analogous to that enjoyed by directors of a limited liability company.

17. ADMINISTRATIVE PROCEEDINGS COMMITTEE(CLAUSE 843)

This is another addition the bill puts forth. This committee has the power to hear persons alleged of contravening the provisions of the Act. It can also resolve disputes arising from the operation of the Act as well as impose administrative penalties for contravention of the Act.

CONCLUSION

It is no doubt that an attempt at repealing and re-enacting the CAMA is a step in the right directions and of a truth, on the face of it, the additions, subtractions and modifications put forth by the CAMA Bill means good for the business climate in Nigeria, however, it is common knowledge that a piece of legislation is only as good as enforcement makes it. Thus, even if the Bill is eventually signed into law, proper and timely enforcement of the provisions of the Bill where appropriate is the key to maximum enjoyment of its benefit.

In view of this, if and when the bill is signed into law, corporate bodies should be ready to partner with the government and the commission by ensuring that they comply with the provisions of the Bill and the government should also be ready to enforce the provisions of same to strengthen ease of doing business in Nigeria.