CORPORATE LAW PRACTICE

By:

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NIGERIAN LAW SCHOOL 2018/2019

(ENUGU CAMPUS)

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(Week 3)

OVERVIEW OF THE LEGAL FRAMEWORK & REGULATORY BODIES ON CORPORATE LAW PRACTICE IN NIGERIA

PRINCIPAL LAWS AND REGULATORY BODIES ON CORPORATE LAW PRACTICE

Exams: applicable law, statutory body, contribution of the body to corporate practice in Nigeria, if any accreditation needed. The first seven legislations are the principal legislations that have general applicability.

S/N	Applicable Law	Regulatory Body	Administrative Head
1	Companies and Allied Matters Act 2004	Corporate Affairs Commission	Registrar-General
2	Investments and Securities Act 2007	Securities and Exchange Commission	Chairman
3	Nigerian Investment Promotion Commission Act 2004	The Nigerian Investment Promotion Commission (NIPC)	Executive Secretary
4	Foreign Exchange Monetary & Miscellaneous Provisions Act	Central Bank of Nigeria	Governor of the Central Bank of Nigeria
5	Immigration Act	Nigerian Immigration Service	Comptroller-General
6	National Office for Technology Acquisition Promotion Act 2004	National Office for Technology Acquisition Promotion	Director-General
7	Industrial Inspectorate Act	Industrial Inspectorate Division of the Federal Ministry of Trade & Investment	Director
8	Constitution of the Federal Republic of Nigeria		
9	Federal High Court Act	Federal High court	Chief Judge
10	Banks and other Financial Institutions Act	Central Bank of Nigeria	Governor of the Central Bank
11	Asset Management Corporation Act, 2010	Asset Management Corporation of Nigeria	Managing Director (S.10(1)(b) AMCON
12	Insurance Act 2007	National Insurance Commission	Chief Executive Officer
13	National Industrial Court Act	National Industrial Court	President
14	Federal Inland Revenue Service Act, 2007	Federal Inland Revenue Service	Executive Chairman
15	National Insurance Commission Act	National Insurance Commission (NAICOM)	Chief Executive Officer

16	Nigerian Communication Commission Act	Nigerian Communication Commission	Chief Executive Officer
17	National Agency for Food & Drug Administration & Control Act	National Agency for Food & Drug Administration & Control	Director General
18	Mortgage Institutions Act	Federal Mortgage Bank	Managing Director
19	Nigerian Copyright Act	Nigerian Copyright Commission	
20	Nigerian Maritime Administration & Safety Agency Act	Nigerian Maritime Administration & Safety Agency (NIMASA)	
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22	Standard Organisation of Nigeria Act	Standard Organisation of Nigeria	
23	Nigeria Deposit Insurance Corporation Act	Nigeria Deposit Insurance Corporation	Managing Director
24	Stamp Duties Act		
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32	Infrastructure Concession Regulatory Commission Act	Infrastructure Concession Regulatory Commission	
33	Nigeria Maritime Administration & Safety Agency Act	Nigeria Maritime Administration & Safety Agency (NIMASA)	
34	Nigeria Export Process in Zones Act	Nigeria Export Processing in Zones Authority (NEPZA)	
35	Nigeria Export Promotion Council Act	Nigeria Export Promotion Council	
36	National Automotive Council (Amendment) Act	National Automotive Council	
37	Financial Reporting Council Act	Financial Reporting Council	
38	Mortgage Institutions Act	Federal Mortgage Bank	
39	Capital Gains Tax Act		
40	Education Tax Act		

There are other subsidiary legislations such as: Companies Proceedings Rules, Company Regulation 2012, Winding Up Rules, Securities & Exchange Commission Rules, Nigeria Stock Exchange Winding Up Rules, Code of Corporate Governance for Public Companies, Code of Corporate Governance for Banks & Distant Houses, Guidelines for Whistle Blowing, etc.

FEATURES AND FUNCTIONS OF THE REGULATORY BODIES AND THEIR RELEVANCE ON CORPORATE LAW PRACTICE

I. Corporate Affairs Commission

A. Establishment

This is the apex of the regulatory bodies for companies in Nigeria, which was established under ***Section 1 of the CAMA*** as a body with full legal capacity like incorporated companies. Thus, it has perpetual succession and a common seal, capable of suing and being sued in its corporate name, of acquiring, holding or disposing of any property, movable or immovable, for the purpose of carrying out its functions.

The establishment of the Corporate Affairs Commission as an autonomous body was as a result of the perceived inefficiency and ineffectiveness of the erstwhile Company Registry, a department within the Federal Ministry of Commerce and Tourism, which was then responsible for the registration and administration of the repealed Companies Act of 1968.

B. Features of CAC

1. **Membership:** the Commission has a membership of 15 persons representing a wide variety of interests – the business community, labour, the legal profession, accountancy profession, Manufacturer's Association of Nigeria, association of Small Scale Industries, the Institute of Chartered Secretaries and Administrators, the Securities & Exchange Commission and the Ministries of Trade and Tourism, Finance and Economic Development, Justice, Industry, and Internal Affairs. The members of the CAC include the following - ***S. 2 CAMA***
   (a) A chairman
   (b) A representative of the business community
   (c) A representative of the legal profession
   (d) A representative of the accountancy profession
   (e) A representative of the manufacturers association
   (f) A representative of the securities and exchange commission
   (g) A representative of the federal ministry of commerce
   (h) A representative of the federal ministry of justice
   (i) A representative of the federal ministry of industry
   (j) The Registrar- General of the commission.
2. **Chairman:** The chairman who is appointed by the President on the recommendation of the Minister of Trade and Commerce must be a person who is experienced in or has acquired specialised knowledge of corporate, industrial, commercial, financial or economic affairs and is thus able to make outstanding contributions to the work of the commission – ***Section 2 of the CAMA*****.**
3. **Registrar General:** There is a provision for a Registrar-General of the commission who must be a person who has qualified to practice law in Nigeria for not less than 10 years and he must have had experience in company law practice or administration for not less than 8 years. He is entitled to represent the Commission in legal proceedings in court – ***Section 8(1) of CAMA*****.**
4. **Term of Office:** Members of the Commission other than ex-officio members hold office for 3 years and are eligible for re-appointment for one further term of 2 years. With the exception of the Registrar, generally, they are all part-time members – ***Section 3 of CAMA*****.**
5. **Termination of Membership:** A member of the commission ceases to hold office, if he becomes of unsound mind or is incapable of carrying out his duties, if he becomes bankrupt

or has made arrangement with his creditors, if he is convinced of a felony or any offence involving dishonesty – ***Section 3(4) of CAMA*****.**

6. **Remuneration & Allowances:** Members, other than the representatives of the Ministries, the Securities and Exchange Commission, the Institute of Chartered Securities and Administrators and the Registrar-General are entitled to such remuneration and allowances as the president may direct – ***Section 4 of CAMA*****.**
7. **Quorum:** The quorum for meetings of the Commission is 5 - ***Section 5(3) of CAMA*****.**

C. Functions of CAC

The functions of the Commission as set out in ***Section 7 of the Companies and Allied Matters Act***, includes the following:

1. Administration of the Companies and Allied Matters Act
2. Regulation and Supervision of the formation, incorporation, management and winding up of companies under the Act.
3. Establishing and maintaining companies' registry and offices in all the States of the Federation.
4. Arranging and conducting investigation into the affairs of any company where the interest of shareholders and public so demands.
5. To regulate, register and wind-up business names and partnerships
6. To regulate, incorporate and wind-up incorporated Trustees/Associations.
7. To perform such other functions as specified in any Act or Law
8. To undertake such other activities as are necessary or expedient for giving full effect to the provisions of this Act.

II. Securities Exchange Commission

A. Establishment

The Securities and Exchange Commission, as it is today, is the outcome of the Investments and Securities Act (ISA) No 45 of 1999. ISA 2007 replaced ISA 1999. The Securities and Exchange Commission (SEC) is the apex regulatory body for Nigeria's capital market. It however, operates under the supervision of the Federal Ministry of Finance. The Securities and Exchange Commission, Nigeria, like other exchange commissions elsewhere, regulates the operation of capital market transactions, ensuring that the relevant rules are complied with. It regulates the Nigerian Stock Exchange.

The business of capital formation and mobilisation is at the root of economic development, which is why every economy wants to develop its capital market. Capital markets drive capital mobilisation and allocation to businesses, in the push for economic growth. Through the capital market, companies and governments mobilise capital for investment, while offering opportunity to investors to seek profitable outlets for their funds. Because complex financial processes are often involved, and large numbers of investors participate, the need for guarding the mechanism for those transactions becomes apparent. Investors need to be protected, just as the process needs to be kept viable.

B. Features of SEC

1. **Membership:** the Commission consists of a chairman appointed by the President and 10 other persons including 2 full-time Commissioners who are 10 years post call who must be persons with ability, experience and specialised knowledge in capital market matters – ***Section 3 of the ISA***.
2. **Director General:** There is a Director-General for the Commission. He is appointed by the President and he is the Chief Executive of the Commission.

C. Functions of SEC (Section 9 ISA)

1. To regulate investment and securities business in Nigeria
2. To register and regulate Capital Market Operators and their functions
3. To register securities of public companies

4. To maintain a register of foreign investment portfolios in Nigeria.
5. To render assistance to promoters and investors wishing to establish Securities Exchanges and Capital Trade Points;
6. To register and regulate the venture capital funds and collective investments schemes
7. To protect the integrity of the securities market
8. To facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market
9. To facilitate the linking of all markets in securities through modern communication and data processing facilities
10. To review, approve and regulate mergers, acquisitions and other forms of business combinations;

D. Relevance to Corporate Law Practice

The Securities and Exchange Commission is consequently there to see to the orderly and rapid development of the capital market. Its basic role is to ensure transparent conduct, such that parties that take decisions, especially on investments, do it on the strength of good information and sound processes. By that, it is to attract more funds into the market and also attract more viable companies that could expand their operations by tapping funds from the capital market.

III. Nigerian Investment Promotion Commission

A. Establishment

Section 1 NIPCA established this body as a body corporate with perpetual succession. The commission shall encourage, promote and coordinate investment in the Nigerian economy.

B. Functions

Section 4 NIPCA provides that the Commission shall encourage, promote and co-ordinate investment in the Nigerian economy and accordingly, shall—

1. Co-ordinate and monitor all investment promotion activities to which this Act applies;
2. Initiate and support measures which shall enhance the investment climate in Nigeria;
3. Promote investments through effective promotional means;
4. Collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital, and advise on request, the availability, choice or suitability of partners in joint-venture projects;
5. Register and keep records of all enterprises to which this Act applies;
6. Identify specific projects and invite interested investors for participation in those projects;
7. Initiate, organise and participate in promotional activities, such as, exhibitions, conferences and seminars for the stimulation of investments;
8. Maintain liaison between investors and Ministries, Government departments and agencies, institutional lenders and other authorities concerned with investments;
9. Provide and disseminate up-to-date information on incentives available to investors
10. Assist incoming and existing investors by providing support services
11. Evaluate the impact of the Commission in investments in Nigeria and make appropriate recommendations;
12. Advise the Federal Government on policy matters designed to promote the industrialisation of Nigeria or the general development of the economy
13. Perform such other functions as are supplementary or incidental to the attainment of the objectives of this Act.

C. One Stop Investment Centre

1. Establishment

In its continuous effort to encourage Foreign Direct Investment (FDI) in Nigeria, the Federal Government established the One Stop Investment Centre (OSIC) otherwise known as One Stop Shop (OSS) on 21st March 2006. The OSIC is housed by the NIPC.

Nigeria like most African nations has set up statutory bodies to regulate foreign investment in the country. Therefore foreigners interested in carrying on business in the country are required to obtain investment approvals after incorporating their companies. The practice has been that company incorporation and foreign investment approvals are processed in different authorised government agencies. This process was characterised by delays usually caused by government bureaucracy, which also stifled the smooth start-up of foreign businesses in Nigeria.

In a bid to ensure the timely incorporation of companies and grant of investment approvals, the government had in the early 1990's set up the Industrial Development Commission Committee (IDDC) to serve as a one stop agency for all pre-investment approvals. The IDDC had the statutory responsibility to grant Business Permits, Approved Status-in-Principle, Expatriate Quota, approvals on fiscal concessions, vet licensing and transfer agreements and generally advise the Federal Government on policy matters designed to promote the industrialisation of the country.

Although the law establishing the IDDC provided that every valid application received would be processed within two months, this expectation was rarely ever met in practice. The IDDC Act was subsequently repealed by the Nigerian Investment Promotion Commission (NIPC) Act 1995 which established the NIPC to encourage and promote investment in Nigeria. Companies with foreign participation are required to apply to NIPC for registration and the statute provides that within 14 days from the receipt of completed registration forms, NIPC shall register such companies or otherwise advice the applicant accordingly.

2. Features

1. The participating agencies will maintain their existing mandates and responsibilities within the structure of OSIC
2. Only statutory provisions will be administered at OSIC and not special applications
3. Agencies will establish their presence at OSIC in phases
4. Approval time for business entry approvals is 24 hours
5. OSIC covers investments into all sectors of the economy
6. It is mandatory for all foreign investors to register with OSIC to facilitate foreign direct investment tracking/investor tracking as provided in the NIPC Act.

3. Functions

This includes simplifying and curtailing the procedures and guidelines for issuing business approvals, permits and authorisations by eliminating bottlenecks faced by investors in establishing and running businesses in Nigeria.

In addition, OSIC is expected to achieve the following **functions**:

1. Reduce the high cost of doing business
2. Eliminate dealing with multiple agencies
3. Eradicate the use of discretion and lack of transparency in granting approvals, licenses, permits
4. Eliminate over bureaucratisation in procedures and processes
5. Eradicate poor service delivery
6. Ensure Foreign Direct Investment and investor tracking

IV. National Office for Technology Acquisition Promotion

The principal function of NOTAP is to:

1. Register contracts that are registrable under the Act
2. Issues Certificate of Registration
3. Monitor continuously the execution of contracts and agreements so registered under it. See ***Section 4(d) & 6(1) of NOTAP Act***.

V. Central Bank of Nigeria

The Central Bank of Nigeria was established by the Central Bank Act 1958. ***Section 2 of the CBN Act*** makes provision for its functions as follows:

1. Ensure monetary and price stability
2. Issue legal tender currency in Nigeria
3. Maintain external reserves to safeguard the international value of the legal tender currency
4. Promote sound financial system in Nigeria, act as banker and provide economic and financial advice to the Federal Government.

The CBN relationship with corporate law is that it authorises financial institutions such as banks to carry out financial activities which includes lending and importing of capital and provision of foreign exchange used by companies for business in Nigeria.

VI. Federal High Court

The FHC is regulated by the Federal High Court Act 2004 but exercises exclusive jurisdiction by virtue of ***Section 251(1) (e) CFRN 1999*** in respect to matters arising from the operation of CAMA.

VII. Investment and Securities Tribunal

This body is established by the ***Investment and Securities Act 2007*** with the following functions under ***Section 284***: The tribunal shall to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving - the decision of the Commission in the operation and application of this Act; the Commission and self-regulatory organisation; a capital market operator and the Commission; and an investor and the commission.

VIII. Asset Management Corporation

AMCON performs the following functions "in accordance with the provisions of this Act" i.e. the AMCON Act)

1. Acquire eligible bank assets from eligible financial institutions
2. Purchase or otherwise invest in eligible equities
3. Hold, manage, realise and dispose of eligible bank assets
4. Pay coupons on, and redeem at maturity, bonds and debt securities issued by the Corporation as consideration for the acquisition of eligible bank assets
5. Perform such other functions, directly related to the management or the realisation of eligible bank assets that the Corporation has acquired
6. Protect, enhance, or realise the value of the eligible bank assets that the Corporation has acquired
7. Perform such other activities and carry out such other functions which in the opinion of the Board are necessary, incidental or conducive to the attainment of the objects of the Corporation.

See ***Section 5 AMCON Act***.

REGULATORY LAWS

1. **Companies and Allied Matters Act:** The Act has three material parts. PART 'A' deals with incorporated Companies; PART 'B' deals with the procedure for the registration Business Names; and PART 'C' deals with the procedure for the registration of the Trustees of non-profit organisations. Dealings in Companies Securities - has been transferred to the Investments and Securities Act, Cap 124 LFN 2004. Highlights of the Companies and Allied Matters Act include the following:
   (a) Inclusion, modification or ejection of principles of law and equity with particular reference to promoters, pre-incorporation contracts, the doctrines of *ultra vires* and constructive notice of registered documents, meetings, directors, company secretary, etc.

(b) Specialized subjects were introduced and separated into appropriate groups, e.g. Insider Trading, Unit Trusts, Mergers and Acquisitions, Business Names and Incorporated Trustees.
(c) Establishment of Corporate Affairs Commission to administer company matters.
(d) Introduction of minimum share capital and virtual abolition of shares carrying weighted votes and non-voting shares.
(e) Stronger and closer control over directors and company accounts.

2. **Investment and Securities Act:** this Act established the Securities and Exchange Commission. It regulates capital market operations, issues protection to investors, and ensures fair and transparent market.
3. **Nigerian Investment Promotion Commission Act:** this Act established the Nigerian Investment Promotion Commission and requires registration of foreign investments with the Commission. It stimulates foreign investment in Nigeria. It allows aliens to do business in Nigeria except items stated under the negative list such as arms and ammunitions, drugs and psychotropic substance, military and para-military uniforms and attires, etc.
4. **Foreign Exchange Monitoring and Miscellaneous Provisions Act:** this Act empowers the CBN to administer its provisions. Foreigners who want to do business in Nigeria will have to come with the capital through authorized dealer institutions like banks. They have unconditional repatriation of capital; assurance that business shall not be nationalized. Where it is to be nationalized, it must be for overidding public interest and adequate compensation will be given.
5. **Immigration Act:** this Act regulates the coming into Nigeria by aliens. Aliens must apply for Nigeria visa from Nigerian Embassy in their home country. Aliens desirous of setting up business in Nigeria are to obtain business permit and expatriate quota and those desirous of working in Nigeria are to obtain residence permit. For an alien to stay in Nigeria for more than 90 days, such alien must obtain residence permit.
6. **National Office for Technology Acquisition and Promotion Act:** this Act makes provision for the registration of every agreement and contract entered into by any person in Nigeria with any person outside Nigeria involving the transfer of foreign technology to Nigeria partners. The registration is to be made within 60 days with NOTAP. Failure to register such contract will not invalidate it but the investor will find it difficult to repatriate the money.
7. **Industrial Inspectorate Act:** this Act makes provision for investigation of the undertakings of industries including investments and other related matters. It also made provision for the inspection, valuation and certification of capital expenditure incurred by businesses in Nigeria.
8. **Insurance Act:** regulates insurance business in Nigeria and it applies to all insurance business and insurers other than those carried on by friendly societies, pension funds or provident funds.
9. **National Insurance Commission Act:** regulates the inspection of insurance companies including the control, management and merger of insurance companies.
10. **Nigerian Communications Commission Act:** regulates the supply of telecommunications services, facilities and promote fair competition and efficient market conduct. It also promotes the development of Nigeria's telecommunications capabilities, industries and skills.

11. **National Agency for Food & Drug Administration & Control Act:** regulates importation, exportation, manufacturing, advertisement, distribution, sale and use of food, drugs, cosmetics, medical services, bottled water and chemicals.
12. **Standard Organisation of Nigeria Act:** standardize methods and products in Nigerian industries.
13. **Nigeria Copyright Act:** it creates the Nigerian Copyright Commission to serve as an anti-piracy and enforcement agency for intellectual properties in Nigeria. The Act regulates the copyright industry.
14. **Electric Power Sector Reform Act:** monitors and regulates the electricity industry, issuance of licence to market participants and ensures compliance with market rules operating guidelines.
15. **Nigeria Maritime Administration & Safety Agency Act:** regulates the maritime industry and provides for the national shipping policy and Nigerian maritime labour policy.

PROCEDURE FOR ACCREDITATION WITH CAC AND REGISTRATION WITH SEC

I. Accreditation with CAC

A. Concept

Accreditation is required in respect of matters relating to companies (Part A CAMA) and not Part B & C. The professionals authorised to transact business with CAC relating to Part A are:

1. Legal practitioners
2. Chattered accountants
3. Chattered secretaries
4. A firm of any of the above professionals

B. Procedure

1. Pick up and fill Accreditation Form A or B
2. Pay application fee of ₦2,500 for individuals ₦5,000 for firms
3. Return of completed application form accompanied by:
   (a) Two passport photographs
   (b) Qualifying certificate i.e. qualifying Certificate and his Call to Bar Certificate.
   (c) A copy of his current receipt of payment of practicing fee for at least for the year of application
   (d) A copy of his NYSC discharge or exemption certificate.
   (e) A copy of his registration receipt

Identification for legal practitioner is CAC/NBA/IND/0001or Firm CAC/NBA/FIRM/0001.

C. Replacement of Lost Accreditation Card

The things needed for the replacement of lost accreditation card are:

1. Police report
2. Affidavit of loss
3. Copy of receipt for payment of practising fee in the current year
4. Copy of credentials
5. Payment of ₦1,000 replacement fee

ACCREDITATION FORM

CORPORATE AFFAIRS COMMISSION CAC/ACR/1
Plot 420 TAGRIS CRESCENT MAITAMA ABUJA

APPLICATION FOR ACCREDITATION
(*for use by firms/individual*)

No……

1. Name of the firm/individual: Killi Nancwat & Co

2. Nature of the business: Legal Practice and Consultancy

3. Principal place of business: Abuja

4. Branches (addresses, not P.O.Box)

(i) No 139b Mission Road Jos, Plateau State

(ii)

(iii)

Telephone: 07031112732 **Email Address:** Knanchwat2020@yahoo.com

5. Full names, enrolment number and signatures of each partner (in the partnership)

(i) Killi Nancwat/SC/2214/ **(ii)**

(iii) **(iv)**

6. Name and Signatures of representatives:

(i) NIL **(ii)**

(iii) **(iv)**

7. Evidence of eligibility to practice for the year:

GTB.

We hereby certify that the foregoing particulars are to the best of our knowledge, information and belief, correct and we undertake to notify the Registrar-General whenever any change is made or occurs in any of them.

Dated at 22nd **this** 22nd **day of** November, **2018**

(Signature of Principal Partner)

Killi Nancwat

(Name of Principal Partner)

*Evidence of eligibility to practice should include current practicing/membership fee receipt, etc.

II. Registration with the SEC

A. Concept

To operate in the Nigerian capital market as a CMO/CMC, one must be registered by SEC. this is because ***Section 38(1) of ISA*** provides that no person shall operate in the Nigerian capital market as an expert or professional or in any other capacity as may be determined by SEC; or carry on investment and securities business unless he is registered in accordance with ISA and the rules and regulations made thereunder.

They can register as firms or persons carrying on business in their names or as a corporate body. See ***Rule 178 SEC Rules 2013***. The professionals allowed registration are:

1. Legal Practitioners,
2. Accountants,
3. Auditors,
4. Engineers,
5. Estate Valuers,
6. Property Manager, and
7. Others as determined by SEC.

For individual Partners, they must possess 5 years post-call experience to qualify to be registered while for sponsored individuals it is 2 years post-call that is needed. See ***R. 178 SEC Rules 2013.***

Registration by SEC is totally different from accreditation by CAC. See ***SEC v. Prof A.B. Kasunmu SAN.***[1]

B. Procedure for Corporate Bodies (Section 178 (2) SEC Rules)

1. Send an application to SEC by filling SEC Form 3
2. Pay the application fees of:
   i. Firm - ₦20, 000
   ii. Principal Partner - ₦ 5,000
   iii. Sponsored Individual - ₦1, 000
3. Submit the application Form with the following documents:
   (a) Two sets of duly completed form SEC 2 to be filed by at least two sponsored individuals, one of whom shall be a principal partner
   (b) CV of the sponsored individuals including details of activities stated in order of time from secondary school till date
   (c) A copy of the certificate of incorporation of the company certified by the company secretary. Where an uncertified copy is filed, the applicant must present the original for sighting by an authorised officer of SEC
   (d) Profile of the company indicating past and present activities
   (e) Two copies of the MEMART certified by CAC
   (f) Signed copy of audited account or audited statement of affairs
   (g) Full postal address of immediate past employer of sponsored individuals
   (h) Sworn undertaken to keep proper records and render returns as may be specified by SEC from time to time
   (i) Evidence of minimum paid up capital of N5million. That is, bank statement of 3-6months of the applicant with minimum balance of N5million
4. SEC will then visit the office of the applicant
5. The applicant is to participate in SEC training school

B. Procedure for Firms or Person Carrying out Business in Their Names (Section 178 (2) SEC Rules)

1. Send an application to SEC by filling SEC Form 2

[1] (2009) 10 NWLR (Pt. 1150) 509

2. Pay the application fees of:
   iv. Firm - ₦20, 000
   v. Principal Partner - ₦ 5,000
   vi. Sponsored Individual - ₦1, 000
3. Submit the application Form with the following documents:
   (a) Certified copy of certificate of business name (where applicable)
   (b) CV of at least two officers (known as sponsored individuals) including details of activities arranged in order of time from secondary school till date
   (c) Profile of the firm, including details of past and present activities
   (d) A copy of the partnership deed (where applicable)
   (e) Full postal and electronic address of immediate past employer of sponsored individuals
   (f) Sworn undertaken to keep proper records and render returns as may be specified by SEC
   (g) Bank statement of 3-6 months of the applicant with a minimum balance of:
      i. Individual - ₦500,000
      ii. Firm- ₦2, 000,000.00
   (h) Evidence of payment of practicing fees by sponsored individuals
   (i) Professional indemnity insurance policy
   (j) Full postal address of bankers
4. SEC will then visit the office of the applicant
5. The applicant is to participate in SEC training school

C. Revalidating Accreditation

Revalidate accreditation at SEC every 5 years. See ***Section 38 of the Investment and Securities Act, 2007; R. 178 SEC Rules 2013*****.**

COMPLETION OF FORMS REQUIRED FOR ACCREDITATION OF COMPANY WITH CAC

1. Reservation of name Form;
2. The business name;
3. The general nature of the business or proposed activities;
4. The full address of the principal place of business, and every other subsidiary place of business;
5. Where the registration to be effected is that of a firm; the present forenames and surnames, nationality, age, sex, occupation and usual residential address of each of the individuals who are partners, and the corporate name and registered office of such corporation, which is partner;
6. The date of commencement of the business or activities;
7. Passport photographs duly certified in the case of sole proprietorships or firms consisting of individual;
8. Certificates of professional proficiency in cases of sole proprietorships or partnerships or firms intending to carry on any professional business.

It should be noted that additional information and supporting documents may be required in the case of a firm or an individual carrying on business on behalf of another individual, firm or corporation whether as nominee or trustee and in the case of a firm or individual carrying on business as general agent for another concern or entity overseas and not having a place of business in Nigeria.

ETHICAL ISSUES INVOLVED

1. A lawyer shall not engage in incorporation at CAC before accreditation i.e. don't use someone else's accreditation.
2. A lawyer shall not charge excessive fee that does not commensurate with the service rendered – ***Rule 52 RPC*.**
3. Unless permitted by the General Council of the Bar, a lawyer shall not practice as a legal practitioner at the same time as he practices any other profession. See ***Rule 7(1) of the RPC***
4. A lawyer shall not practice as a legal practitioner while personally engaged in the business of buying and selling commodities or the business of a commission agent - ***Rule 7(2) RPC*.**
5. A lawyer, whilst a servant or in a salaried employment of any kind, shall not appear as advocate in a court or judicial tribunal for his employer except where the lawyer is employed as a legal officer in a Government department. ***Rule 8(1) RPC*.**
6. a lawyer, whilst a servant or in a salaried employment, shall not prepare, sign, or file pleadings, applications, instruments, agreements, contracts, deeds, letters, memoranda, reports, legal opinion or similar instruments or processes or file any such document for his employer. ***Rule 8(2) RPC*.**
7. A director of a registered company shall not appear as an advocate in court or judicial tribunal for his company. ***Rule 8(3) RPC*.**
8. A lawyer must devote and dedicate to the cause of his client. ***Rule 14 RPC*.**
9. A lawyer must represent his client within the bounds of the law e.g. if his client instructs him to incorporate a company whose objects is to manufacture arms and ammunition or produce police uniform, it is the duty of the lawyer to advise him against embarking on such venture. ***Rule 15 RPC***.

(Week 4)

CHOICE OF BUSINESS ORGANISATION AND FORMATION (I) - COMPANIES

INTRODUCTION

I. Concept

There are three types of business organisations under the Nigerian corporate law practice. They are:

1. Sole proprietorship (not registered as business name)
2. Business name (registered as business name or partnership).
3. Companies

Part A and B of CAMA are business organisations as they can carry out business. On the other hand, incorporated trustees under part C of CAMA is non-business organisation. Business organisations are profit-oriented. Companies are the most widely used business organization. They are profit-oriented. Under ***Section 18 CAMA***, it takes at least two persons to incorporate or form a company.

II. Advantages of a Company over Other Types of Business Organisations

There are certain advantages which companies have over other types of business organizations. Advantages in this sense are different from the features of company when compared to other business organizations. These advantages are:

1. **Perpetual Succession**: a company once incorporated, enjoys perpetual succession. In partnership, when one of two partners dies, that is the end of the partnership. For company where shareholders die, other persons will take over the shares.
2. **Limited Liability:** when it is a company that is either limited by shares or guarantee, the liabilities of its members are thus limited. For sole proprietorship and partnership, the owners and partners have unlimited liability.
3. **Investors for a Company**: investors invest in a company more than in any sole proprietorship and partnership.
4. **Availability of Funds**: a company can easily approach the bank for loan.
5. **Management**: in a company, the management is different from the owners.

III. Types and Forms of Companies

Under ***Section 21 CAMA***, there are six types of companies viz:

1. Private company limited by shares
2. Public company limited by shares
3. Private company limited by guarantee
4. Public company limited by guarantee
5. Private unlimited company
6. Public unlimited company

However, in practical reality, the types of companies obtainable are those whose names and the acronyms therefore are provided in ***Section 29 CAMA***. They are four as:

1. Private company limited by shares (Ltd)
2. Public company limited by shares (Plc)
3. Private company limited by guarantee (Gte)
4. Private unlimited company (unlimited)

One reason why it is impossible to have a public company limited by guarantee in practical reality is that they are not registrable under CAMA. This is because one basic feature of public companies is that they offer their shares to the public, but companies LTD/GTE do not even have a share capital and so cannot operate as public companies.

There are instances where the law mandatorily requires that a company should be formed before a particular business can be carried out.

1. Banking business - Banks and other Financial Institution Act
2. Insurance business - The Insurance Act
3. Private guard
4. Mortgage business - Mortgage Institution Act
5. Partnership of over 20 persons - s. 19 CAMA
6. Stock broking
7. Foreigners/Aliens - Nigerian Investment Promotion Act. S. 54 & 56 CAMA.

COMPANIES LIMITED BY SHARES

By ***Section 21(1)(a) CAMA***, a company limited by shares is one having the liability of its members limited, by the memo, to the amount, if any, unpaid on the shares respectively held by them. It could either be a private or a public company. See ***Section 21(2) CAMA***.

I. Private Companies Limited by Shares (LTD)

A. Concept

This is the most popular kind of company in use. It is a company which is stated in its memo to be a private company and which has the liability of its members limited, by the memo, to the amount, if any, left unpaid on the shares held by them. See ***Section 21 and 22 CAMA***.

B. Features

The features of a private company, whether limited by shares or not include:

1. **Restriction in Transferability of Shares:** It must, by its articles, restrict the transferability of its shares. See ***Section 22(2) CAMA***. The right of pre-emption exists if so stated in the articles.
2. **Membership:** By ***Section 18 CAMA***, it must have a minimum of two (2) members but its total membership must not exceed fifty. See ***Section 22(3) CAMA***. For the purpose of the above, note that joint holders of shares are deemed to be a single members. See ***Section 22(4) CAMA***.
3. **Authorised Minimum Share Capital:** A private company must have an authorized minimum share capital of not less than N10, 000 - ***Section 27(2)(a) CAMA*** - of which not less than 25% must be subscribed to by the members at incorporation and even at all times. See ***Section 99(1), (2) & (4)*** and ***Section 27(2) (b) CAMA***.
4. **Invitation to Public to Subscribe for Its Shares or Debentures:** Unless authorised by law, a private company shall not/is prohibited from inviting the public to subscribe for any of its shares or debentures. See ***Section 22(5) (a) CAMA*.**
5. **Invitation to Public to Deposit Money:** Unless authorised by law, such as private companies in banking businesses, a private company shall not invite the public to deposit money, for a fixed period or payable at call, whether or not bearing an interest. ***Section 22(5) (b) CAMA***.
6. **Name Acronym:** The name of a private company limited by shares must end with LTD. ***Section 29(1) & (5) CAMA***.
7. **Statutory Books:** A private company does not need to keep certain statutory books like the Index of members.
8. **Appointment of Over-Age Director:** A private company has no restriction in the appointment of an over-age director (70 years and above) - ***Section 256 CAMA***.
9. **Qualification for Company Secretary:** By ***Section 295 CAMA***, the company secretary of a private company does not need any special qualification besides the general requirement that the directors must consider him as possessing the requisite knowledge and experience to perform the function of a company secretary.
10. **Use of Written Resolutions:** Private companies can use written resolutions. See ***Section 234 CAMA***.

11. **Appointment of Several Directors by a Single Resolution:** Can appoint several directors by a single resolution. ***Section 261 CAMA***.

C. Suitability

In making a choice of business organisations or in advising a client in that regards, a private company limited by shares is most suitable and recommended in the following instances:

1. Where a small or medium sized business needs to acquire an incorporated status
2. Where family members and/or friends intend to carry on business with an incorporated status and no interference from outsiders
3. Where the capital available to start up the business is relatively small, that is, less than ₦500, 000

II. Public Company Limited by Shares (PLC)

A. Concept

By ***Section 24 CAMA***, a public company is any company other than a private company, and which is expressed in its memo to be a public company. The liabilities of its members must be restricted by the memo to the amount, if any, left on paid on the shares respectively held by them. See ***Section 21(1) (a) CAMA***.

B. Features

1. **Invitation to the Public to Subscribe for Its Shares or Debentures:** It can raise money from the public by offering its shares or debentures to the public and inviting them to subscribe. This makes it easier to raise funds through the capital market when it is listed on the stock exchange.
2. **Membership:** By ***Section 18 CAMA***, it must have a minimum of 2 members, but there is no limit on its maximum. That is, two – infinity
3. **Authorised Minimum Share Capital:** The authorised minimum share capital of a public company shall not be less than ₦500, 000 - ***Section 27(2) (a) CAMA***. It must be noted that not less than 25% of the share capital must be subscribed to by the members at incorporation and even at all times. See ***Section 27(2) (b), 99(1), (2), & (4) CAMA***.
4. **Appointment of Over-Aged Director:** Public companies can appoint an over-age director (70 years and above) but special notice to the company must be given and the director must disclose his age - ***Section 252 and 256 CAMA***
5. **Qualification for Company Secretary:** The person who can be appointed the company secretary of a public company must either be a legal practitioner, chartered accountants, chartered secretaries, or a firm of any of them or must have held the office of company secretary of a public company for at least three (3) of the five (5) years immediately preceding his appointment in a public company. See ***Section 295 CAMA***. He must also possess requisite knowledge and experience.
6. **Statutory Meeting:** A public company must hold its statutory meeting within six month of incorporation - ***Section 211 CAMA***.
7. **Publication of Additional Notices of Its AGM:** It must publish additional notices of its AGM in newspapers and such notice must be given to all those who are entitled to receive notice.
8. **Name Acronym:** The name of a public company limited by share must end with “Public Limited Company (PLC). See ***Section 29(2) & (5) CAMA***.
9. **Appointment of Several Directors by a Single Resolution:** Cannot appoint two or more directors by a single resolution.

C. Suitability

In making a choice of business organisation or in advising a client in that regards, a public company limited by shares should be recommended in the following instances:

1. Where a growing medium or large scale business needs to acquire incorporated status

2. Where the capital available to start up the business is relatively large. That is ₦500, 000 and above
3. Where the business intends to raise capital from the public through the invitation of the public to subscribe for shares or debentures
4. Where the membership of the company is not restricted in terms of share acquisition and disposal
5. Where sector regulations requires a business organisation to be a public company in order to be permitted to operate.
6. Where 50 persons or more want to join in the formation of a company as subscribers and do not intend to be joint holder of shares

III. Differences between a Private Company and a Public Company

Note that the features of private and public companies can produce the differences between them when juxtaposed.

COMPANIES LIMITED BY GUARANTEE (LTD/GTE)

A. Concept

Section 21(1)(b) CAMA provides that a company LTD/GTE is one which has the liability of its members limited, by the memo, to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up. ***Section 26(1) CAMA*** further provides that where a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar object, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted by CAMA, the company shall not be registered as a company limited by shares, but may be registered as a company LTD/GTE.

B. Features

1. **Lack of Share Capital:** They are not registered with a share capital. They do not have share capital - ***Section 26(2) CAMA***. Form CAC 2 is not filled or filed.
2. **Non-Distribution of Profit to Members:** Any provision in the MEMART of the company LTD/GTE or any resolution which give any member the right to participate in the divisible profits of the company or to divide the company's undertaking into shares or interests shall be void. See ***Section 26(3) CAMA***. Profit is not distributable to members.
3. **Registration of Memo with Consent of the Attorney General:** The memo of a company LTD/GTE cannot be registered without the consent and authority of the Attorney General of the Federation - ***Section 26(5) CAMA***. This is one major disadvantage because it is difficult to get AG's consent.
4. **Liability of Members:** The liability of the members of a company LTD/GTE is limited to the amount which they undertake to contribute to the assets of the company if it is being wound up and such an amount shall not be less than ₦10, 000 - ***Section 26(7) CAMA***. Such amount is not payable at call, but is only payable when the company is being wound up. The liability of its members is at winding up.
5. **Involvement in Business:** It is allowed to do business, but not with a view to making profits for distribution to its members. ***Section 26(4) CAMA***.
6. **Name Acronym:** The name of such a company must end with LTD/GTE - ***Section 29(3) & (5) CAMA***.
7. **Application by Cypress of Left Over of Funds or Assets:** Upon the winding-up of a company LTD/GTE, any part of the company's funds or assets which is left over, after discharging all its debts and liabilities, shall not be distributed among the members, but shall be applied cypress. That is, it will be transferred to another similar company with similar objects or other charitable purposes. See ***Section 26(10) CAMA***. Such other company or charity shall be determined by the members prior to its dissolution.

8. **Application of Income & Property towards Promotion of Its Objects:** The memo of a company LTD/GTE must contain special clauses as required under ***Section 27(4) CAMA*** to the effect that the income and property of the company shall be applied solely towards the promotion of its objects.

C. Comparison with Company Limited by Shares

1. Similarities

1. Limited liability
2. Legal personality

2. Differences

(a) The liability of the members of a company limited by shares is payable, whether at call or not, at any time during the life time of the company, as well as at its winding up. While in a company LTD/GTE, the liability is only payable at winding up. Therefore, members cannot be compelled to contribute their undertakings while the company is still a going concern.

(b) Unlike a company limited by shares, there is no automatic right to proxy in a company LTD/GTE. Such right can only exist in a company LTD/GTE where it provided for by the articles. See ***Section 230 CAMA***

(c) A company limited by shares can distribute its profits to its members through the declaration of dividends; while a company limited by guarantee is prohibited from distributing its profits to any of its members.

(d) Share capital. Only companies limited by shares can have share capital. See ***Section 26(2) and 27(2) CAMA***.

(e) Consent of AGF: the incorporation of companies LTD/GTE requires the consent of the Attorney General of the federation. See ***Section 26(5) CAMA***

(f) Special clauses are required in the memo of a company LTD/GTE - ***Section 27(4) CAMA*****.**

(g) In company LTD/GTE, the liability of the members is limited by guarantee; while in a company limited by shares, it is limited not by guarantee, but by shares.

D. Comparison with Incorporated Trustees

1. Similarities

(a) Not for profit making
(b) Enjoy tax exemptions
(c) Both administered by CAC
(d) Legal personality
(e) Their incomes are not distributed to members by way of dividend, bonus or reward
(f) Both of them are incorporated with share capital.

2. Differences

(a) IT do not do business at all, while companies LTD/GTE are permitted to do business
(b) The consent of AGF is required for the incorporation of companies LTD/GTE, but no such consent is required for IT
(c) IT uses a constitution as it guiding rules, while companies LTD/GTE use MEMART
(d) Upon incorporation, publication of a public notice of the incorporation in Newspapers is required for IT, but there is no such requirement for companies LTD/GTE
(e) Passport photographs and the impression of the common seal are required for the incorporation of IT, but there is no such requirement for companies LTD/GTE
(f) Upon incorporation, every member of the company LTD/GTE forms the body corporate, but in the case of IT, only the registered trustees, and not all the members, form the body corporate
(g) IT are non-business organisations incorporated under Part C of CAMA, while companies LTD/GTE are business organisations incorporated under Part A CAMA.

(h) An infant can join in formation of a company limited by guarantee as long as there are two other persons who are qualified under CAMA. In incorporated trustee, an infant cannot be a trustee.
(i) Information and incorporation of a company limited by guarantee, it must be at least two persons. However, in an incorporated trustee, only one trustee is statutorily required. See ***Section 590(1) CAMA***. This is only so in CAMA. In practice, at least two trustees are required
(j) A company limited by guarantee being a company must hold annual general meeting. An incorporated trustee is not mandated to hold an annual general meeting although its constitution can provide for annual general meeting
(k) An incorporated trustee does not have directors but trustee(s). A company limited by guarantee has directors and not trustee and the directors must be at least two. There can be one trustee for an incorporated trustee - ***Section 590(1) CAMA***. In practice, at least two trustee.

UNLIMITED COMPANIES (Unlimited)

A. Concept

Section 21(1) (c) CAMA defines and unlimited company as a company which does not have any limit on the liability of its members. An unlimited company is a separate legal personality and so, it enjoys the incidences of incorporation, but its members do not enjoy the full benefits of this separate legal personality because there is no limitation on their liability for the debts of the company.

B. Features

1. **Unlimited Liability of Members:** Thus, unlike limited companies, that enjoy dual limitation of liability between the members and the company (either does not bear the other's liabilities), the limitation of liability for unlimited companies is lineal and reserved only for the company. This is because the company does not bear the liability of the members but the members bear the company's liability without limitation. They cannot disclaim any debt or liability incurred by the company. This feature of the unlimited liability of the members of an unlimited company is one major similarity between unlimited companies and partnerships. This is because the liability of partners is also unlimited. Thus, with respect to the liability of the members of an unlimited company, its members are like partners since their liabilities are unlimited.
2. **Share Capital:** By ***Section 25 CAMA***, an unlimited company must be incorporated with a Share capital.
3. **Name Acronym:** By ***Section 29(4) & (5) CAMA***, the name of an unlimited company ends with "Unlimited" ("ULTD").

C. Suitability

The incorporation of an unlimited company may be recommended in the following situations:
1. Where there is an enlarged partnership which is getting beyond the legal maximum of the members of a partnership.
2. Where persons wish to form a company in a manner rendering them liable, without limitation for the debts of the company.
3. The law may make it mandatory for certain kinds of companies to be incorporated as unlimited companies in order to ensure probity in the management of public funds. For instance, it was once required that insurance brokerage companies be registered as unlimited companies.

STEPS TOWARDS THE FORMATION OF A COMPANY

I. Steps to incorporate a Company in Person

Responsibility for formation of companies is vested exclusively in legal practitioners (***Section 35(3) CAMA***)

A. Taking Instructions from Client

1. **Client's Personal Details:** the particulars of the client like name, address, etc.
2. **Date for Completion of Registration:** the particular date you are expected to complete the registration process and hand over the certificate of incorporation to the client.
3. **Name of Company**: Note ***Section 30 CAMA*** on prohibited and restricted names.
4. **Type of Company**: the company can be company limited by shares, company limited by guarantee, or unlimited company. It is also important to note whether it will be a public or private company. Also compare the advantages and disadvantages of companies and partnerships.
5. **Sphere of Operation:** Anywhere within Nigeria. A Company wishing to operate outside the country must comply with the laws of the foreign country concerned – need for official seal.
6. **Objects or Business of the Company**: See ***Section 27(1) CAMA*****.** These must be legal. Generally, a company must not carry on any business or object not authorised by its memorandum of association (***Section 39(1) CAMA***). However, an *ultra vires* transaction may no longer be fatal - ***Section 39(2)-(4) CAMA***.
7. **Capital:** Generally, the capital of a company connotes the totality of its assets including borrowed money, which is loosely called loan capital. Specifically, however, the capital of a company refers to the share capital.
8. **Subscribers:** These are persons who sign the Memorandum of Association (for a number of shares) and the Articles of Association - ***Section 27(2)(3) and (5) CAMA***; ***Section 34 (3)(c) CAMA***. Their full particulars must be obtained. They must have capacity to form a company - ***Section 20 CAMA***); must not be less than 2 and must together subscribe shares amounting in value to at least 25% of the authorised share capital. If there are non-Nigerian subscribers - ***Section 20(4) CAMA***) - applications must be made under the ***Nigerian Investment Promotion Commission Act.***[2]
9. **Membership of Company is made up of:-**
   (a) The subscribers who are deemed to have agreed to become members and whose names must be entered in the Register of Members - ***Section 79(1) CAMA***; and
   (b) Every other person who agrees in writing to become a member and whose name is entered in the Register of Members - ***Section 79(2) CAMA***.
10. **Expatriate Employees**: including directors, must be covered by expatriate quota – ***Section 8 Immigration Act***.
11. **Registered Office:** Obtain an address to be used as the Registered Office of the company ***Section 35(1) and (2) CAMA***; ***Section 547 CAMA***.
12. **Articles of Association:** Contains regulations for the management of the company. Full instructions should be taken, bearing in mind that substantial portion of what used to be contained in the model Articles in Part 1 of Table A of Schedule 1 of the Companies Act, 1968 is contained now in the main body of the Act.
13. **Directors:** Directors are the persons appointed by the company to manage the affairs of the company - ***Section 244(1) CAMA***) and need not be members of the company. Every company must have at least two directors - ***Section 246(1) CAMA***. The number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them or may be named in articles - ***Section***

[2] Cap Nl17 LFN 2004

247 CAMA. A person may be appointed director for life - ***Section 255 CAMA***. **Note:** Disqualification for directorship - ***Section 257 CAMA***; Directors share qualification - ***Section 251 CAMA***.

14. **Control and Management:** May be achieved e.g. through control over appointment of director, section life directorship, distribution of shares, classes of shares and rights attached to shares, custody of common seal.
15. **Public Issue of Shares and Prospectus**: Only a public company can issue its shares or debentures to the public, usually by way of a prospectus - ***Section 48 of Investments and Securities Act*** but where no prospectus is issued a statement in lieu of prospectus is filed - ***Section 61 of Investments and Securities Act***. Filing the prospectus is not a prerequisite for the formation of a public company - ***Section 36(4) CAMA***.
16. **Other Matters: e.g.**
    - **(a) Tax Relief**: If any tax relief is to be claimed, particulars should be obtained to enable application to be made; e.g. under the Industrial Development (Income Tax Relief) Act.[3]
    - **(b) Tax Clearance Certificates**: for the subscribers and first directors
    - **(c) Pre-investment approvals**: e.g. see para. 8 on subscribers above and Industrial Inspectorate Act.[4]

B. Conducting Search of the Proposed Name and Reservation

The lawyer is to conduct search of the proposed name to ensure that it is not similar to or resembles and existing name and reserve it. The reservation is normally for a period of 60 days. Another reservation can be made after the expiration of the 60 days.

C. Preparation of Incorporation Documents

The lawyer is to prepare the incorporation documents such as:

1. Memorandum and articles of association,
2. Availability Check and Reservation of Name (CAC Form 1)
3. Application for registration of a company (CAC Form 1.1)
4. Any other document required by the Commission to satisfy the requirement of any law relating to the formation of a company.

D. Stamping

Present to the Federal Commissioner of Stamp Duties (FIRS):

1. Two copies of the Memorandum and Articles of Association; the Memorandum shall be stamped as a deed (***Section 27(6) CAMA***); the articles shall bear the same stamp duty as if they were contained in a deed (***Section 34(4) CAMA***).
2. Submit also 2 copies of the statement of Authorized Share Capital-pay the appropriate Stamp Duties (ad-valorem) See ***Stamp Duties Act.***[5] The commissioner will assess the amount payable - *ad valorem i.e.* 3.00 Naira for every 200 Naira-Get a Bank Draft for the amount-payable to FEDERAL GOVERNMENT OF NIGERIA FIRS (Stamp Duties Account)

E. Filing of Incorporation Documents at CAC

Deliver to the Commission the following documents and pay the appropriate registration fees as set out in the 3rd schedule to the Companies Regulations 2012:

1. Availability Check and Reservation of Name (FORM CAC 1)
2. Application for registration of a company (FORM CAC 1.1)

[3] Cap I 7 LFN 2004
[4] Cap 18 LFN 2004
[5] Cap. S8 LFN 2004

3. Two copies of Memorandum and Articles of Association duly stamped.
4. Means of identification (photo page of international passport, or current drivers' license, or national ID) for subscribers to the Articles of Association.
5. Evidence of payment of stamp duties and filing fee.
6. Residence permit in case of resident foreigners.
7. Consent of the Attorney General where the company to be registered is a company limited by guarantee.
8. Any other document required by the Commission to satisfy the requirement of any law relating to the formation of a company.

F. Obtaining Certificate of Incorporation

The lawyer is to obtain Certificate of Incorporation and the Certified True Copy of the documents of the company from CAC for the client.

II. Steps to Incorporate a Company Online

1. Check for availability of proposed company name and reserve
2. Complete pre-registration form – CAC Form 1.1
3. Pay filing fee to CAC
4. Pay stamp duty fee to FIRS
   Step 2 – 4 can be completed on the company registration portal
5. Prepare the signed copy of your pre-registration documents for upload as follows:
   (a) Form CAC 1.1
   (b) Recognized form of identification for Director(s)/Subscriber(s) and Secretary
   (c) Stamp duty receipt
   (d) Evidence of payment to CAC
6. Upload the scanned documents for processing
7. Submit the original copies of the documents uploaded at step 7 (Form CAC 1.1, MEMART, etc.) to the CAC office you had selected in exchange for your certificate and Certified True Copies of the documents.

REGISTRATION

I. Concept

Having complied with Section 35, the Commission has no discretion but to register the Memorandum and Articles.

II. Refusal of Registration

However, the Commission may refuse the registration on the following grounds (***Section 36(1) CAMA***) - if the Commission is of the opinion that:

1. Memorandum and Articles do not comply with the Act;
2. Business or object of the company is illegal;
3. There is an incompetent or, a disqualified subscriber – ***Section 20 CAMA***), i.e.
   (a) An individual below 18 years except two other qualified persons are 18 and above,
   (b) An individual found to be of unsound mind by a court in Nigeria or elsewhere,
   (c) An individual who is an undischarged bankrupt,
   (d) An individual disqualified from being a director under ***Section 254 CAMA*****,** i.e. a fraudulent person,
   (e) A corporate body in liquidation.
4. There is non-compliance with requirements of any other law as to registration and incorporation of a company.
5. The name conflicts with or is likely to conflict with an existing trade mark or business name registered in Nigeria.

If, aggrieved by refusal to register, the company will give notice to the Commission to apply to court for directions. (***Section 36(2) CAMA***). If the Commission registers the Memorandum

and Articles, it will under its seal certify that the company is incorporated, the type of limited liability and whether it is private or public. The Certificate of Incorporation shall be *prima facie* evidence of compliance with the Act, that the association is a company authorized to be registered and is duly registered (***Section 36(6) CAMA***). In the cases ***Lasisi v Registered Company,***[6] the court held that mandamus cannot be issued against the CAC to compel them to register a particular name so far they have exercised their discretion fairly.

III. Effect of Registration

Section 37 CAMA - From date of incorporation, the company have the following effect -

1. Body corporate with power to sue and be sued
2. Power to hold land
3. Perpetual succession
4. Common seal

REGULATION OF CORPORATE NAMES

I. Concept

Even though a company is entitled to have any name, some names are prohibited while some others are restricted - ***Section 30(1) & (2) CAMA***.

II. Prohibited Names

1. **Identical Names:** A name identical or resembling an existing name of a company as to be calculated to deceive. There is an exception here to the effect that such name can be used where the existing company is in liquidation or in the course of being dissolved and its consent to the use of that name has been obtained. See ***Section 30(1)(a) CAMA***; ***Niger Chemists Ltd v Nigeria Chemists Ltd;***[7] ***Daily Need Pharmaceutical Ind. v Daily Needs Industries Ltd***.[8]
2. **Chamber of Commerce:** A name containing the words "chambers of commerce" unless it is a company limited by guarantee. See ***Section 30(1) (b) CAMA***; ***Lagos Chamber of Commerce v Registrar of Companies***.[9]
3. **Misleading Names:** A name, which in the opinion of CAC, is capable of misleading as to the nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy. See ***Section 30(1) (c) CAMA*****.**
4. **Violating Existing Trade Mark or Business Name:** A name which, in the opinion of CAC, would violate any existing trade mark or business name registered in Nigeria, unless the consent of the owner is obtained. See ***Section 30(1) (d) CAMA***. It must be noted that even if the trademark or business name is not registered, remedy can be sought from the Court through the common law action passing-off.

The foregoing rules do not apply only to already registered and existing names. They also apply to names which have been reserved under section 32 CAMA, for the period for which they were reserved. See ***Section 32(1) & (2) CAMA*****.** With respect to the registration of business names, the principles are basically the same and they are provided for under ***Section 579(2) CAMA*****.**

III. Restricted Names

Under CAMA, restricted names can be used with the consent of the CAC but in practice, the consent of the relevant authority must also be obtained before CAC can grant consent. That is, although CAMA provides that the consent of CAC is what is required, in practice, CAC usually requires evidence of the initial consent. For instance, if I want to register “Nsukka Global Ltd”;

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[6] (1976) 1 FWLR 7, SC 73
[7] (1961) ALL NLR 171
[8] (1997) 3 NWLR (Pt. 491) 99
[9] (1952) 14 WACA 197

before CAC would grant consent, I must first show evidence of consent to use the name Nsukka from Nsukka Local Government in Enugu State. The restricted names are:

1. **Federal, National, Regional, State, Government:** Names that contain the words Federal, National, Regional, State, Government or words that suggest that it enjoys patronage from the federal or state government or any ministry or department of government. See ***Section 30(2) (a) CAMA*****.**
2. **Municipal or Chartered:** Names that contain the word 'municipal' or 'chartered' or in the opinion of CAC suggests or is calculated to suggest that it enjoys connection with any municipality or local authority. See ***Section 30(2) (b) CAMA***.
3. **Cooperative or Building Society:** Names that contain the word 'cooperative' or 'building society'. See ***Section 30(2) (c) CAMA*****.**
4. **Group or Holding:** Names that contain the word "group" or "holding". See ***Section 30(2) (d) CAMA***.

IV. Procedure after Discovering Contravention

The rules on corporate names are so strict that even if a name was inadvertently registered in contravention of CAMA, then by ***Section 31(1) & (4) CAMA***, the owner of the new contravening name would have the option of either to:

1. Voluntarily drop the name, or
2. Would be forced to compulsorily change the name, either by the directive of CAC acting *suo motu* or upon a petition by the aggrieved original owner of the name. Under ***Section 31(1) CAMA***, the time limit within which CAC can compel a company to change its name is 6 months from the date the offending name was registered. After the 6 months period, the only remedy is through a common law action under the economic tort of Passing-Off.
3. Institute an action under the tort of passing off.

V. Grounds for Cancelling an Approved Name

In furtherance of ***Sections 31(1) & (4) CAMA***, there are new grounds upon which CAC can cancel the registration of an approved name. They are provided in ***Regulation 10 of the Companies Regulations 2012*** as follows:

1. **Fraud:** The CAC can cancel an approved name where the CAC has reasonable grounds to believe that the name; whether for a company, business name, or incorporated trustee, was obtained by fraud.
2. **Inadvertently or Erroneously Approved Name:** The CAC can cancel an approved name when it inadvertently or erroneously approved the name.

V. Requirements for the Registration of Companies with Names Containing the Words Group, Holding or Consortium

A. Group

Section 30(2) (d) CAMA provides that a company shall not be registered with any name bearing the word Group unless with the consent of CAC. ***Regulation 20 of the Companies Regulations 2012*** provides the requirements for the consent of the CAC to use the word "group" in the name of a company. They are:

1. Formal application for consent
2. Evidence of not less than 3 associate companies to form the "Group" company
3. Evidence of common membership of the associate companies
4. Resolutions of the associate companies consenting to the "Group" Relationship
5. Statement by majority of the directors of the proposed "Group" company that the share capital of the company shall not be less than the highest share capital amongst the associate companies.
6. Updated annual returns of associate companies
7. Updated section 553, CAMA filing where applicable

B. Holding

Section 30(2) (d) CAMA provides that a company shall not be registered with any name bearing the word Holding unless with the consent of CAC. ***Regulation 21 of the Companies Regulations 2012*** provides the requirements for the consent of the CAC to use the word "holding" in the name of a company. They are:

1. Formal application for consent
2. Evidence of not less than 2 subsidiary companies
3. Statement by majority of the directors of the proposed "Holding" company that the company shall acquire more than half in the nominal value of the share capital of each of the subsidiaries within 90 days of its incorporation
4. Updated annual returns of subsidiary companies
5. Updated section 553, CAMA filing by subsidiary companies where applicable

Section 567 CAMA defines a holding company in terms of Section 338(1). Therefore, where a company is a member of another company and controls the composition of the Board of Directors of that other company or holds more than half in nominal value of the equity share capital of that other company (that is, at least 51%), then the first mentioned company is deemed to be a holding company, while that other company is deemed to be its subsidiary. In this regards, ***Section 338(5) (a) CAMA*** provides that a company shall be deemed to be the Holding Company of another, if that other is its subsidiary. Section 567 CAMA also defines a subsidiary company in terms of section 338(1) CAMA. Therefore, a company shall be said to be a subsidiary company when another company is a member of it and controls the composition of its board of directors or holds more than half in nominal value of its equity share capital

C. Consortium

Regulation 22 of the Companies Regulations provides the requirements for the consent of the CAC to use the word "consortium" in the name of a company. They include:

1. Formal application for consent
2. Evidence of not less than 3 companies forming the consortium
3. Evidence of registration in home country in case of a foreign company
4. Resolutions of each company in the consortium consenting to the arrangement and stating the object of the consortium
5. Statutory declaration to wind up the consortium in accordance with the provisions of CAMA upon completion of the object of the consortium
6. Statement of the object of the consortium in the memorandum of association of the consortium
7. Inclusion of a clause to wind up the consortium in the articles of association of the consortium
8. Updated section 553, CAMA filing by companies forming the consortium where applicable

A consortium is the name given to the kind of company formed when a group of companies come together in an enterprise for the purpose of undertaking a given project; such that upon the completion of that project, the company would be wound up. It is like a venture partnership except that it enjoys incorporated status.

D. Financial Holding Company (FHCo)

In addition to CAC's requirements for the use of "holding", the following are also required for financial holding companies under ***CBN Regulations on Financial Holding Companies 2014***. ***Regulation 2.1*** defines FHCo as a company whose principal object includes the business of a holding company set up for the purpose of making and managing (for its own account) equity investment in two or more companies, being its subsidiaries, engaged in the provision of financial services, one of which must be a bank. The requirements are:

1. The FHCo shall be a body corporate registered with CAC as a company and licenced by the CBN. ***Regulation 2.2.1 CBN Regulations on Financial Holding Companies 2014*.**
2. The size of its board of directors must be between 7-12 members. See ***Regulation 2.3.1 CBN Regulations on Financial Holding Companies 2014*.**
3. It must have at least two subsidiaries, one of which must be a bank
4. The focus of its business must be the provision of financial services
5. The FHCo is permitted to have only two hierarchies namely, the parent and intermediate financial holding companies. See ***Regulation 2.3.3 CBN Regulations on Financial Holding Companies 2014*.**

In all the above, whether group, holding, consortium or FHCo, a formal application letter for consent is written to the CAC and the other requirements are attached to it.

SAMPLE DRAFT OF FORMAL APPLICATION FOR CONSENT

N. E. KILLI AND ASSOCIATES
Legal Practitioners, Solicitors and Chartered Arbitrators
No 3 AdeyemoAlakija Street, Victoria Island Lagos
Web: *www.nekilli.com* - Phone: 07064793812
Email: *Knachwat2020@yahoo.com*

Our Ref:_____ Your Ref:_____
December 4, 2014

The Registrar-General,
Corporate Affairs Commission,
Abuja.

Dear Sir/Madam,

APPLICATION TO CONSENT TO REGISTER "ABC GROUP LTD"
PURSUANT TO SECTION 30(2) (d) OF THE COMPANIES AND ALLIED MATTERS ACT AND REGULATION 20 OF THE COMPANIES REGULATIONS, 2012

Kindly refer to the above subject-matter.
We are Solicitors to A Ltd, B Ltd and C Ltd, (Our clients). Pursuant to the instructions of our clients, we apply, on their behalf, for the consent of the Corporate Affairs Commission to register ABC Group Ltd.
We have attached, for your kind consideration and approval, the following documents to this formal application for consent:

1. Copies of the Certificates of Incorporation of A Ltd, B Ltd and C Ltd as evidence of the three (3) associate companies to form the "Group" company
2. Copies of the Statements of Authorised Share Capital and Return of Allotment Forms of A Ltd, B Ltd and C Ltd as evidence of common membership of the associate companies
3. Copies of the resolutions passed by A Ltd, B Ltd and C Ltd consenting to the formation of ABC Group Ltd
4. A copy of a statement by all (or a majority) of the first directors of the proposed ABC Group Ltd that the share capital of the company shall not be less than the highest share capital amongst the associate companies
5. Updated annual returns of A Ltd, B Ltd and C Ltd
6. Updated section 553, CAMA filing where applicable

We undertake to pay the necessary fees.
Thank you.

Yours faithfully,

_____

N. E. Killi, Esq.
Principal Partner
For: N. E. Killi & Associates

NOTE: If the letter above is for a holding company, then in the heading, it changes to regulation 21 and the documents to be attached would be those listed in regulation 21. If the letter is for a consortium company, then the heading becomes: "application for consent to register ABC Consortium pursuant to Regulation 22 of the Companies Regulations 2012" and the particulars would be as listed in Regulation 22.

(Week 5)

CHOICE OF BUSINESS ORGANISATION AND NON-BUSINESS ORGANISATION AND FORMATION (II) - BUSINESS NAME, INCORPORATED TRUSTEES AND PARTNERSHIP

BUSINESS NAME

I. Concept

Companies are not the only business organisation in Nigeria. There are others like sole proprietorship and partnership, which are covered as business names under CAMA. Business name is covered in part B of the CAMA. ***Section 570 CAMA*** provides for establishment of the office of the Registrar of Business Names in every state of the federation.

Section 588(1) CAMA defines a business name as the name or style under which any business is carried on, whether in partnership or otherwise. Sole proprietorships and partnerships can be registered as business names. Therefore individuals, partnerships and companies can register business names.

Business name is the most convenient form of doing business by a sole proprietor or partnership in a more recognisable form. Thus, the essence for registering a business name is to secure the name style.

II. Reasons for the Suitability of Business Names

1. Simplicity in registration
2. Cheaper to register as there is no need to pay stamp duties
3. Easy management
4. It shows the true identity of those behind its formation
5. Less formality in administration
6. Easy dissolution by agreement or operation of the law.
7. Enjoys registered business name except in litigation where the proprietors are sued in their own name but described as "trading under the name and style of"
8. The registered business name is protected from parallel registration of the name either as corporate name, business name or trademark
9. Although the registration of a business name with other person is not proof of a partnership, it raises a rebuttable presumption of the existence of a partnership.
10. There is no procedural requirement for dissolution of business registered as business names. ***Section 578 CAMA*** only provides for notice to be given to registrar for removal of any firm, company or individual registered under Part B which has cease to carry on business or if individual in sole proprietorship is dead.

III. Prohibited and Restricted Business Names

A. Restricted Business Names

The restricted names are provided for under ***Section 579(1) CAMA***. By that provision, where the Registrar is of the opinion that the registration of any of the under listed names would likely mislead the public, then the Registrar shall, unless the consent of the CAC has been obtained, refuse to register the business name or cancel the registration thereof. Those names include:

1. **Federal, National, State, Municipal, Government:** Any name which contains the words national, government, municipal, state, federal or any other word which suggests that the business enjoys the patronage of the federal, state or local government
2. **Cooperative:** Any name which contains the word "co-operative" or its equivalent in any language or any abbreviation thereof

3. **Chamber of Commerce, Building Society, Guarantee, Trustee, Investment, Bank, Insurance:** Any name which contains the words "chambers of commerce", building society, guarantee, trustee, investment, bank, insurance or any word of similar connotation
4. **Identical or Similar to Existing Name:** Any name which is identical with or similar to any name by which a firm , company, or individual is registered in Nigeria under CAMA
5. **Similar to Trademark:** Any name which is similar to any trademark.

See ***Section 579(1) (a)-(e) CAMA***

B. Prohibited Business Names

The prohibited names are provided for under ***Section 579(2) CAMA***. By that provision, the Registrar of business names shall refuse to register or cancel the registration of any business name which:

1. **Misleading as to Nationality, Race or Religion:** Contains any word which in the opinion of the Registrar is likely to mislead the public as to the nationality, race or religion of the persons by whom the business is wholly or mainly owned or controlled; or
2. **Deceptive and Objectionable:** Which is, in the Registrar's opinion, deceptive or objectionable in that it contains a reference, direct or otherwise, to any personage, practise or institution, or is otherwise unsuitable for use as a business name.

C. Appeal to the CAC

However, any person aggrieved by the refusal of the Registrar to register such a name under ***Section 579(2) CAMA*** may, within one month of such refusal or cancellation, appeal to the CAC.

IV. Mandatory and Non-Mandatory Registration of Business Name

A. Mandatory Registration

Pursuant to ***Section 573(1) CAMA***, a business name shall and must be registered under Part B of CAMA if:

1. **Firm:** In the case of a firm, the name does not consist of the true surnames of all partners without any addition other than the true forenames of the individual partners or the initials of such names - ***Section 573(1) (a) CAMA*****.**
2. **Individual:** In the case of an individual, the name does not consist of his true surname without any addition other than his true forenames or the initials thereof - ***Section 573(1) (b) CAMA*****.**
3. **Corporation:** In the case of a corporation, whether or not registered under CAMA, the name does not consist of its corporate name without any addition - ***Section 573(1) (c) CAMA*****.**

B. Non-Mandatory Registration

However, by ***Section 573(2) CAMA***, the registration of a business name will not be mandatory where:

1. **Business carried on in Succession to a Former Owner:** The addition merely indicates that the business is carried on in succession to a former owner of the business. In that case, the addition shall not, of itself, render registration mandatory. See ***Section 573(2) (a) CAMA***.
2. **Addition of "S" to Same Sur-Name by Two or More Partners:** Where two or more individual partners have the same surname, the addition of an "S" to that surname shall not render registration mandatory. For instance, if a partnership between "NANCWAT KILLI" and "DINDAM KILLI" is named "KILLIS", registration is not mandatory. See ***Section 573(2) (b) CAMA*****.**
3. **Business carried on by a Receiver or Manager appointed by the Court:** if the business is carried on by a receiver or manager appointed by any court, registration shall not be mandatory. For instance, KILLI & ADAMU (In Receivership); KILLI & ADAMU (Under New Management)

Therefore, from the provisions of ***Section 573(2) CAMA***, the instances where it will not be mandatory to register a business name are:

1. **Firm:** In the case of a firm, the name consists of the true surnames of all the partners without any addition other than the true forenames of the individual partners or the initials of such forenames. Example: KILLI & ADAMU; NANCWAT KILLI & JOEL ADAMU; N. KILLI & J. ADAMU.
2. **Individual:** In the case of an individual, the name consists only of his true surname without any addition other than his true forenames or the initials thereof. Example: KILLI; NANCWAT KILLI; N. KILLI; KILLI N.
3. **Corporation:** In the case of a corporation, whether or not registered under CAMA, the name consists of its corporate name without any addition. For instance, a business run by Killi Nigeria Ltd must be named "Killi Nigeria Ltd". The use of anything other than this name will require registration.

IV. Who Can Register a Business Name?

Sole proprietors (individual – that is, every person), partnerships and companies can register business names. However, note the following:

1. **Infants:** an infant can register a business name. However, by ***Section 574(6) CAMA***, where an individual, who is a minor, or a firm of which one of the partners is a minor intends to register a business name, the signature of such a minor on the Statement in the prescribed form shall be countersigned by a Magistrate, Legal Practitioner or Police officer of or above the rank of ASP. See ***Section 574(6) CAMA***. By ***Regulation 55 of the Companies Regulations 2012***, where a Magistrate, Legal Practitioner or Police officer of or above the rank of ASP counter-signs a minor's signature, such person shall state his full name, address and phone number.
2. **Fraudulent Persons**: these persons are absolutely barred or estopped from registering or joining to register a business name. In this regard, ***Section 579(4) CAMA*** provides that where the Register has irrefutable evidence to the effect that an individual, firm or company that has previously been involved in fraudulent trade malpractices, either in local or international trade, is submitting an application for the registration of a new business name, the Registrar shall refuse to register such a business.

V. Time for the Registration of a Business Name

Section 574(1) CAMA makes it mandatory for every firm, individual or corporation required to be registered under Part B, to be registered within Twenty-Eight (28) days from the date of the commencement of the business for which registration is required. The conditions for registration of business names are:

1. The business organisation involved must be carrying on business in Nigeria under a business name,
2. Have a place of business in Nigeria – ***Section 573 CAMA***.

VI. Procedure for the Registration of Business Names

1. Apply for availability check and reservation of the proposed business name using Form CAC 1.
2. Before the commencement of the business or within 28 days after the commencement of the business, the firm, individual or corporation shall deliver a statement in writing in the prescribed form, called "Application for the registration of a business name (Form CAC/BN/1) to the Registrar in the State in which the principal place of business of the proposed business name is located. The application must be duly signed and must contain the following particulars:
   (a) The business name or names, if it is carried on under two or more names
   (b) The general nature of the business
   (c) The full postal address of the principal place of business

(d) The full postal address of any other places of business (branches), if any
(e) The date (or proposed date) of commencement of the business

Where the registration is that of a firm, then:

(a) The names of the partner, present and former names and their surnames, and their Passport Photographs
(b) Nationality of origin of each partner and any other nationality
(c) The age and sex of each partner
(d) The usual place of residence of each partner
(e) Other occupations of each partner

Where the registration is that of an individual, then:

(a) The name of the individual, including present and former names and surnames,
(b) Passport Photographs
(c) Nationality of origin of the individual and any other nationality
(d) The age and sex of the individual
(e) The usual place of residence of the individual
(f) Other occupations of the individual

Where the registration is for a business carried on by a company, then:

(a) The corporate name of the company
(b) The registered address of the company
(c) The Company's RC Number and Impression of the Common seal

It must be noted that ***Section 574(1) CAMA*** requires that the application must be duly signed as required. In this regard, ***Section 574(5) CAMA*** provides that:

(a) If the application is furnished by an individual, it must be signed by him
(b) If the application is furnished by a firm, it must be signed by each individual who is a partner, and by the director or the secretary of each corporation which is a partner
(c) If the application is furnished by a company, it must be signed by a director or the secretary of the company.

NB: note the caveat and procedure to be followed when a minor is to sign the application form. See ***Section 574(6) CAMA***.

VII. Documents to be submitted at the CAC for the Registration of Business Name

The documents to be submitted at the CAC for the registration of a business name are listed under ***Regulation 54 of Companies Registration 2012*** as follows:

1. Search and availability of name – CAC Form 1
2. Duly completed and signed application for the registration of a business name – Form CAC/BN/1
3. Two passport- sized photographs for individuals & firm, and in the case of a corporate body, a copy of the Certificate of Incorporation and CTC of the resolution authorising the formation of the business name.
4. Updated annual return in the case of a corporate body
5. Payment of filing fees
6. Payment of fees for certified true copy of certificate for display at each disclosed branch office.

VIII. Particulars of Instructions to Obtain For the Registration of a Business Name

1. Proposed name of the business, both preferred and alternate name
2. Nature of the business
3. Address of its principal place of business and branches if any
4. Proprietors, whether individuals, firms or corporate bodies
5. Proficiency, if applicable
6. Passport photographs of the proprietors.
7. Date of commencement

IX. Documents to be given back to the Proprietors after Registration

After the registration of the business name, the following documents would be given back to the proprietors by the CAC:

1. Original Certificate of registration of the business name
2. CTC of the Application for the Registration of the business name

X. Effect of Registration

It appraises the public of the true identity of the owner – ***Domingo v Queen.***[10]

XI. Entry and Removal of Business Name from the Register

A. Entry of Business Name in the Register

When the Registrar receives the application for registration with the required particulars, he will enter in the register the business name of the individual, company or firm, and will issue a certificate containing the business name – ***Section 575 CAMA*****.** The business name includes the identification letters of the state where it was registered, which shall be in brackets at the end of the business name.

B. Removal of Business Name from the Register

If any firm, company or individual registered ceases to carry business, it shall be the duty of the partner or of the individual or his personal representative, to notify CAC within three months after the business has ceased, stating that the firm or individual has ceased to carryon business – ***Section 578 CAMA*****.** Where the Registrar receives such a notice of cessation of business, he may remove the registered name of the firm, company or individual from the register.

Where the Registrar has reasonable cause to believe that any firm, company or individual registered is not carrying on business, he may send a notice informing the firm, company or individual that the registered name may be removed from the register, unless an answer is received within two months from the date. If the Registrar either receives an answer from the firm, company or individual to the effect that the firm, company or individual is not carrying on business or does not within two months from the date of the notice receive an answer, he may remove the firm, company or individual from the register.

PARTNERSHIP

I. Concept

A partnership is a voluntary association of two or more persons who jointly own and carry on a business for profit. A partnership is presumed to exist if the persons agree to share proportionally in the business's capital, profit and losses. A partnership lacks legal personality and the partners are personally liable for all the debts and liabilities of the partnership, without limitation, except if it is a limited partnership or limited liability partnership in Lagos.

II. Membership

By ***Section 19(1) CAMA***, a partnership cannot consist of more than 20 persons. Once a partnership has more than 20 partners, it must be registered as company under CAMA or else it remains unlawful. See ***Akiloshe v. AIT***. The exceptions to this rule above are:

1. **Partnership Formed in Pursuance of any Enactment:** Where such an association or partnership is formed in pursuance of any other enactment in force in Nigeria. See ***Section 19(1) CAMA***
2. **Cooperative Society:** Where such an association is a co-operative society registered under the provisions of any enactment in Nigeria. See ***Section 19(2)(a) CAMA***
3. **Law Firm:** Where the partnership is a law firm. That is, where it is for the purpose of carrying on the practice of law by persons, each of whom is a legal practitioner. That is, each of the partners must be legal practitioners. See ***Section 19(2)(b)(i) CAMA***

[10] (1963) 1 All NLR

4. **Accountants:** Where such partnership is for the purpose of practicing as accountants by persons, each of whom is entitled by law to practise as an account. See ***Section 19(2)(b)(ii) CAMA***

III. Regulatory Law

Outside the provisions above, Partnerships are not governed by CAMA. They are governed by the provisions of the Partnership agreement (Deed of Partnership) and other relevant Partnership laws. A partnership will be governed, to an extent, by CAMA only if it is registered as a business name under Part B of CAMA.

The point has been made that it is not mandatory to register a partnership as a business name under CAMA. Consequently, except for the regulations affecting the partnership on account of its registration as a business by CAC under CAMA, the operations of a partnership are not governed by CAMA.

In practice, however, it is difficult to operate a partnership without its registration under CAMA as a business name. The practical challenges that accompany the carrying on of a partnership without its due registration are:

1. Difficulty in opening or operating a current account
2. Difficulty in undertaking commercial transactions that require certain corporate documentation
3. Loss of priority if someone else registers or reserves the partnership name first; particularly if the partnership has gained popularity, clients and goodwill
4. Uncertainty of tax liability
5. Uncertainty of the terms of the partnership

IV. Features of Partnership

Section 3(1) of Partnership Law of Lagos defines partnership in the following words "the relationship which subsists between persons carrying on a business in common with a view to profit". From the above definition some of the basic features of partnership can be deduced:

1. **Legal Business:** There must be a legal business which the parties have agreed to undertake. See ***Henshaw v. Roberts***; ***Section 3(1) Partnership Law Lagos***
2. **Membership:** A business between two or more persons but not more than 20 persons except co-operative society, legal practitioners and accountants.
3. **Carrying on Business in Common:** The business must be carried on in common by the partners. See ***Ugorji v Uzoukwu***; ***Section 3(1) Partnership Law Lagos***
4. **Profit Oriented:** The business must be profit-oriented and the partners agree to share the profits and losses. See ***Ugorji v. Uzoukwu***; ***Section 3(1) Partnership Law Lagos.***
5. **Agent to Other Partners:** Each partner is deemed to be an agent of the other partner(s)
6. **Less Formal Formation:** Its formation is less formal. Thus, a partnership can be formed orally, in writing, by deed, by conduct or implied by law. See ***Thomopholous v. Mandilas***
7. **Registration as a Business Name:** It could be registered as a business name, but the Partnership Deed is not a registrable instrument under CAMA or at the CAC
8. **Management:** in managing a partnership, every partner (except a limited partner) has a right to participate in the management of the partnership.
9. **Lack of Share Capital:** there is no share capital required for the registration of a partnership.
10. **Personal Liability:** the partners are personally liable for the debts and liabilities of the partnership except it is a limited liability partnership under the partnership law in Lagos.

Note that joint tenancy and co-ownership is not a partnership. It can safely be said that once an association of persons does not have the foregoing features, it is not partnership. As a general rule, acts of joint capital contribution, sharing profits and losses are prima facie evidence that a partnership exists except where it is a debt repaid, where a servant is remunerated, or where the widow/child of a deceases partner receives annuity from the business. See ***Section 4***

Partnership Law Lagos. The law can presume the existence of a partnership once the essential elements of a partnership are present.

V. Capacity to Form Partnership

Only legal persons, whether natural or artificial, of full legal age and capacity, without any form of legal disability can join in the formation of a partnership. The following persons cannot join in the formation of a partnership.

1. **Infant:** Even though an infant can join in registration of partnership under Part B of CAMA - ***Section 574(6)***, he cannot join in the formation of a partnership or in the partnership agreement as the general rule of contract. This is because under the general law of contract, he remains an infant and the partnership is not a contract for necessaries or a beneficial contract for service.
2. **Insane:** An insane person cannot join in a partnership agreement
3. **Bankrupt & Company under Liquidation:** A person that is bankrupt/a company in liquidation cannot form partnership.
4. **Unincorporated Association** – as it does not have legal personality

VI. Types of Partnership

1. General partnership
2. Limited partnership
3. Limited liability partnership
4. Venture partnership

VII. Deed of Partnership

The following are the necessary guideline for drafting articles of partnership agreement. Some key areas or terms that need modification would be indicated

1. **Name of Partnership**
2. **Parties:** this include particulars of all parties involved in the partnership
3. **General Nature of the Partnership Business**
4. **Place of Business of the Partnership and Branches, If Any**
5. **Time of Commencement:** this is very important because of the requirement of registration within 28 days from the date of commencement of business - ***Section 574(1) CAMA***
6. **Capital & Capital Contribution:** there is a presumption of equality in the absence of a contrary intention. By ***Section 25(a) Partnership Law Lagos***, all the partners are entitled to share equally in the capital of the business and must contribute equally to the capital of the business. This is the position implied by law in the absence of an express provision to the contrary. Therefore, if the partners intend otherwise, then instructions should be taken to include a clause in the deed which will provide the proportions or percentages of partners' share in the capital and their contributions thereto. It should clearly state how much each partner should contribute.
7. **Sharing of Profits and Losses:** the formula for this must be expressly stated or the law will imply equal division. By ***Section 25(a) Partnership Law Lagos***, each partner is entitled to share equally in the profits and losses of the partnership. Therefore, if the parties intend to share the profits and losses unequally, a clause should be inserted to reflect the sharing formula according to the intention of the partners.
8. **Partnership Property:** when a partner brings in any personal property, it should be expressly specified in the partnership agreement because the law presumes that every property used by the firm is bought with the partnership money and belongs to the partnership. See ***Sections 21, 22, & 23 Partnership Law Lagos*.**
9. **Remuneration of Partners:** by ***Section 25(d) Partnership Law Lagos***, the law presumes that partners are not entitled to any form of remuneration. Therefore, if the partners intend that remuneration should be paid, specific instructions must be taken to include an express clause to that effect.

10. **Suspension and Expulsion of Partners:** when a partnership agreement does not expressly provide for expulsion and suspension of any partner for gross misconduct, no partner can be expelled or suspended irrespective of his conduct. If any partner is expelled or suspended, it determines/terminates the partnership. See ***Section 26 Partnership Law Lagos*.**
11. **Admission of New Parties:** under the old law, the law presumes that when a new partner is admitted, the partnership is dissolved hence a new partnership is being formed. Thus, if the partners intend to admit new partners without dissolving the partnership, a clause to that effect must be expressly provided for. See ***Section 25(g) Partnership Law Lagos*.**
12. **Duration:** the duration of a partnership is temporary unlike a company incorporated under Part A CAMA which enjoys perpetuity. A partnership can only live as long as the partners. Thus, there is a need to specify the duration of partnership failure of which it terminates at will. Sustenance of duration of partnership through admission of new members.
13. **Dispute Resolution:** there should be a clause which provides for means of resolution of dispute between the partners. It can be submission to an arbitrator, conciliator or mediator.
14. **Retirement:** the retirement of a partner determines the partnership. See ***Section 27(1) Partnership Law Lagos***. To avoid this, express provisions to the contrary must be provided for in the partnership deed.
15. **Powers and Duties of the Partners:** the powers and duties of the partners must be stated.

VIII. Implied Terms in Partnership Relationship

The implied terms in partnership relationship where the deed of partnership is silent are:

1. Equal capital contribution
2. Equal sharing of profits and losses
3. Effect of death, bankruptcy, suspension, expulsion or retirement of a partner is that it determines the partnership
4. Partners are not entitled to remuneration
5. The duration is partnership at will
6. Equal right to participate in the management
7. Partnership property must be applied exclusively for the purpose of the partnership

In the absence of specific provisions to the contrary of the above in the partnership agreement, they would be implied into the agreement by common law. To modify or exclude their implications, the solicitor must receive specific instructions on them to modify their implications.

IX. Features of Sole Proprietorship

1. Unlimited liability
2. It is a one man business
3. It has no perpetual succession
4. Requires less formality in formation
5. Only the owner has legal capacity to sue and be sued and not the business name

INCORPORATED TRUSTEE(S)

I. Concept

Incorporated trustee is a non-business organisation and it is quite all embracing. It is covered in Part C CAMA - ***Section 590 to 612***. Incorporated trustee involves any community of person bound together by custom, religion, kinship or nationality or anybody or association of person established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose. For the purpose of incorporation under Part C, such community or body or association would appoint one or more trustees to apply to the CAC to be registered as a corporate body – ***Section 590(1) CAMA***. Upon registration, the trustee(s) shall become a corporate body – ***Section 590(2) and 596 CAMA***.

1. Having perpetual succession

2. Common seal
3. Power to sue and be sued in its corporate name
4. Hold, acquire, transfer, and dispose of any property or interests.

II. Categories

1. Religious bodies
2. Clubs and social/cultural associations
3. School and foundations

III. Qualification of a Trustee

Only a person at law is qualified to be appointed a trustee. The following persons are disqualified – ***Section 592(1) CAMA***.

1. An infant is not qualified to be appointed as trustee
2. A person of unsound mind who had been found to be so by the court
3. An undischarged bankrupt
4. A person convicted of an offence involving fraud and dishonesty within five years of his proposed appointment.

IV. Essential Features and Suitability of Incorporated Trustees

1. **Corporate Personality:** ***Section 590(2) and 596 CAMA*** is express and clear when they provide that only the trustee or trustees have corporate personality and not the community, body or association.
2. **Name:** ***Section 591(1)(a) CAMA*** expressly provides that the proposed name must contain "incorporated trustees of"
3. **Non-Business Oriented:** Incorporated trustees is not to do business but it has capital and income/property which is not shared by the trustees but towards the promotion of its objects.
4. **Constitution:** the body uses Constitution and not Memorandum and Articles of Association. An incorporated trustee in its constitution must have the special clause on application of its income and capital and transfer of its assets on dissolution.
5. **Management:** the body is run by trustees and not directors.

V. Instruction to be Taken When Registering an Incorporated Trustee

1. Name of the proposed organisation
2. Aims and objectives of the organisation
3. Names, addresses, occupation, number and ages of trustees
4. Powers, duties and tenure of office of trustees
5. The use and custody of the common seal
6. Matters relating to its meetings
7. Procedure for disbursement of funds and accounting policies
8. Special clause (same as that in company limited by guarantee)
9. Availability of landed property
10. Publication of 28 days' notice in two newspapers calling for any objections to the registration of the organisation.
11. Address and registered office of the organisation
12. Minutes of the meeting where trustees were appointed

V. Application for Incorporation

Regulations 65 & 66 of Companies Regulations 2012

The requirements for incorporation of trustees shall include the following

1. Form of approval for name
2. Duly completed set of incorporation form – incorporated trustee application
3. Formal application for registration signed by the chairman and secretary of the body or association or the solicitor

4. Extract of the minute of general meeting appointing the trustees, listing all members present and the voting pattern.
5. Two printed copies of the constitution (an incorporated trustee is required to have a constitution – s. 593)
6. Trustee declaration form duly deposed to by each trustee in the High Court; two passport photographs of trustee(s).
7. Impression of the common seal of the association on the application form.
8. Notice of the situation of the address of the association or any change therein
9. Evidence of land ownership/undertaking in lien
10. Payment of filing fee.
11. Cuts of newspaper public notice

If the commission is satisfied that the application complies with the relevant provisions, notice of application is to be published in two national newspapers stating the following

1. Name of the association
2. Principal objects of the association
3. Full names of the proposed trustee(s)
4. Invitation to the public to object the name, object and proposed trustee(s) of the association within 28 days – ***Rule 65(4) CR***

One of the newspapers must be in circulation in the locality of the association and the other, a national newspaper – ***Rule 65(3) CR***.

A Draft of Public Notice Issued

PUBLIC NOTICE

GODLY WOMEN PROMOTION OF BREAST FEEDING

The general public is hereby notified that the above named association with the office in Plot 555 Balarabe Musa Crescent, Victoria Island, Lagos has applied to the Corporate Affairs Commission for registration under Part C of the Companies and Allied Matters Act Cap C20 LFN 2004

THE TRUSTEES ARE:

1. MRS LAASUTU JACOB
2. MRS JOYCE NCHUWAN
3. MRS AMAKA ODINAKA

AIMS AND OBJECTIVES

1. To encourage breast-feeding of babies and discourage non-breast feeding.
2. To stop every day-care facilities aiding non-breast feeding mothers

Any objection to this registration should be forwarded to the Registrar-General of Corporate Affairs Commission, Plot 565, Ndota Street, Wuse 5, Abuja within 28 days of the publication

Signed:
Killi, Nancwat Elaias
Solicitior

VI. Special Clause of Incorporated Trustees

"The income and property of the association shall be applied towards the promotion of the objectives of the body and no portion shall be paid or transferred directly or indirectly by way of dividends, bonus or otherwise however by way of profit to the members of the association". If in event of dissolution of the corporate body there remains after satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among members of that association but shall be given or transferred to some other institutions having objects similar to the objects of the association, such institutions to be determined by members of the association at or before dissolution.

VII. Content of the Constitution

1. Name or title of the association which shall not conflict with that of a company, or with a business name or trademark registered in Nigeria;
2. Aims and objectives of the association
3. Appointment, powers, duties, tenure of office and replacement of the trustee
4. Use and custody of common seal
5. Meetings of the association
6. Number of members of the governing body, if any, the procedure for the appointment and removal and their powers
7. Procedure for disbursement of the funds of the association where subscriptions and other contributions are to be collected
8. Keeping of accounts
9. Auditing of such accounts
10. Special clause – ***Section 593 CAMA***

VIII. Books

Incorporated trustee - the association whose trustees are incorporated is to keep and maintain the following books:

1. Books of account (showing income and expenditure of income, assets and liabilities of the association)
2. Minutes book
3. Register of members
4. Register of trustees

(Week 6)

PREPARATION OF DOCUMENTS FOR BUSINESS AND NON-BUSINESS ORGANIZATION AND FORMATION

PREPARATION OF DOCUMENTS FOR COMPANIES

I. Statutory Forms for Incorporation of Companies

1. Availability Check and Reservation of Name (FORM CAC 1)
2. Application for registration of a company (FORM CAC 1.1)

II. Check List of Documents for Incorporation of Companies

3. Availability Check and Reservation of Name (FORM CAC 1)
4. Application for registration of a company (FORM CAC 1.1)
5. Two copies of Memorandum and Articles of Association duly stamped.
6. Means of identification (photo page of international passport, or current drivers' license, or national ID) for subscribers to the Articles of Association.
7. Evidence of payment of stamp duties and filing fee.
8. Residence permit in case of resident foreigners.
9. Consent of the Attorney General where the company to be registered is a company limited by guarantee.
10. Any other document required by the Commission to satisfy the requirement of any law relating to the formation of a company.

III. Content & Sample of a Memorandum of Association

A. Company Limited by Shares

Regulation 18 provides that the memorandum and articles of association of a company shall be in the form provided in ***Schedule 3 to the Regulation***. ***Section 27 of CAMA*** provides for the various clauses in a memorandum of association of a company, which are as follows:

1. **Name Clause -** this is the name approved by CAC. E.g. LEIZOU NIG LIMITED
2. **Registered Office -** the registered office must be situated in Nigeria e.g. the registered office of the company is situate in Nigeria (add only IN NIGERIA because if specific address is given and the company move to another address also within Nigeria, there would be need to amend the memo and there are procedure for amending the memo) specific address can be given in CAC Form 1.1.
3. **Object Clause -** this covers both the object and business for which the company is to carry out (in case of company limited by guarantee, there is addition). There is usually the main object, ancillary object and omnibus object.
4. **Status Clause –** this provides for the type of company, whether public or private.
5. **Liability Clause -** it determines the liability of the members of the company. Note that the liability of a company can never be limited but only that of its members. Liability can be as to shares or guarantee or unlimited.
6. **Share Capital Clause** - the share capital for private company limited by shares is at least ₦10, 000 and that of public company is at least ₦500, 000. Example "the authorised share capital is ₦100, 000 divided into 100,000 ordinary shares at ₦1 each". Where there is both preferential and ordinary shares, the draft should reflect that.
7. **Association and Subscription Clause -** this is the association clause and subscription clause. The association clause contains declaration by the subscribers of which must be at least two.
8. **Subscription Box** - The subscription box shows the name and addresses of subscribers; the description of subscribers; the unit of shares taken by each; and their signature.

9. Attestation Clause - since memorandum is signed as a deed, it must be witnessed to accordingly. Hence the provision for attestation. Professionals engaged in formation of the company or some other reputable person can attest.

FEDERAL REPUBLIC OF NIGERIA
COMPANIES AND ALLIED MATTERS ACT CAP C20 LFN 2004
COMPANY LIMITED BY SHARES
MEMORANDUM OF ASSOCIATION OF SKY INSURANCE LIMITED

1. The name of the company is Sky Insurance Limited
2. The registered office of the company is situate in Nigeria
3. The objects for which the company is established are:
   a. to carry on the business of life and non-life insurance,
   b. marine insurance, and
   c. motor vehicle insurance.
   d. To do all such other things as may be considered incidental or conductive to attainment of the above objects or any of them.
4. The company is a private company
5. The liability of the members is limited by shares
6. The nominal share capital of the company is ₦100, 000,000 (One hundred million naira) divided into 100,000,000 ordinary shares of ₦1 each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of the memorandum of association and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

	Names and Addresses of Subscribers	Description of Subscribers	Number of Shares taken by Each Subscriber	Signature of Subscribers
1	Akintunde Pepple of No. 10, Akpan Street Diobu, Edo State.	Business man	50 Million ordinary Shares	
2	Akpata Pepple of No. 10, Akpan Street Diobu, Edo state.	Teacher	20 million ordinary shares	
3	Grace Pepple of No. 10, Akpan Street Diobu, Edo state.	Business woman	20 million ordinary shares	
4	Steve Pepple of No. 10, Akpan Street Diobu, Edo State.	Student	10 million ordinary shares	
	Total Shares Taken		100 million ordinary shares	

DATED THIS 21st DAY OF JANUARY, 2018

WITNESS TO THE ABOVE SIGNATURES:
NAME: Chief Emoefe
ADDRESS: Plot 222, AlausaIkeja
OCCUPATION: Legal practitioner
SIGNATURE:

B. Company Limited by Guarantee

1. Name clause
2. Registered office clause
3. Objects clause
4. Status clause
5. Liability clause
6. Special clause
7. Guarantee clause
8. Association and subscription clause
9. Subscription Box
10. Attestation clause

FEDERAL REPUBLIC OF NIGERIA
COMPANIES AND ALLIED MATTERS ACT CAP C20 LFN 2004
COMPANY LIMITED BY GUARANTEE
MEMORANDUM OF ASSOCIATION OF MAGERAD CHARITY (LIMITED BY GUARANTEE)

1. The name of the company is Magerad Charity (Limited by guarantee)
2. The registered office of the company is situate in Nigeria.
3. The object for which the company is established is to build motherless babies home across Nigeria.
4. The company is a private company
5. The liability of the members is limited by guarantee
6. The income and property of the company shall be applied solely towards the promotion of its objects and that no portion thereof shall be paid or transferred directly or indirectly to the members of the company except as permitted by the Act. However nothing herein shall prevent the payment in good faith of remuneration to any servant of the company or to any other person for services actually rendered.
7. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year afterwards for payment of the debts and liabilities of the company before he ceases to be a member and the cost, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, Such amount as may be required not exceeding ₦2,000 so however that the total amount to be so contributed by all the members shall not be less than ₦10,000.
8. If upon the winding up or dissolution of the company, there remains after the satisfaction of all its debts and liabilities any property of the company, the same shall not be paid or distributed among the members of the company, but shall be transferred among some other companies having objects similar to the objects of the company and such other company shall be determined by the members prior to the dissolution of the company.

We, the several persons whose names and addresses are subscribed hereunder are desirous of being formed into a company limited by guarantee in pursuance of this memorandum of association

	Names and Addresses of Subscribers	Description of Subscribers	Signature of Subscribers
1	Justice Aloa of No 34 Adekunle Street, Enugu, Enugu State	Schoolmaster	

2	Bello Uno of No 12 Agbani Close, Enugu, Enugu State	Schoolmaster	
3	Peter Akpan of No 139B Mission Road, Nkanu West, Enugu State	Schoolmaster	
4	Lanre Paul of No 130A Mission Road, Nkanu West, Enugu State	Schoolmaster	
5	Ogunlanre Ademoju of No 13 Ebele Road, Enugu, Enugu State	Schoolmaster	
6	Amina Momoh of No 18 Ebele Road, Enugu, Enugu State	Schoolmaster	

DATED THIS 21st DAY OF December, 2018

WITNESS TO THE ABOVE SIGNATURES
NAME: Chief Emoefe
ADDRESS: Plot 222, Alausa Ikeja, Lagos State
OCCUPATION: Legal practitioner
SIGNATURE:

C. Unlimited Company

1. Name clause
2. Registered office clause
3. Object clause
4. Status clause
5. Liability clause
6. Share capital clause
7. Association and subscription clause
8. Attestation clause

FEDERAL REPUBLIC OF NIGERIA
COMPANIES AND ALLIED MATTERS ACT CAP C20 LFN 2004
UNLIMITED COMPANY
MEMORANDUM OF ASSOCIATION OF MAGERAD CHARITY (UNLIMITED)

1. The name of the company is "The Patent Stereotype Unlimited".
2. The registered office of the company will be situated in Nigeria.
3. The business for which the company is established is the working of a patent method of founding and casting stereotype plates of which method John Smith is the sole patentee.
4. The company is a private company.
5. The liability of the company is unlimited.
6. The share capital of the company is ₦1, 000,000 (one million naira) divided into 10,000 shares of ₦100 each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set against our respective names.

	Names and Addresses of Subscribers	Description of Subscribers	Number of Shares taken by Each Subscriber	Signature of Subscribers

1	Justice Aloa of No 34 Adekunle Street, Enugu, Enugu State	Businessman	2,000	
2	Bello Uno of No 12 Agbani Close, Enugu, Enugu State	Businessman	2,000	
3	Peter Akpan of No 139B Mission Road, Nkanu West, Enugu State	Businessman	1,000	
4	Lanre Paul of No 130A Mission Road, Nkanu West, Enugu State	Businessman	1,000	
5	Ogunlanre Ademoju of No 13 Ebele Road, Enugu, Enugu State	Businessman	1,000	
6	Amina Momoh of No 18 Ebele Road, Enugu, Enugu State	Business Woman	1,000	
7	Grace Aloma of No 189 Zone C, Apo Resettlement, FCT Abuja	Business Woman	2,000	
	Total Shares taken		10,000	

DATED THIS 21st DAY OF December, 2018

WITNESS TO THE ABOVE SIGNATURES
NAME: Chief Emoefe
ADDRESS: Plot 222, Alausa Ikeja, Lagos State
OCCUPATION: Legal practitioner
SIGNATURE:

IV. Content and Sample of Articles of Association

1. Interpretation
2. Classes of shares
3. Call on shares
4. Transfer of shares
5. Restriction on transfer of shares
6. Transmission of shares
7. Forfeiture of shares
8. Prohibition of loans or financial assistance to buy shares
9. Increase of share capital
10. Reduction of share
11. Borrowing
12. Meeting
13. Notice of meetings
14. Proceedings at meetings, quorum
15. Chairman
16. Voting
17. Poll
18. Proxy
19. Written resolutions

20. Number of directors
21. Appointment of first directors and other directors
22. Casual vacancy
23. Share qualification
24. Life director
25. Vacation of office of director
26. Tenure of office
27. Removal
28. Proceedings at meetings
29. Written resolutions of directors, quorum
30. Notice of meeting of directors
31. Remuneration
32. Managing director
33. Duties of directors
34. Secretary
35. Appointment and removal, duties
36. Common seal
37. Authority to use
38. Signature of documents
39. Official seal
40. Dividends and reserve
41. Declaration of dividends and interim dividends
42. Payment of dividends
43. Capitalisation of profits
44. Accounts
45. Audit
46. Stock exchange
47. Winding up
48. Indemnity

FEDERAL REPUBLIC OF NIGERIA
COMPANIES AND ALLIED MATTERS ACT CAP C20 LFN 2004
COMPANY LIMITED BY SHARES
ARTICLES OF ASSOCIATION OF SKY INSURANCE LIMITED

(PURSUANT TO SECTION 33 AND 34 OF THE COMPANIES AND ALLIED MATTERS ACT 2004)

The form and content of the Articles of Association of this company is in accordance with:

Part I (Public Company Limited by Shares) ☐
Part II (Private Company Limited by Shares) ☒
Part IV (Unlimited Company) ☐

Respectively of Table "A" in schedule 1 of this Act, with additions, omissions or alteration as may be required in the circumstances.

	Name and Addresses of Subscribers	Description of Subscribers	Signature of Subscribers
1	Akintunde Pepple of No. 10, Akpan Street Diobu, Edo State.	Business man	

2	Akpata Pepple of No. 10, Akpan Street Diobu, Edo state.	Teacher	
3	Grace Pepple of No. 10, Akpan Street Diobu, Edo state.	Business woman	
4	Steve Pepple of No. 10, Akpan Street Diobu, Edo State.	Student	

DATED THIS 21st DAY OF December, 2018

WITNESS TO THE ABOVE SIGNATURES
NAME: Chief Emoefe
ADDRESS: Plot 222, Alausa Ikeja, Lagos State
OCCUPATION: Legal practitioner
SIGNATURE:

PREPARATION OF DOCUMENTS FOR BUSINESS NAMES

I. Statutory Forms for Registration of Business Names

1. Search and availability of name (CAC Form 1)
2. Application form (CAC/BN/1)

II. Checklist of Documents for Registration of Business Names

3. Search and availability of name (CAC Form 1)
4. Application form (CAC/BN/1)
5. Evidence of payment of filling fees
6. Qualifying certificate in case of a professional partnership
7. Two passport sized photograph of each partner
8. Photo identification of the partners

III. Contents of a Partnership Agreement

1. Parties
2. Names and style
3. Place of business
4. Nature of business
5. Commencement
6. Duration
7. Capital
8. Property and partnership
9. Profits and drawings
10. Bankers and signatories to bank
11. Salary
12. Accounts
13. Powers, rights and duties
14. Retirement
15. Expulsion and suspension
16. Dissolution
17. Arbitration

PREPARATION OF DOCUMENTS FOR INCORPORATED TRUSTEES

I. Statutory Form for Incorporated Trustees

1. Availability check and reservation of name (CAC Form 1)
2. Application form for incorporated trustees (Form CAC/IT/1)
3. Trustee declaration form

II. Checklist of Documents for Incorporated Trustees

1. Availability check and reservation of name (CAC Form 1)
2. Application form for incorporated trustees (Form CAC/IT/1)
3. Two printed copies of the constitution of the association
4. Duly signed copies of the minutes of the meeting appointing the trustees and authorising the application.
5. Duly signed minutes of meeting where special clause was adopted
6. The impression of drawing of the proposed common seal
7. The original newspaper publication
8. Formal letter of application for registration
9. Two passport photographs of each trustee
10. Evidence of land ownership/affidavit in lieu
11. Trustee declaration of non-disqualification/sworn affidavit for each trustee
12. Letter authorising the solicitor or any other person incorporating the incorporated trustees
13. Payments of the prescribed filing fee.

III. Content of Form CAC/IT/1

1. Special clause (Appendix A)
2. Aims and objectives (Enclosure A)
3. Rules and regulations governing the body (Enclosure B)
4. Statement and short description of the land held or about to be acquired by the body (Enclosure C)
5. Names, addresses and occupations of trustees (Enclosure D)
6. Proposed title of the body (Enclosure E)
7. Impression of the common seal (Enclosure F)
8. Rules for the use and custody of the common seal (Enclosure G)
9. Copy of the relevant minutes where the trustees were appointed (Enclosure H)
10. Details of current or past affiliations

IV. Content of the Constitution of Incorporated Trustees

1. Name
2. Aims and objectives
3. Common seal
4. Special clause
5. Trustees
6. Governing body
7. Meetings
8. Accounts
9. Fund

(Week 7)

PROMOTION OF COMPANIES AND PRE-INCORPORATION CONTRACT

PROMOTION OF COMPANIES

I. Concept

A company as it is known is an artificial person that is a creation of law. There are processes which must be fulfilled before a company can be said to be in existence. In other words, there are different activities involved in the formation of a company. There are persons behind these activities and such persons are known as promoters. Promotion activities are usually more evidenced when foreigner is involved in the incorporation of a Nigerian company. Under the Nigerian law, a promoter is determined by promotion activities, that is, it is only when promotion activities relating to a company can be identified before such person can be called a promoter.

II. Definition of a Promoter

Section 61 of CAMA provides that any person who undertakes to take part in forming a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose, or who with regard to a proposed or newly formed company, undertakes a part in raising capital for it, shall prima facie be deemed a promoter of the company. From the foregoing, it means that a promoter is a person involved in promotion activities for a proposed or a newly formed company - ***Garba v. Sheba Int. (Nig.) Ltd***.[11]

Thus, the necessary determination of who a promoter is, is to ask the question what did he do, if the person was involved in promotion activities, then he is a promoter. It is pertinent to note that a company can be a promoter of a proposed company. Also, a person who took no active part in the formation of a company nor raised capital for it but left others to form the company on the understanding that he would profit from the formation of the company would be a promoter. In ***Emma Silver Mining Co ltd v. Lewis*** - a lawyer who incorporated the company at CAC and in lieu of his professional fees decides to buy shares in the company is a promoter of the company. All subscribers to the memorandum and articles of association are promoters of the company. Note NOT SHAREHOLDERS BUT SUBSCRIBERS.

However, the proviso to Section 61 CAMA is to the effect that a person acting in a professional capacity for person engaged in procuring the formation of the company is not a promoter. For instance, a legal practitioner acting in his professional capacity in relation to a proposed company is not a promoter. Should the legal practitioner be a subscriber to the memorandum and articles of association, then he is a promoter. Also, a lawyer who negotiates property for the proposed company at a profit is promoter of that company - ***Twycross v. Grant***. In professional capacity for a legal practitioner would include preparation of necessary documents like memo and articles and registration of company at CAC.

It is pertinent to note that prior to incorporation of company, both investors and those running around for the incorporation of the company are promoters of the company. It should be noted that a person becomes a promoter from the very moment he begins to take part in forming a company or in setting it going.

III. Promotion Activities/Functions of Promoters

1. Discovery or development of business idea
2. Detailed investigation into the prospects of the company; whether viable or profitable
3. Raising capital for a proposed or newly formed company
4. Finding directors for a proposed company

[11] [2002] 1NWLR (Pt.748) 372.

5. Acquiring properties on behalf of a proposed company
6. Preparing prospectus for a proposed company
7. Personality shopping for the proposed company
8. Obtaining requisite permits
9. All activities towards incorporating a company, although CAMA did provide for raising funds/capital for a newly formed company.

IV. Legal Relationship between Promoter and the Company

The legal relationship which exists between a promoter and a company is neither an agency relationship nor is it a trust relationship. This is because as it relates to agency, there is no principal in existence and ordinarily, the act of an agent binds the principal, thus a promoter is not the agent of the company. In agency, the contract is between the principal and third parties. As it relates to trust relationship, a promoter is not the trustee of the company because in trusteeship, the legal title is vested in the trustee. The legal title of any property acquired by a promoter is not vested in the promoter to hold in trust for the company.

Hence, the legal relationship between the promoter and the company is FIDUCIARY RELATIONSHIP. This is because fiduciary relationship entails the concept of utmost good faith. The fiduciary relationship between the promoter and the company implies certain duties and liabilities of the promoters - ***Section 62(1) & (2) of CAMA***. Actually, it is the promoter that stands in fiduciary duty towards the company. In a fiduciary relationship, there is always a presumption that one party is superior to the other. In this case, it is the promoter.

V. Duties of a Promoter

1. **Account for Money & Properties:** a promoter has a duty to account to the company for money or properties received in the course of promotion activities - ***Garba v. Sheba Int. (Nig.) Ltd***.[12]
2. **Not to make Secret Profit:** a promoter has a duty not to make secret profit. This is based on utmost good faith underlying fiduciary relation. Any secret profit made must be returned. The rule is that the promoter should not make secret profit. They can make profit but it should not be secret. Any profit made should be disclosed to an independent Board of Directors, existing or potential members or the company at general meeting.
3. **Not to Exploit Confidential Information:** a promoter has a duty not to exploit confidential information obtained on behalf of the company in course of promotion activities for personal use.
4. **Disclose any Conflict of Interest:** a promoter has a duty to disclose any conflict of interest in his transaction with the company. As a fiduciary, once a promoter has any interest in the transaction, he should give full disclosure to the company. The law did not say promoter should not trade with the company, but only requires full disclosure.
5. **Not to Expose Company to Loss**. As a fiduciary, the promoter is expected to scrutinize every transactions on behalf of the company and ensure that there is due compliance to the law. Thus, promoters are to use diligent care and skill for transaction entered into on behalf of the company if not the good faith of such transaction may be called to question.
6. **Full Disclosure of all Relevant Facts**: a promoter has a duty to make full disclosure to the company of all relevant facts. Where the disclosure is not in full, the company can rescind the contract – ***Gluskstein v Barnes***.[13]

VI. Remedies Available to the Company upon Breach of Duty by the Promoter

1. **Recession of Contract:** this involves unscrambling the contract and return of the consideration – ***Lagunas Nitrate Co v. Lagunas Syndicate 21*****.** However, recession may not avail the company where the interest has been transferred to third parties i.e. where

[12] [2002] 1NWLR (Pt.748) 372.
[13] (1900) AC 240

restitution in intergrum – ***Re Leeds & Hanley Theatre of Varieties Ltd.***[14] Recession is available not only for actual transactions in question but also for ancillary transaction there to.

2. **Recovery of Secret Profit/Liability to Account for Profit:** the company can recover any secret profit that has been made by the promoter in the actual or ancillary transaction – ***Gluckstein v Barnes.***[15] The basis of this remedy is that it is either an action in equity on basis of constructive trust or at law as a claim for money had and received.
3. **Action for Damages:** damages may be awarded where recession is not possible. However, it was held in ***Jacobus Marler Estate Ltd v Marler,***[16]that the company must prove the market value of the property at the time the promoter bought it and at the time he sold it to the company.
4. **Action for Deceit:** deceit could only arise against a promoter for a misrepresentation inducing the company to enter into the contract. It is also worthy of note that a promoter can be liable to shareholders or subscribers in damages for fraud if the promoter is a party to a wilful false statement inducing subscription and in absence of fraud, for compensation to such subscriber if he was a party to any false statement in the prospectus.
5. **Action to Render Account:** the company can bring an action for the promoter to render account for properties and money received on behalf of the company in the course of incorporation.

VII. Liabilities of Promoters

The above duties are owed to the company and not any individual investors, also the duties are not for decoration as where there is a duty there lies liability for its breach. The following are the liabilities of promoters.

1. To compensate the company for any loss suffered by his failure to act with utmost good faith.
2. To account for any property received in the course of promotion activities.
3. To account for any money/profit received in the course of promotion activities.
4. An action for damages for exploitation of confidential information of the company, gotten during promotion activities.
5. The company can refuse to ratify (approve) any pre-incorporation contracts entered into by the promoter.
6. A promoter is liable for the loss or damages sustained by any person who subscribes for shares or debentures in the company on the faith of the untrue statements made by him in the prospectus.

It is pertinent to note that ***Section 62(4) CAMA*** provides that period of limitation does not apply to proceedings brought by the company to enforce any of its right relating to breach of fiduciary duties. However, the court can in part or whole grant relief to the promoter from liability.

VIII. Remuneration of Promoters

The position of the law generally is that a promoter is not entitled to remuneration, unless there is a clause in the articles of association which authorises the directors to pay the promoter. ***Re English and Colonial Produce Company.***[17]In the absence of such clause, a promoter is not entitled to remuneration. The rationale for this is that, since pre-incorporation contracts are not binding on, or enforceable by or against the company, it may be difficult for promoters to have

[14] (1992) 2 Ch. 809
[15] (1878) 2 App. Cas. 1218
[16] (1913) 85 LJPC 167 HL
[17] (1906) 2 CH 435 CA

an enforceable contractual remuneration for their services and indemnify for their expenses. However, the following options are open to the promoter:

1. Enter into a contract with the company as to remuneration which of course the company will have either the option of rescission or ratification in accordance with ***Section 62(3) CAMA***.
2. Enter into a contract with the investors or person instructing him on the promotion activities. This contract can be notarised by the notary public and like all other contracts, can be sued upon breach in the court.
3. Purchasing an undertaking and promote a company which he then sells the undertaking at an enhanced price.
4. Receiving commission from a vendor who sold a property to the company. However, he must disclose that to the company.
5. Given an option to subscribe for shares at a particular price within a specified period. He must disclose to the company and the company must also declare it in the prospectus.

PRE-INCORPORATION CONTRACT

I. Concept

Pre-incorporation contracts are all contracts entered on behalf of a proposed company for such company to take over the contract upon incorporation. The promoter can enter into a contract on behalf of the company or with the company in the course of promoting the company.

II. Ratification of Pre-Incorporation Contracts

A. Common Law Position

Under common law, both contract on behalf of a company prior to incorporation with intention for the company to take over the contract upon incorporation, and contract by the proposed company itself prior to incorporation was not binding on the company. Similarly, the company cannot on incorporation ratify such contract. Thus under common law, pre-incorporation contract is not binding on company and it cannot ratify such contract. This has been upheld in ***Kelner v. Baxter, Edokpolor & Co Ltd v. Sem-Edo Wire Industry Ltd***. Under common law, the only way out was NOVATION AGREEMENT, which is the company entering into the old contract as if it is a new one. It will have to be by deed as consideration is past.

B. Nigeria Position

Under CAMA by virtue of ***Section 72(1) CAMA***, pre-incorporation contract even though not automatically binding on the company can be ratified by the company – Section 72(1) provides that "any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto. See ***Societe Generale Bank (Nig) Ltd v. Societe Generale Favouriser etc***.

However, ***Section 72(2) CAMA*** is to the effect that prior to the ratification by the company, the person who purported to act on behalf of the company in absence of any agreement to the contrary shall be expressly bound by the contract. Other express agreement in this case could be an agreement made between a promoter and investors, if contract between promoters and company is not ratified, the person making the contract on behalf of the company can fall back to any other agreement, absence of which he is bound by it.

Section 62(3) CAMA is to the effect that if the company is to ratify a transaction between it and a promoter, there must be full disclosure and any of the following can ratify it on behalf of the company:

1. An independent board of directors of the company
2. All members of the company
3. By the company at a general meeting with the exclusion of the promoter(s) and his cronies.

Ratification is usually by a formal resolution which is passed by the company. The resolution must show in clear terms what was ratified.

III. Indication for Pre-Incorporation Contract

It is not in all cases or instances that pre-incorporation contract is necessary. The necessity for it is dependent on the circumstances of each particular case. However, pre-incorporation contract may be necessary in the following instances:

1. Payment of promoter's expenses and remuneration when needed
2. Joint ventures business between Nigerian(s) and alien
3. A new company incorporated to take over existing business or property to be owned or used by new company.
4. Partnership business to be converted to incorporated company
5. Shareholders' agreement/formation agreement/memorandum of understanding needed to secure respective interests of shareholders
6. Promoters/directors' service contracts is to be executed before the company is formed
7. Protection of technical/confidential information used for promotion activities is highly desired
8. Regulatory permits and other steps are preconditions before the company can be incorporated or commence business.

IV. Incidences of Pre-Incorporation Contracts

A. Types of Pre-Incorporation Contracts

1. Joint venture agreement
2. Shareholders' agreement
3. Memorandum of understanding
4. Contract for the payment of promoters' expenses.
5. Confidentiality agreement
6. Director's service agreement (appointment of managing director)
7. Technology transfer agreement
8. Managerial or consultancy agreement
9. Patents/trademarks agreement
10. Take over agreements (acquisition of business or property)
11. Contract for conversion of partnership to incorporated companies

B. Features of Pre-Incorporation Contracts

1. **Non-Bindiness on Company:** pre-incorporation contracts are not binding on the company unless it have been ratified or adopted by the company.
2. **Made Prior to Existence and Incorporation of Company:** such contracts are made prior to existence and incorporation of the company.
3. **Bendiness on the Promoter:** such contracts are binding on the promoter and not the company except in cases where a company has ratified the contract.
4. **Tripartite Relations:** there is a tripartite relationship as the contract is made by the 'promoter' with 'third parties' on behalf of the 'proposed company'.
5. **Personal Liability of Promoters:** promoters are personally answerable under pre-incorporation contracts.

V. Joint Venture Agreement

A. Concept

A Joint Venture Agreement (JVA) is a mechanism by which two or more entities can combine to do business together without the formality and commitment involved in forming a partnership or other similar entity. It affords the venturing partners with many of the benefits of partnership without many of its liabilities. The benefits of JVA are as follows:

1. Lack of permanence
2. Obligates partners to specific duties and obligations set for in the JVA.

3. Short and defined durations
4. Allowing companies to share expertise thus benefitting both parties

B. Contents/Features/Terms

1. Commencement date
2. Parties
3. Recital (background information about the parties)
4. Purpose/nature
5. Place of business
6. Obligation of parties
7. Contribution of partners
8. Distribution of profits and loss
9. Management
10. Term/duration
11. Supremacy clause
12. Confidentiality clause
13. Accounts/Bankers
14. Governing law
15. Dispute resolution
16. Dissolution

Draft of Joint Venture Agreement

JOINT VENTURE AGREEMENT

THIS JOINT VENTURE AGREEMENT (the Agreement) is made as of the 10th day of January, 2019.
BETWEEN Moyin Killi International Limited, a private limited company incorporated under the Companies and Allied Matters Act; of No. 139B Mission Road Agbani, Nkanu West Local Government Area, Enugu State (First Party) of the First Part and
Oluwatosin Bubbles Company Limited, a private limited company incorporated under the Companies and Allied Matters Act, of No. 28 Clinton Avenue Agbani, Nkanu West Local Government Area, Enugu State (Second Party and collectively called, the "Parties") of the Other Part.

WHEREAS the First Party is engaged in the business of production of leather skins and hides and the second party is engaged in the business of buying and selling of shoes.

WHEREAS the parties wish to join together in a joint venture for the purpose of formation of company limited by shares with an objective of production of shoes.

NOW THEREFORE BE IT RESOLVED, in consideration of the mutual covenants, promises, warranties and other good and valuable consideration set forth, the parties agree as follows:

Place of Business
The joint venture business shall be carried on at No. 34 Oduduwa Street, Agbani, Nkanu West Local Government, Enugu State or at such other place or places as the partners may from time to time agree upon.

Duration of Venture
The duration of the joint venture shall be 10 years from the 10th day of January, 2019 to 9th day of January, 2029 but subject to prior determination as provided in this agreement.

Name of Business
The firm's name shall be Prolific Shoes Company Limited, which shall be registered pursuant to the Companies and Allied Matters Act, 1990.

Bankers
1. The bankers of the joint venture shall be Guarantee Trust Bank Limited or such other bankers as may from time to time be agreed upon by the partners. All moneys of the Joint venture (other than moneys from petty expenses) shall be paid to and kept deposited with the said bankers.
2. Each partner shall have power to draw Cheques in the name of the firm.

Capital Contribution
The capital of the joint venture shall be a sum of Fifty Million Naira (N50, 000,000 Naira) to be contributed by the partners in equal shares immediately after the date of this agreement.

Profit Sharing
The partners shall be entitled to the net profits arising from the business in equal shares and such net profits shall be divided among the partners immediately after the settlement of the annual accounts.

Account Book/Accountability
1. Proper and usual books of account shall be kept and maintained at the place of business of the Joint venture and shall be open to inspection by either partner or their agent.
2. On the 31st day of December, 2019 and on the same day in each succeeding year, an account shall be taken of all assets and liabilities of the Joint venture and a balance sheet and profit and loss account shall be prepared and be signed by each partner who shall be bound thereby unless some manifest error are found within three (3) months in which case the error shall be rectified.
3. Each partner may draw out of the Joint venture profit the sum of N100, 000 (Hundred thousand naira only) every month on account of his share of profits, but if when the annual account is taken, either partner shall have drawn any sum in excess of his share of the profits he shall forthwith repay such excess to the said joint venture account.

Commitment of Parties to the Joint Venture
Each partner shall devote his whole time and attention to the business of joint venture and shall use his utmost endeavours to further the interest of the Joint venture business.

Restrictions
Neither partner shall without the written consent of the other:
1. Engage in or be concerned or interested either directly or indirectly in any business, other than that of the joint venture.
2. Enter into any bond or become bail or surety for any person or knowingly cause or
3. Suffer to be done anything whereby the Joint venture property may be taken in execution or otherwise endangered.
4. Assign mortgage or charge his share in the asset or profits of the Joint venture.
5. Compromise compound release or discharge any debt due to the Joint venture except upon payment in full.
6. Contract any Joint venture debt exceeding the sum of N1, 000, 000 in respect of any one transaction.
7. Take, engage or dismiss any agent or servant of the firm.
8. Introduce or attempt to introduce any other person into the business of the Joint venture.

Breach of Contract
If either partner shall commit any breach of the terms of this agreement, the other partner shall be at liberty within three months from becoming aware of such breach by notice in writing to the offending partner forth with to determine the joint venture.

Determination and Dissolution
Either party shall be at liberty to determine the joint venture by giving to the other not less than (three) calendar months' notice in writing of his intention provided always that the joint venture shall not in this manner be determined within two years from the date of commencement.
Upon the dissolution of the joint venture by the death of a partner or by either partner giving notice to determine in the manner herein before specified, the other partner shall be entitled to purchase the same of the partner so dying or giving notice provided that written notice of intention to purchase shall be given to the retiring partner or to the personal representatives of the deceased partner within two calendar months after the date of dissolution.

Dispute Resolution
All disputes between the partners in relation to any matter whatsoever touching the joint venture affairs or the construction of this agreement and whether before or after the determining of the joint venture shall be referred to a single arbitrator in accordance with the provisions of the Arbitration and Conciliation Act .Cap. A8 LFN 2004.

IN WITNESS OF WHICH THE PARTIES HAVE EXECUTED THIS AGREEMENT THE DAY AND YEAR FIRST ABOVE MENTIONED.

The common seal of the First Party, Moyin Killi International Ltd. was affixed to this agreement in the presence of:

…… ……..
Director Secretary

The common seal of the Second Party, Oluwatosin Bubbles Company Ltd. was affixed to this agreement in the presence of:

…… ……..
Director Secretary

VI. Shareholders Agreement

A. Concept

This is an agreement that structures the relationship between the shareholders of a company. It describes how the company should be operated and the shareholders rights and obligations. It makes sure that the shareholders are treated fairly and that their rights and investments are protected. It also contains details as to the management of the company, ownership of shares and privileges and protection of shareholders.

B. Content/Feature/Terms

1. Commencement date
2. Parties
3. Recitals
4. Definition and interpretation
5. Business object of the company
6. Consideration
7. Warranties

8. Completion
9. Auditors and bankers
10. Registered office
11. Accounting reference date
12. Secretary
13. Directors
14. Share distribution
15. Dividend policies
16. Further financing
17. Guaranties and indemnities
18. Company's business
19. Directors and chairman
20. Important management decisions
21. Deadlock
22. Transfer of shares
23. Material breach
24. Winding up
25. Restrictive covenants
26. Confidentiality
27. Shareholders consent

Sample Draft of Shareholders Agreement

SHAREHOLDERS AGREEMENT

THIS SHAREHOLDERS AGREEMENT (the Agreement) is made and effective this 10th day of January, 2019.
BETWEEN Solomon Liman of No. 5 Regina Street, Liverpool, United Kingdom (First Shareholder) of the One Part and
Oluwatobi Harry of No. 28 Clinton Avenue, Bristol, United Kingdom (Second Shareholder) of the second part and
Nsikan Ayo, the sole Proprietor of Nosakhire Palm Produce (Nig) Enterprises of No. 25 Ikpoba Road, Agbani, Enugu State (Third Shareholder) of the third other part.

RECITAL:
The First two shareholders are British businessmen who have taken step toward the formation of a Nigerian Limited Liability Company with the third Shareholder, a Nigerian businessman, on extraction, production and exportation of palm produce.

IT IS HEREBY AGREED AS FOLLOWS:
1. The shareholders have agreed to form a limited liability company whose object is to extract and export palm produce.
2. The proposed names of the company are Benakol Palm Produce Nigeria Limited or Nosakam Palm (Nig) Limited.
3. The company would carry on business at No. 25 Ikpoba Road, Agbani, Enugu State which shall be registered as its corporate office.
4. The office accommodation of the first shareholder is to be given as consideration for share used or converted as business premises by the company.
5. The company is to be incorporated at the Corporate Affairs Commission (CAC) with a minimum share capital of N10, 000,000 (Ten Million Naira) into 10,000,000 divided into ordinary share of N 1.00 Each.

6. The Parties are to contribute towards the funding of the company.
7. The 10,000,000 share of the company is divided into the following ratio among the first, second and third shareholder who shall be the subscribers of the Memorandum of Association of the company:
   (a) Solomon Liman = 5,000,000 SHARES
   (b) Oluwatobi Harry = 2,000,000 SHARES
   (c) Nsikan Ayo = 3,000,000 SHARES

Confidentiality

The First, second and Third Shareholder to this agreement have agreed to maintain confidentiality with respect to details of this shareholder's agreement, the object of the proposed company, the trade secret and patent right of the shareholders.

IN WITNESS OF WHICH WE EXECUTE THIS AGREEMENT IN THE MANNER BELOW THE DAY AND YEAR FIRST ABOVE WRITTEN

Signed and Delivered by:

Solomon Liman _____ *First Shareholder*
Oluwatobi Harry _____ *Second Shareholder*
Nsikan Ayo _____ *Third Shareholder*

In the presence of:

Name:
Address:
Occupation:
Signature:

VII. Memorandum of Understanding

A. Concept

A memorandum of understanding is a formal agreement entered into between two or more parties or companies to establish official partnerships.

B. Contents/Features/Terms

1. Commencement
2. Parties
3. Recital
4. Nature/purpose
5. Contribution
6. Obligation of parties
7. Time frame
8. Confidentiality
9. Indemnity
10. Liabilities
11. Breach of agreement
12. Competition
13. Dispute resolution mechanism
14. Amendment of agreement
15. Termination

Sample Draft of Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING is made on this 10th day of January, 2019
BETWEEN
National Institute of Agricultural Extension Management (MANAGE), a statutory body, having its office at No 1 Benakol Street, Garki Abuja which expression shall include authorized representative of the first part
AND
Adebola Training Centre Ltd, a company incorporated under the Companies and Allied Matters Act, having its Office at No 32 Abacha Street Maitama, Abuja (Training Centre) represented by its authorized representative of the second part.

THIS MEMORANDUM OF UNDERSTANDING WITNESSES AS FOLLOWS:

The Training Centre is desirous of undertaking a joint project for the training and handholding component of the said Scheme with MANAGE, the two parties to this Memorandum of Understanding, with the intention of both being legally bound and accepting the following terms and conditions:

Coordination and Contact Points

1. MANAGE for coordination on broad policy issues and matters related to centralized operations.
2. Training Centre for all operational matters which includes training, handholding component as per MANAGE guidelines.

Responsibilities of the Training Centre

The Training Centre shall;

1. Organize training and handholding activities under the Agri-Clinics and Agri-Business Centres Scheme as per the MANAGE guidelines.
2. Ascertain for itself the financial viability of the project and shall fund all cost over runs, if any;
3. Not make any financial commitment on behalf of MANAGE, nor shall take loans or create any other financial liability binding MANAGE under this agreement;
4. Conduct no such parallel activity which may be prejudicial to the interests of the said Scheme, or MANAGE;
5. Maintain records of the trainees and their regular attendance, and share them with MANAGE; and
6. Register candidates for organizing training programmes

Responsibilities of MANAGE:

The MANAGE shall:

1. Develop and provide broad course outline to the Training Centre.
2. Provide list of trainees allotted to each Training Centre or be entitled to ask training institute to generate applications.
3. Provide norms and guidelines wherever necessary;
4. Provide lump-sum grant to the Training Centres on per trainee basis at the rates fixed by Scheme guidelines.
5. Be responsible for the logistics and operational aspects of the training component of the said Scheme; and
6. Provide timely clarifications regarding Academic Inputs and any other necessary information to the Training Centre.

Indemnity

The Training Centre hereby agrees jointly and severally to indemnify MANAGE, their representatives, administrators and properties from and against all action, demands, proceedings, prosecutions, attachments, and the like arising out of its liabilities and all charges, taxes, etc.

Liabilities

MANAGE shall not, however, be liable for:

1. Any payments of claims by employees of the Training Centre
2. Discharging any financial commitments made by Training Centre.
3. Any suit on account of demands for infringement of copyright and
4. Other laws by the Training Centre which have no nexus with the object of the MoU being entered into.
5. The Training Centre shall ensure that all its software is legal. MANAGE shall not be responsible in any way for any liabilities arising out of use of pirated software.

Breach of Agreement

MANAGE shall have the right to terminate the agreement with the Training Centre, in case the Training Centre either fails to provide the services successfully as mentioned in the agreement, or violates any of the clause mentioned in the MOU, or exploits the students or misuses the partnership with MANAGE in any way.

Amendment to the Agreement

The obligation of the Training Centre and MANAGE have been outlined in this agreement. However, during the operation of the agreement, circumstances may arise which call for alteration or modifications of this Agreement. These modifications/alterations will be mutually discussed and agreed upon in writing.

Period of Validity

This agreement shall be initially valid for one year from the date of signing the agreement and to be renewed subsequently by mutual consent of both the parties.

Arbitration

Any dispute arising with regard to any aspect of this Agreement shall be settled through mutual consultations and agreements by the parties to the Agreement.

IN WITNESS OF WHICH THE PARTIES HAVE EXECUTED THIS AGREEMENT THE DAY AND YEAR FIRST ABOVE MENTIONED

The common seal of National Institute of Agricultural Extension Management was affixed to this understanding in the presence of:

…… ……..
Director Secretary

The common seal of Adebola Training Centre Ltd. was affixed to this understanding in the presence of:

…… ……..
Director Secretary

VIII. Relationship between Pre-Incorporation Contract and Memo & Articles of Association

1. **Incorporation of Terms of the Pre-Incorporation Contract into the MEMOART:** Formation contracts like shareholders' agreement, joint venture agreement as important as they are to those entering it, they are not one of the incorporation documents to be submitted at the CAC thus not binding on the company. In this like, businessmen in trying to get round it would include the terms of the agreement in the object clause of the company's memorandum. This can be done by providing the object clause of the memorandum of association as follows: "*To give effect to the Joint Venture Agreement, dated this……..day of…… between…… And …… ……*."
   However, the Supreme Court in ***Edokpolor & Co Ltd v. Sem-Edo Wire Ltd*** stated that object clause are no more than a list of the object the company may lawfully carry out. They are certainly not objects the company must carry out. Pre-incorporation agreement is not binding on the company. The effect of incorporating the JVA into the Memorandum of Association is that members of the company will have strong desire to perform the terms of the JVA.
2. **Supremacy Clause of Pre-Incorporation Contracts:** Aside from inserting the formation agreement in the object clause of memorandum of association, another practice is to insert a supremacy clause in the formation agreement to the effect that if there is conflict between the agreement and memorandum and articles of association, the agreement will prevail. Irrespective of the supremacy clause, the memorandum and article of association is still a superior document. The MEMOART is a public document unlike formation agreement which is a private document. Both are contractual document backed by the statute. See ***Section 41(1) CAMA*** which states that the memorandum and articles of association have the effect of contract under seal between the company and its members and officers.
3. **Conflict between Pre-Incorporated Contract and MEMOART:** If a provision in shareholder's agreement and the provision of the memorandum and articles of association conflicts, that of the memorandum and articles of association will prevail. It has earlier been stated that pre-incorporation contract is not binding on the company except the company ratifies it. However, between those who are parties to the pre-incorporation contract, it is binding on them and if the parties are members or officers of the company, they cannot rely on memorandum and articles of association of the company. On the other hand, the shareholders' agreement being a pre-incorporation contract can be enforceable when its content is stated in memorandum and articles of association especially the articles of association as there are some areas of the articles that can be modified. Note that all subscribers are promoters of a company. Also, nature of business in shareholders' agreement can be in the object clause of memorandum of association.
   In ***NIB Investment (West Africa) v. Chief A.O Omisore***, the Court of Appeal stated that when parties make a contract, it is within their own prerogative to make their own law to which they are subject. Same also creates the rights and obligations which they are subject. In the case of a company, it is the articles and memorandum of association and CAMA that creates right and obligation which bind the members of the company.
   As between the memorandum of association and articles of association, where there is conflict, the memorandum of association will prevail. This can be inferred from the provision of ***Section 48(1) CAMA***, which provides that the alteration of articles of association shall not contradict the memorandum of association. By virtue of this, the said provision has given memorandum of association superiority over the articles of association.

(Week 8)

POST INCORPORATION MATTERS (Exams)

PRELIMINARY STEPS BEFORE COMMENCEMENT OF BUSINESS

These involve matters which a company must put into consideration before commencing business. This would broadly include publication of name and statutory books.

I. Publication of Name

A. Corporate Name & Trade Name

Name in this regard involve both corporate and trade name. There is a difference between them. A corporate name is the name with which a corporate body is registered at the CAC and reflect on the certificate of incorporation while a trade name is the name with which a corporate body carries on its business and affairs. For instance, Coca-Cola is a trade name (brand name) while Nigerian Bottling Company Plc is the corporate name. Also Star is a brand name while Nigerian Breweries Plc is the corporate name. The importance or significance is that in commencing an action against a corporate body, the action is to be commenced in its corporate name and not trade or brand name. In ***Bank of Baroda v. Iyalabani Ltd***, the Court of Appeal in a majority decision held that it is usually accepted practice to institute an action in company's full corporate name like Ltd, Unltd, Plc, ltd/Gte and in this instant case, failure to include it shows that the company is not a legal person.

B. Situations for Publication of Name

Section 548(1) CAMA provides the publication of corporate name in certain instances after incorporation.

1. **Place of Business:** The name and the registration number of the company is to be affixed or painted on the outside of every place of its business in a visible position in legible letters. In failing to comply with this requirement, the company and every director who knew of the breach, shall be liable for a fine of ₦100.
2. **Company Seal (Common & Official):** The corporate name of the company is to be engraved in legible character on its common seal and official seals. Official seals is used when the company does business outside Nigeria. In failing to comply with this requirement, the company and every director who knew of the breach, shall be liable for a fine of ₦500.
3. **Official Correspondence:** The corporate name and registration number on all official documents, which includes: Business letter of the company; All notices; Advertisements; Bills of exchange; Promissory notes; Endorsements; Cheques; Bills of parcels; Invoices; Receipt; Letters of credit; etc. In failing to comply with this requirement, the company and every director who knew of the breach, shall be liable for a fine of ₦500.
4. **Certificate of Incorporation:** a company is expected to publish its certificate of incorporation in a conspicuous place inside its business premises. The certificate of incorporation carries the company's registered name and registration number (RC Number).

II. Statutory Books

There are certain statutory books which a company is required to keep in its head or registered office. They are:

1. **Register of Members:** every company (Ltd, Plc, Unltd and Gte) is expected to keep a register of members. The register must contain the names, addresses, share capital, class

of share, and date of registration of each member. The entry of a person into the register is within 28 days of concluding agreement with the company to be a member – ***Section 83 & 84 CAMA***.

2. **Index of Members:** this is for a public company limited by shares only. Once such public company's membership exceeds 50, an index of members is to be kept which names are written in alphabetical order. In case of an alteration of register of members, such alteration must also be reflected in the index within 14 days – ***Section 85 CAMA***.
3. **Register of Substantial Interest in Shares:** this is a register of members having a 10% of unrestricted voting rights and it is required to be kept by public company – ***Section 97 and 95 CAMA***.
4. **Register of Charges:** every company is expected to keep a register of charges at its registered office - ***Section 191 CAMA***. A charge is a security over the whole or specified part of the company's undertaking and assets including cash and uncalled capital of the company both present and future without precluding the company from dealing with such assets.
5. **Register of Debenture Holders:** every company that issues debenture is to maintain a register of the holders – ***Section 193 CAMA***. Debentures are issued by a company as security for any debt liability or obligation of the company or of any third party, where the company borrows money or mortgages or charges its undertaking, property or uncalled capital for the purpose of its business or objects.
6. **Minutes Book:** Every company is required to keep a minute's book containing the minutes of the meetings of the company – ***Section 241 and 242 CAMA***.
7. **Register of Directors Shareholding:** this is the register to be kept by every company of directors and the shares or debenture held by them – ***Section 275 CAMA***.
8. **Register of Directors and Secretaries:** every company is expected to keep a register of all its director and secretaries right from when the company was incorporated at its registered office – ***Section 292 CAMA***.
9. **Accounting Records:** every company is to cause accounting records to be kept – ***Section 331(1) CAMA***. Accounting records are part of financial statement. The financial statements may include balance sheet, profit or loss account, directors' report, auditors' report, statement of source and application of funds, five year financial summary, etc.

III. Statement of Affairs

Section 553 CAMA states that every banking company or insurance company, shall before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, submit to the corporate affairs commission a statement of affairs. Such statement of affairs shall be displayed in a conspicuous place in the registered office of the company and in every branch office where the company carries on business.

COMPANY CONTRACTS

I. Concept

A contract can be entered into, varied or discharged on behalf of a company in all ways an individual can, such as a contract under seal, in writing or by parol. A contract entered into by any of the above means shall be effectual in law and will bind the company and its successors and all parties there to - ***Section 71 CAMA***.

Upon incorporation, a company can ratify any contract or transaction entered into by the company, or by any person on behalf of the company. The ratification binds the company to

the contract or transactions and entitles it to the benefits or otherwise as though it had been in existence as at the date of the contract. In the absence of ratification, the person who entered into the contract on behalf of the company will be personally bound to the contract and also entitle to the benefits – ***Section 72 CAMA***.

II. Forms of Contract a Company can enter into

Section 71 CAMA empowers a company to contract in the following capacity:

1. **Contracts under Seal:** Contracts required to be made by deed and determined by deed can be done by a company in writing under the common seal of the company.
2. **Written Contracts:** Any written contract which can be validly entered into by individuals.
3. **Oral/Parol Contracts:** Any oral contract which can be validly entered into by individual.

Thus for the purpose of contract, a company has the same capacity like an individual. However, it is not advisable for an individual to enter into oral contract with a company as company is just a person at law.

III. Instances of Execution of Company's Contract

1. **Bills of Exchange and Promissory Notes:** Bills of exchange and promissory notes are deemed to have been made, accepted or endorsed on behalf of a company, if so done in the name of the company or by a person acting under its authority – ***Section 73 CAMA***.
2. **Common Seal of a Company:** Common seal of a company in its use is regulated by the articles of association of the company - ***Section 74 CAMA; African Dev Co Ltd v. LEDB***.
3. **Official Seal**: it is usually used outside Nigeria, where the object of the company permits transacting in foreign countries and if authorised by its article - ***Section 75 CAMA***. The official seal is to have an inscription of the name of every country is to be used.
4. **Appointment of Attorney by Deed**: A company can appoint an attorney under deed to act on its behalf within and outside Nigeria. A deed signed by the attorney binds the company and has the same effect as deed under company common seal - ***Section 76 CAMA***.
5. **Authentication of Document:** where a document or proceeding requires authentication by a company, such may be signed by: director and secretary or other authorised officers of the company. It need not be under its common seal unless CAMA provides for such - ***Section 77 CAMA***. See ***SPAC Nig Ltd v. Allaprinta***. See also ***Section 78 CAMA*** - service of court processes.

CORPORATE SEARCHES

I. Concept

Corporate search is relevant because documents required to be filed at the CAC are regarded as public documents which are opened to the public assessment. Anyone can do a search on a company in any of the state offices of CAC and its headquarters.

II. Instances of Corporate Search

Corporate search can be used in the following instances:

1. Revealing any irregularities in incorporation process of a company.
2. Knowing the corporate status of a company. Not all bodies that claim to be companies are actually registered at CAC (formation or due incorporation/registration of a company).
3. Knowing priority in registration of two companies using identical name.
4. Operating of a bank account for a company/organization. Bankers usually request a corporate search report to verify entries made by applicants to open an account for a corporate body.
5. Granting of credit facility to a company - the borrowing capacity of the company.
6. Investigation of a company - there will be particulars of directors, annual returns among others at CAC.

7. Conducting due diligence/legal audit - determining if there has been compliance with the laid down rules.

III. Items to Look Out for

Depending on what the search report will be used for, the following are the items to look out for in corporate searches:

1. Company's register/due incorporation of the company
2. Memorandum and articles of association of the company, the object clause, restriction clause and liability of member's status.
3. Statement of share capital
4. Particulars of directors - who are in control of the company
5. Annual returns of the company

IV. Procedure for Conducting Corporate Searches

1. Obtain CAC prescribed form for search or formally apply to the Registrar General CAC for search.
2. Payment of search and certified true copy prescribed fees. Any document which the person would need is to be certified by CAC, being the issuing authority.
3. Conduct the search and obtain certified true copy of relevant document.
4. Evidence of payment of annual return up to date is required to obtain CTC.
5. Preparation of search report and attach the certified true copy of the relevant documents. The search report should be accompanied by a covering letter.

In ***Witt Butch Ltd v. Goodwill and Trust Investments Ltd***, the court held that the appropriate authority to issue certified true copies of company's documents is the CAC and not the High Court Registry (or Notary Public). Note generally that issuing authority should certify public documents. See ***Regulations 49, 63, 66 & 76 of Companies Regulation 2012*** on the requirements for certified true copy.

V. Contents of a Search Report

1. Clients name and address
2. Date of search
3. Place of search
4. Name of company
5. Registered Certificate Number (RC No.)
6. Date of Incorporation of the company
7. Object of the company
8. Directors of the company
9. Company share capital
10. Change in the registered particulars (such as alteration, conversion or registration)
11. Encumbrance (Charge/Debenture)
12. Pending litigation
13. Annual returns
14. Final remark/comment

VI. Sample Draft of an Application for Search, Covering Letter and Search Report

Application for Search

NE KILLI & CO
Legal Practitioners and Solicitors
Plot 556, Balarabe Musa, Victoria Island, Lagos
08021247778, Nekilli@hotmail.com

Our Ref; 142/0 13th January, 2019

The Registrar-General,
Corporate Affairs Commission,
No 1 Garki Road,
Maitama,
Abuja.

Dear Sir,

APPLICATION TO CONDUCT CORPORATE SEARCH ON TROPICAL INVESTMENT NIGERIA LIMITED

We kindly refer to the above subject matter.
We are one of the external solicitors to the Premier Bank Plc which intends to open and operate an account for Tropical Investment Limited. Thus, we kindly seek your permission to conduct a corporate search on Tropical Investments Limited which claim to be a Nigerian company registered under the Companies and Allied Matters Act Cap C20 LFN 2004.
Thank you.

Yours faithfully,
(Signature)
Killi Nancwat
For: NE KILLI & CO

Covering/Forwarding Letter

NE KILLI & CO
Legal Practitioners and Solicitors
Plot 556, Balarabe Musa, Victoria Island, Lagos
08021247778, Nekilli@hotmail.com

Our Ref No: 73/20 15th January, 2019

Mr. Olawale Oduoye
The Company Secretary,
Premier Bank Plc,
11, Oye Street,
Lagos State.

Dear Sir,

RE: CORPORATE SEARCH REPORT OF TROPICAL INVESTMENT LIMITED

We refer to the above subject matter.
We are glad to inform you that a corporate search has been carried out on Tropical Investments Limited. Attached to this letter is the search report.
Thank you.

Yours faithfully,
(Signature)

Killi Nancwat
For: NE KILLI & CO

ENCLOSED
1. A copy of the search report
2. CTC of Certificate of Incorporation
3. CTC of Statement of authorised share capital
4. CTC of particulars of directors

Search Report

SEARCH REPORT ON TROPICAL INVESTMENT LIMITED

1. Date of search: 14th January, 2019
2. Place of search: Corporate Affairs Commission
3. Name of company: Tropical Investments Limited
4. RC Number: No 728
5. Registered offices: No 5, Ahmadu Way, Victoria Island, Lagos.
6. Date of incorporation: 17th June, 2009
7. Business/object: Hotel and House keeping
8. Directors: Mr. Clifford Leizou, Mrs. Kate Ejiro Leizou, Mr. Efe Leizou
9. Share capital: ₦2, 000, 000 divided into 2,000,000 ordinary shares of ₦1 each
10. Encumbrance: NIL
11. Change in registered particulars: NIL
12. Pending litigation: NIL
13. Annual Return: The annual return of the Tropical Investment Limited is up to date.
14. Remark: Premier Bank Plc can go ahead with view to banking with Tropical Investment Limited.

Dated this 15th day of January, 2019

(Signature)
Killi Nancwat Esq.
Plot 555, Balarabe Musa
Victoria Island
Lagos

ALTERATION OF REGISTERED DOCUMENTS

I. Alteration of Memorandum of Association (Exams)

A. Concept

Since memorandum forms the principal document of a company, a company may not alter the provisions in its memorandum except in the cases and in the manner and to the extent for which express provision is made in this Act – ***Section 44(1) CAMA***. The provisions that can be altered are as follows:

1. Name of the company – ***Section 45(1) CAMA***
2. The business or object of the company – ***Section 45(2) CAMA***
3. Restriction on the powers of the company (contained in the Articles of Association) – ***Section 45(3) CAMA***
4. The share capital of the company – ***Section 45(4) CAMA***
5. Any other provisions/conditions which are required by Section 27 CAMA - in accordance with ***Section 46*** and subject to ***Section 49 CAMA***.

B. Change of Name

Change of name in this regard is only a part of the company's name and not status (Plc, Gte, Ltd, Unltd). Change of name is done in accordance with ***Section 45(1) CAMA***. The change of name of a company can occur in two main form: Compulsory change of name and Voluntary change of name. The procedures are not the same.

1. **Compulsory Change of Name:** Compulsory change of name may come in three different ways:
   (a) Inadvertent registration of a new company by a name of already existing company or so nearly resembling it as to be likely to deceive
   (b) Later discovery that the company's name conflicts with an existing trademark or business registered in Nigeria
   (c) After a successful passing off action

   Under the first two, the CAC can direct the change of name. However, certain conditions are sacrosanct. Section 45(1) CAMA made reference to the provisions contained in ***Section 31 CAMA***.

   The procedure under compulsory change of name is as follows:
   (a) The existing company will write a letter to the erring company to change voluntarily within reasonable time.
   (b) If the erring company failed to comply within the time, then the existing company will write a protest letter to CAC. Note what the letter should contain and documents to attach.
   (c) CAC will conduct an investigation to know who registered first
   (d) After investigation, if the protesting company registered first, it will write to the infringing company to go and embark on voluntary change of name within 6 weeks
   (e) Note that CAC can only so direct within 6 months of registration of the infringing company. Once the period exceeds 6 months, the protesting company can only go through a passing off action in the Federal High Court.
2. **Voluntary Change of Name:** CAMA empowers a company to voluntarily change its name with consent of CAC – ***Section 32(1) CAMA***. A letter written to a company by another to change its name and it complies, will fall under the heading of voluntary change of name. The procedure for voluntary change of name is as follows:
   (a) Passing of Board of Directors resolution to propose the change of name with suggestion of new names
   (b) Conducting availability check and reservation of the proposed new names using Form CAC 1 – Section 32(1) CAMA. Name can be reserved for 60 days at most – ***Section 32(2) CAMA***.
   (c) Passing of special resolution, usually at Extraordinary General Meeting – ***Section 31(3) CAMA***.
   (d) Write an application to CAC for consent to the change of name giving reasons for change of name – ***Section 31(3) CAMA***. The application is to be signed by two directors and accompanied by the following documents:
      i. Duly signed copy of special resolution to be delivered within 15 days
      ii. Original certificate of incorporation
      iii. Memorandum and articles of association as altered to reflect the new name
      iv. Duly approved form CAC 1 – availability check and reservation of name
      v. Evidence of payment of filing fees
      vi. Evidence of filing of annual returns up to date (receipts/copies)
3. **Post-Change of Name Activities**
   (a) CAC enters the new name in the register in place of the old name (no new RC number) – ***Section 31(5) CAMA***.

(b) CAC issues a new certificate of incorporation bearing the new name
(c) CAC advertises the change in the official gazette of the federation – ***Section 31(7) CAMA***
(d) Company alters the common seal and get it adopted by the general meeting/alters name plate
(e) Company alters business correspondence/letter headed papers to bear the new name
(f) Company advertises in newspaper to publicize the change of name

Note that change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company and any legal proceedings that could have been continued or commenced against or by it in its former name may be continued or commenced against or by it in its new name – ***Section 31(6) CAMA***.

Sample Draft of Application Letter for Change of Name

NE KILLI & CO
Legal Practitioners and Solicitors
Plot 556, Balarabe Musa, Victoria Island, Lagos
08021247778, Nekilli@hotmail.com

Our Ref; 142/0 13th January, 2019

The Registrar-General,
Corporate Affairs Commission,
No 1 Garki Road,
Maitama,
Abuja.

Dear Sir,

APPLICATION FOR CONSENT TO USE THE NAME: APPLE BANK HOLDING PLC PURSUANT TO SECTION 30(2) CAMA AND REGULATION 20 OF THE COMPANIES REGULATIONS 2012

We write to you in respect of the above subject matter.

In line with the revised regulatory framework of the Central Bank of Nigeria, abolishing universal banking, companies under the existing scheme can only operate under a Holding Company Structure. Our client has complied with the directive and now wishes to incorporate a new Holding Company, to be named Apple Bank Plc.
Please note that in fulfilment of the requirements, the proposed Holding company has two subsidiary companies – Apple Insurance Ltd and Apple Capital Investment Ltd. the Certificates of incorporation of the subsidiary companies are attached. We have also provided the following document:

1. A statement by majority of the directors of the proposed "Holding" Company that the company shall acquire more than half in nominal value of the share capital of each of the subsidiaries within 90 days of its incorporation,
2. Updated annual returns of subsidiary companies, and
3. Updated Section 553, CAMA filing by the subsidiary companies which are insurance and finance companies.

We undertake to pay the requisite fees.

Yours faithfully,
Killi Nancwat
Legal Adviser

Sample Draft of Special Resolution for Change of Name

ALBA NIGERIA LIMITED
NO. 3 OGUI ROAD ENUGU
ENUGU STATE
RC NO: 2021

OUR REF.: _____ DATE: _____

SPECIAL RESOLUTION TO CHANGE NAME OF ALBA NIGERIA LIMITED PURSUANT TO SECTION 31 OF CAMA

At the Extra Ordinary Meeting of ALBA NIGERIA LIMITED held on the 5th of December, 2015 at Albatina head office at No 3 Ogui Road, Enugu, Enugu State, the following resolution was proposed and duly passed:

THAT the name of the company, ALBA NIGERIA LIMITED, be and it is hereby changed into ALBATINA NIGERIA LIMITED.

Dated this 5th day of December, 2015

……. ……
DIRECTOR DIRECTOR

C. Alteration of Business/Objects

1. Board of directors resolution proposing the alteration (in whole or in part) in the object of the company
2. Notice in writing to members and debenture holders – 21 days is to be given to all members of the company (even when not entitled to) and debenture holders secured by floating charge – ***Section 46(1) & (6) CAMA***.
3. Passing of special resolution for alteration of object - ***Section 46(1) CAMA***
4. Application to the court for cancellation of the alteration (if any) by - ***Section 46(2)(a)(b) CAMA***
   (a) Shareholder(s) holding at least 15% in nominal value of the company's issued share capital or 15% of the company's members (Gte)
   (b) Debenture holder(s) holding 15% of company's debenture entitling them to object.
   Application is to be made within 28 days of passing the resolution. Such an application cannot be made by a person who had consented to or voted in favour of the alteration. The court can make an order confirming the alteration or cancel it - ***Section 46(4) CAMA***.
5. When upon application, the court confirms the resolution or otherwise within 15 days, the company is to deliver to CAC the following documents -
   (a) CTC of the order refusing to confirm the resolution
   (b) CTC of the order confirming the resolution and a copy of altered memorandum - ***Section 46(7)(a)(i)(ii) CAMA***
6. If after 28 days no application for cancellation has been made, the company is to within 15 days deliver to the commission a copy of resolution passed – ***Section 46(7) (b) CAMA***. CAC can do any of these two things:

(a) If satisfied, demand delivery of altered memorandum
(b) If not satisfied, give notice in writing of its decision to the company.

7. An appeal can be made to the FHC by the person aggrieved within 21 days of giving the notice. Orders that can be made by the FHC upon application are - ***Section 46(4) CAMA***
   (a) Cancel the alteration
   (b) Confirm the alteration in whole or in part
   (c) Adjourn proceedings in order that an arrangement may be made for purchase of the interests of dissenting members
   (d) Make or give directors orders expedient for facilitating or carrying into effect any of such arrangement.

D. Alteration of Restriction on Powers

Restriction of powers of company in its alteration is done in accordance to ***Section 45(3) CAMA***. The procedure for altering restriction of powers of the company has the same procedure as alteration of its objects.

E. Alterations of Share Capital

Section 45(4) CAMA provides that alteration shall be in accordance with Section 100-111 CAMA. Where a company alters its share capital, it shall within one month give notice to CAC, specifying the alteration (kind). Alteration of a company's shares can be done in any of the following ways:

(a) Increase of share capital - ***Section 102 CAMA***
(b) Reduction/decrease of share capital – ***Section 106 CAMA***
(c) Cancellation of unissued share capital – ***Section 100(1)(d) CAMA***
(d) Consolidation of nominal value of units of share capital into larger amounts
(e) Subdivision of nominal value of units of share capital into smaller amounts - ***Section 100(1)(c) CAMA***
(f) Conversion and reconversion of paid up shares into stock - ***Section 100(1) (b) CAMA***.

1. **Increase in Share Capital:** There are so many reasons for increasing share capital. Importantly a company having a share capital, whether or not the shares have been converted into stock, may in general meeting and not otherwise increase its share capital by new shares of such amount as it thinks expedient - ***Section 102(1) CAMA***. THE procedure for increase in share capital is as follows:
   (a) The board of directors passes a resolution proposing the increase by creation of additional shares in the capital of the company.
   (b) The board authorises the secretary to summon general meeting
   (c) The company at general meeting passes an ordinary resolution setting out the terms of the increase. However, in practice CAC usually demand for special resolution.
   (d) The company delivers to the CAC within 15 days after passing the resolution notice of the increase accompanied by the following documents -
      i. Special resolution
      ii. Altered memorandum and article
      iii. Evidence of up to date annual returns
      iv. Duly stamped form for notice of increase an authorised
      v. Evidence of payment of Financial Reporting Council (FRC) annual dues
      vi. Evidence of payment of fees - Regulation 29 of Companies Regulation
      vii. Updated Section 553 where applicable
   (e) After delivery within 6 months, the company is to deliver to the CAC a statutory declaration by directors that at least 25% of the share capital including the increase has been issued.
   (f) Obtain certificate of increase and attach it to the memorandum of association.

Note: the increase share capital takes effect upon complying with the above conditions - ***Section 103 CAMA***.

Sample Draft of Resolution for Increasing Share Capital

SILVER NIGERIA PLC
NO. 3 NEW HEAVEN ROAD
ENUGU, ENUGU STATE
RC NO: 2011

OUR REF.: _____ DATE: _____

SPECIAL RESOLUTION FOR THE INCREASE OF THE AUTHORISED SHARE CAPITAL OF SILVER NIGERIA PLC PURSUANT TO SECTION 102 & 103 OF THE COMPANIES AND ALLIED MATTERS ACT 2004

At the 3rd Annual General Meeting of Silver Nigeria Plc held on the 2nd day of January, 2019 at Toprank Suite and Tower, Independence Layout, Enugu, it was duly proposed and resolved as follows:

"That the Company's share capital be increased from ₦5, 000,000.00 to ₦15, 000,000.00 shares by the creation of additional ₦10, 000,000.00 shares divided into 10,000,000 ordinary shares of ₦1.00 each. The shares so created are to rank in paripasu with the existing shares of the Company."

Dated the 2nd day of January, 2019

_____ _____
Director Secretary/Director

Since this resolution is to be filed within 15 days of passing it, date should be left blank until filing - ***Section 102(2) CAMA***.

2. **Reduction/Decrease of Share Capital:** The general rule is that a company having a share capital shall not reduce its issued share capital except as authorised by CAMA - ***Section 105(1) CAMA***. There are three ways in which a company may reduce its share capital -
   (a) Extinguish or reduce the liability of any of its shares in respect of share capital not paid up
   (b) Cancel any paid up share capital which is lost or unrepresented by available assets
   (c) Pay off any paid up share capital which is in excess of the company's wants - ***Section 106(2) CAMA***.

   Note reduction of share capital can only be done by special resolution – ***Section 106(1) CAMA***.

   The procedure for the reduction of share capital is as follows:
   (a) The board proposes the resolution to reduce the share capital and prepare scheme of reduction
   (b) The board authorises the secretary to issue notice to members and those entitled to attend general meeting. Notice of general meeting should be accompanied by explanatory circular and scheme of reduction.
   (c) The company at general meeting passes special resolution reducing the share capital. Deliver special resolution within 15 days to CAC.
   (d) Application to the FHC to confirm the resolution for reduction - ***Section 107 CAMA*** and minutes of company's meeting passing the special resolution.

(e) Delivery at the CAC, the following documents - ***Regulation 30 Companies Regulation 2012***
   i. Special resolution for reduction in share capital signed by a director and secretary or two directors stating the mode of reduction
   ii. Certified true copy of court order sanctioning the reduction of share capital
   iii. Evidence of publication of notice of reduction of share capital if so directed by court
   iv. Court-approved minutes of meeting of company stated as altered
   v. Duly stamped memorandum and articles of association reflecting reduced share capital
   vi. Evidence of updated annual returns
   vii. Updated section 553 filing where applicable
   viii. Evidence of payment of FRC, annual dues and payment of fees

(f) Obtain certificate of registration of the order and minutes from CAC and annex the order to the MEMOART.

Sample Draft of Reduction of Share Capital

NE KILLI & CO
Legal Practitioners & Solicitors
No 771, Adeola Hopewell, Agbani, Enugu State
www.abadadiketalabi.com, 08021345678

RC No: ADT/001

OUR REF.: _____ DATE: _____

SPECIAL RESOLUTION OF REDUCTION OF SHARE CAPITAL PURSUANT TO SECTION 106 OF COMPANIES ALLIED ACT

At the Annual General Meeting of the above named company held at Augustine Nnamani Hall, Nigerian Law School, Agbani, Enugu Sate on 1st February 2019 at 12:00 noon, the company resolves the following:

"That the authorised share capital of the company of ₦50,000,000 divided into 50,000,000 ordinary shares of ₦1 each, should be cancelled by ₦20,000,000 of 20,000,000 ordinary shares being unrepresented by available assets thereby leaving ₦30, 000,000 divided into 30,000,000 ordinary shares of ₦1 each".

Dated this 1st day of January, 2019

_____ _____
Director Secretary

3. **Cancellation of Unissued Shares**: This is different from reduction of share capital as share capital can be reduced even when it has been paid up. Cancellation of unissued shares will not require any objection from members.
4. **Subdivision of Nominal Value of Units of Share Capital**: This is the reduction of the nominal value of each unit of shares. If nominal value of each unit was 50k each, and then reduced to 20k the quantity of shares will go up while the share capital nominal value will remain the same. For instance
   (a) ₦5,000,000 at ₦1 will be 5,000,000 units
   (b) ₦5,000,000 at 50k will be 10,000,000 units
   (c) ₦5,000,000 at ₦2 will be 2,500,000 units

5. **Conversion of Shares into Stock and Re-Conversion:** Shares can be converted into stock and converted back into shares, shares - stock, stock - shares.

II. Alteration of Articles of Association

Section 48 of CAMA provides that a company's article can be altered by special resolution. The procedures are:

1. Board propose alteration of articles
2. Board authorises the secretary to issue notice of a general meeting
3. The company passes special resolution altering the articles
4. Stamping of altered articles
5. Delivery at the CAC within 15 days the following documents after 28 days of application to court for cancellation.
   (a) A copy of special resolution authorising the alteration signed by director and secretary or two directors stating the altered clauses.
   (b) Duly stamped articles of association marked as altered reflecting the altered clause.
   (c) Evidence of payment of annual returns up to date
   (d) Evidence of payment of FRC annual dues
   (e) Payment of fees - ***Regulation 25 Companies Regulations***

III. Alteration of Constitution and Registered Particulars of Incorporated Trustees

A. Concept

An association whose trustees are incorporated under the CAMA may alter its constitution by a resolution passed by a simple majority of its members and approved by the commission - ***Section 598 CAMA***. The following are the provisions to be contained in the constitution among others - ***Section 593 CAMA***:

1. Name of the association
2. Aims and objectives
3. Appointment, powers, duties, tenure of office and replacement of the trustee.
4. The use and custody of the common seal
5. The meetings of the association
6. The number of members of the governing body (if any), their powers and procedure for appointment and removal
7. Procedure for disbursement of funds
8. Amendment clause
9. Special clause

Either of the following provisions can be altered.

B. Replacement or Appointment of Additional Trustees

There can be replacement or appointment of additional trustees. The following is the procedure - ***Section 599 CAMA***.

1. Resolution at the general meeting to do so
2. Application in prescribed form to CAC for its approval/formal application signed by the Chairman or Secretary or Solicitors. The application shall be accompanied by the following documents:
   (a) Extracts of minutes of general meeting where change or appointment of additional trustees was adopted signed by chairman and secretary
   (b) Trustees' declaration form duly deposed to by each of the new trustees in the High Court.
   (c) Photocopy of information page of international passport of national identity card for new trustees
   (d) Original certificate of incorporation (or CTC of certificate where applicable) for cancellation

(e) Copy of the public notice as pasted at the registered office of every branch of the association
(f) Updated annual return
(g) Payment of filing fee – if trustee is illiterate, thumb print and illiterate jurat.

3. Publication of application in two daily newspapers by CAC.
4. Display notice of replacement or appointment at the corporation headquarters or branch offices or any place where majority of members will see it.
5. Notice to call for objection within 28 days.
6. If CAC assents to the application, it shall signify its assent in writing to the corporation.

Upon assent, application becomes valid as from the date of the resolution appointing the trustee.

C. Change of Name or Objects

Section 597 CAMA, same procedure with appointment of additional trustees include Application by trustees, attaching a copy of resolution at a general meeting approving the change of name or object certified by trustees. Under ***Regulation 67 Companies Regulation***, the requirements for change of the name of an association whose trustees are incorporated under CAMA includes

1. Form of approval for new name
2. Duly completed application form
3. Formal application for change of name signed by the chairman and secretary or the solicitor
4. Extracts of minutes of general meeting where change of name was approved and signed by the chairman and secretary
5. Two copies of the constitution reflecting the new name as approved
6. Original certificate of incorporation (or CTC of certificate where applicable) for cancellation
7. Copy of the public notice as pasted at the registered office of the association
8. Updated annual returns
9. Payment of fees.

Note that notice of application for change of name must be in two daily newspapers one of which must circulate in the locality of the association and the other a national newspaper. Also the notice of application published in the newspaper shall state the old name of the association, invite objections to the application within 28 days of the publication and state also that the constitution shall be amended to reflect the new name. For documents for change of objects, ***Regulation 18 Companies Regulation***.

D. Change of Business Name, Proprietor's Name, Nature of Business and Address

A business name registered under part B can change its nature of business name or address or change of proprietor(s). ***Regulation 56-59 Companies Regulations*** provides for the requirement.

1. Change of Business Name

(a) Form of approval of name
(b) Duly completed application form
(c) Duly completed form for change of business name
(d) Formal application stating reason for change of name
(e) Original certificate of registration and form for cancellation
(f) Updated annual returns
(g) Payment of filing fees

2. Change of Proprietor's Name

(a) Duly completed application form
(b) Evidence of change of name

(c) Duly completed form for change of proprietor's name
(d) Formal application for change of name
(e) Original certificate of registration and form for cancellation
(f) Form of identification where necessary
(g) Update annual returns
(h) Payment of filing fees

3. Change of Nature of Business

(a) Duly completed application form
(b) Duly completed form for change of nature of business
(c) Formal application and proficiency certificate where applicable.
(d) Original certificate of registration and form for cancellation
(e) Form of identification where necessary
(f) Update annual return
(g) Payment of filing fees

4. Change of Address of Business

(a) Duly completed application form
(b) Duly completed form for change of address
(c) Formal application for change of address
(d) Original certificate of registration and form for cancellation
(e) Form of identification where necessary
(f) Update annual returns

CONVERSION/RE-REGISTRATION OF COMPANIES

I. Concept

CAMA permits the conversion of companies. A private company could convert to public company for the purpose of the public accessing its shares; also where the law mandates the conversion of companies. At a time there was an insurance law which provides that all insurance companies must be unlimited liability company. Again in 2005, many banks had to convert to public limited liability in order to meet the ₦25 billion share capitalisation. Conversion and re-registration is covered in ***Sections 50-53 of CAMA*** and there are instances where conversion and re-registration are expressly prohibited.

II. Types of Conversion and Re-Registration of Companies

The following are the common types of conversion and re-registration of companies in Nigeria:

1. Re-registration of private company limited by shares to public company limited by share (Ltd - Plc) ***Section 50 CAMA***.
2. Re-registration of a public company limited by shares to a private company limited by shares (Plc - Ltd) - ***Section 53 CAMA***.
3. Re-registration of a private company limited by shares to an unlimited liability company (Ltd - Unltd) - ***Section 51 CAMA***.
4. Re-registration of an unlimited company to a private limited liability company (a private company limited by shares) (Unltd – Ltd) - ***Section 52 CAMA***
5. Re-registration of statutory corporation as company limited by shares

III. Re-Registration of Private Company Limited by Shares as Public Company Limited by Shares (Ltd-Plc)

Section 50 of CAMA provides the grounds or conditions to be fulfilled before a private company limited by shares can re-register as public company limited by shares. The procedural steps are:

1. Board resolution proposing the conversion and re-registration from LTD -PLC
2. Board authorises the company secretary to issue notice of General Meeting to pass special resolution

3. Special resolution of the General Meeting authorising the re-registration and consequential alteration of memorandum and articles of association to reflect the status of public company
4. Application for re-registration to CAC in the prescribed form signed by at least one director and secretary together with the following documents:
   (a) Special resolution of the General Meeting
   (b) Printed copy of the memorandum and articles as altered in pursuance of the resolution reflecting the status of Plc.
   (c) Copy of a written statement by the directors and secretary certified on oath by them showing that the paid up capital of the company as at the date of the application is not less than 25% of the authorised share capital.
   (d) Copy of the balance sheet of the company as at the date of the resolution or the preceding 6 months whichever is later.
   (e) Statutory declaration by a director and the secretary of the company to the effect that:
      i. The special resolution required under this section has been passed; and
      ii. The company's net assets are not less than the aggregate of the paid up share capital and undistributable reserves.
   (f) In the event that the company that is converting to PLC is also going to be quoted at the stock exchange, include a copy of any prospectus or statement in lieu of prospects delivered within the preceding 12 months to the SEC for registration – ***Section 50(1) (2) & (3) CAMA***.

   In addition to the above documents, the following are to be delivered to CAC.
   (a) Availability check and reservation of the name (form CAC1)
   (b) Original receipt of filing fees
   (c) Evidence of filing of annual returns up to date
5. When the foregoing are satisfied, the CAC may re-register such company and issues a new certificate reflecting the Plc status. The application to be made in prescribed form shall be signed by a director and secretary. Note the necessary consequential alteration (name, share capital, place, common seal, advertisement, declaration that 25% of share capital has been paid).

IV. Re-registration of Company Limited by Shares as Unlimited Company

Section 51 CAMA makes provision for this form of conversion. The following are sacrosanct:

1. Board Resolution proposing the conversion
2. An application in the prescribed form signed by a director and the secretary of the company
3. The application shall set out such alterations in the company's memorandum and articles as required to bring it into conformity with the requirements of the Act.
4. The following documents together with the application are to be lodged with CAC:
   (a) The prescribed form of assent of the members in support of the re-registration as unlimited subscribed by or on behalf of all the members of the company.
   (b) A statutory declaration made by the directors of the company that the persons by whom or on whose behalf the form of assent is subscribed constitute the whole membership of the company; and if any of the members did not subscribed themselves, the directors have taken all reasonable steps to satisfy themselves that each person who subscribed to it on behalf of a member was lawfully empowered to do so.
   (c) A printed copy of the memorandum and the articles incorporating the alterations set out in the application. There must have been special resolution authorising the alteration.
   (d) Availability check and reservation of new name in Form CAC1
   (e) Receipt of filing fees

(f) Evidence of filing annual returns up to date (receipt)

5. Upon compliance and the CAC is satisfied that the company be registered as unlimited company, it shall register the application and issue to the company a certificate of incorporation appropriate to the status to be assumed by virtue of the section.

V. Re-Registration of Unlimited Company as Private Company Limited by Shares

Re-registration under ***Section 52 CAMA*** is from unlimited to private limited by shares as ***Section 52(2)*** exclude re-registration to public company limited by shares and company limited by guarantee. Note that the re-registration of an unlimited company as a limited company shall not affect the rights and liabilities of the company in respect of any debt or obligations incurred or any contract entered into, by, to, with or on behalf of the company before the re-registration – ***Section 52(9) CAMA***. Procedures are the same as that of private to public company. See generally Section 52(1)-(9) CAMA.

VI. Re-Registration from Public Company Limited by Shares as Private Company Limited by Shares

A. Concept

This is usually a re-registration from a public company limited by shares as private company limited by shares - ***Section 53 CAMA***. The necessary requirements are application, altered memo and articles and other documents delivered to CAC. This is one of the most rigorous conversion as application can be made to court after passing of the special resolution authorising the re-registration to private, the holders of not less than 5% in nominal value of the company's issued share capital or any class thereof or application by not less than 5% of the members excluding a person who has consented or voted in favour of the resolution – ***Section 53(3) (a) (b) CAMA***. The application is to be made within 28 days of passing the resolution and notice of the application in prescribed form is to be given by the applicant to CAC and the company – ***Section 53(4) CAMA***. The court can give an order cancelling or confirming the resolution upon hearing the application and any order it deems fit – ***Section 53(5) CAMA***. The order so made by the court is to be delivered to CAC within 15 days from the making of the court's order or within other period directed by the court – ***Section 53(6) CAMA***.

B. Procedure

1. Board resolution proposing conversion and its re-registration
2. Special resolution by general meeting authorising the re-registration
3. Wait for a period of 28 days to elapse for any application to be made against it to FHC
4. If no application is made, deliver relevant documents and application for re-registration to CAC.
5. If application is made for the cancellation within the 28 days and the court cancels the resolution, within 15 days deliver the CTC of the court order to the CAC – and a printed copy of resolution.
6. If the court order confirms the resolution then deliver the following to CAC:
   (a) A copy of the special resolution
   (b) CTC of the court order
   (c) Application for re-registration in the prescribed form signed by a director and secretary
   (d) Availability check and reservation of name (change of name, availability check form CAC 1A)
   (e) A copy of altered memorandum and article of association
   (f) Original receipt of payment of prescribed filing fees
   (g) Evidence of filing of annual returns up to date
7. Upon satisfaction by CAC, the company may be registered. CAC retains and registers the application along with necessary documents and issues the company with a new certificate

of incorporation. On the issue of the certificate, the company shall become a private company – ***Section 53(8) CAMA***.

VII. Registration of Statutory Corporation as Company Limited by Shares

A. Concept

Under the ***Public Enterprise (Privatisation and Commercialization) Act***, government owned enterprise are being commercialized and privatised.

B. Procedure

1. The Bureau of Public Enterprise obtains a government white paper to commercialize and privatize the enterprise/parastatal and arrange its sale
2. BPE takes steps to incorporate the new company as a public (PLC) with CAC. All the approved documents would be submitted to CAC along with the incorporation documents
3. BPE hands over the new company to its core investors

C. Essential Features Conversion

1. The company would cease to be statutory corporation and be formally registered with CAC.
2. The company would have MEMOART which becomes its source of its governance rather than enabling law that set up the corporation
3. The company ceases to enjoy the status of statutory corporation thus it no longer enjoy the immunity of pre-action notice in the course of initiating suits against it which is enjoyed by almost all the public corporations set up by statutes in Nigeria.
4. The company would be subject to CAC
5. The company can be investigated by CAC while exercising its power under CAMA
6. A statute is no longer needed for its winding up

VIII. Companies Prohibited from Re-Registration

There are some companies that CAMA prohibits from re-registration and conversion, they are:

1. **Re-registered Unlimited Company to Public Limited Company:** Section 50(7) CAMA provides that a company shall not be re-registered under this section if it has previously been re-registered as an unlimited company. This is where the company was originally a private company limited by shares which re-register to unlimited; it cannot register as a public company. No Ltd –Unltd –Plc
2. **Re-registered Unlimited to Private Limited Company:** Section 51(3) CAMA provides that a private company limited by shares which has re-registered to unlimited company cannot go back to a private limited company by shares. No Ltd – Unltd – Ltd.
3. **Unlimited to Public Limited Company:** An unlimited company cannot be re-registered as a public company. No Unltd – Plc – Section 52(2) CAMA.
4. **Unlimited to Company Limited by Guarantee:** An unlimited company cannot be re-registered as a company limited by guarantee. No Ltd – Gte – Section 52(2) CAMA.
5. **Re-registered Private Limited Liability to Unlimited:** A private limited liability company by shares which converted from unlimited company cannot go back to unlimited company – Section 51(2) CAMA. No Unltd – Ltd – Unltd.
6. **Public Limited Liability to Unlimited:** No public company limited by shares to unlimited company. There is Unltd – Ltd – Plc.

ETHICAL ISSUES ARISING IN POST-INCORPORATION MATTERS

1. A lawyer should not make false statement to the CAC
2. A lawyer should dedicate and devote his time to the service of his client
3. A lawyer should not carry out actions which are contrary to the law
4. A lawyer should advice his client appropriately in terms of alteration of registered documents and conversion.

(Week 9)

FOREIGN PARTICIPATION IN BUSINESS IN NIGERIA

INTRODUCTION

I. Concept

This relates to the question of whether and to what extent a foreign national, or alien can participate in business in Nigeria. ***Section 567 of CAMA*** defines an alien as a person or association, whether corporate or incorporated, other than a Nigerian citizen or association. ***Section 20(4) of CAMA*** provides: *"subject to the provisions of any enactment regulating the rights and capacity of aliens to participate or undertake in trade or business, an alien or a foreign company may join in forming of a company". **Section 17 of Nigerian Investment Promotion Commission (NIPC)*** provides that a non-Nigerian whether company or individual may invest and participate in the operation of any enterprise in Nigeria except those in the negative list. ***Regulation 26 Companies Regulations*** provides that a foreign national may hold 100% equity in business enterprise and undertake any type of business except those in the negative list.

It is clear from the above provisions that a foreigner is allowed to participate in business in Nigeria but subject to some enactments. An alien (foreigner) may choose to register a business name as a sole proprietor (or partnership), he may wish to incorporate a company with other aliens or Nigerians, and he may wish to buy shares into an existing company.

II. Negative List

The negative list include:

1. Arms and ammunition;
2. Narcotic drugs and psychotropic substance;
3. Para-military and military wears and accoutre.

CHECKLIST OF LEGAL FRAMEWORK & REGULATORY AUTHORITIES ON FOREIGN PARTICIPATION IN NIGERIA

	ENABLING LAW	REGULATORY AGENCY	PERMIT/APPROVAL/FUNCTIONS
1	Companies and Allied Matters Act (CAMA)	Corporate Affairs Commission (CAC)	Incorporation of Nigerian (formation and registration of companies) Companies for FDI and companies without exemption
2	Nigerian Investment Promotion Commission Act (NIPCA)	Nigerian Investments Promotion Commission (NIPC), One-stop Investment Centre is housed at NIPC	Regulates & promotes investment activities. Showcases investment opportunities in Nigeria and how to invest in all sectors of the country. Registers a foreign company after incorporation in Nigeria and before start of business – ***Section 17***
3	Investment Securities Act (ISA) 2007	Securities & Exchange Commission (SEC)	Regulates the registration of securities, records of FPI and FDI- ***Section 8***, regulation of capital market

4	Immigration Act 2010	Nigerian Immigration Service (NIS)	Regulates the entry of aliens into the country. Supervises and grants visa, Business Permits, Residence permits, expatriate quota and work permit - ***Section 8***
5	National Office for Technology Acquisition Promotion Act (NOTAPA) 1994	National Office for Technology Acquisition & Promotion (NOTAP)	Registration of technology transfer from foreigners to their partners in Nigeria. Gives Certificate of Approval
6	Foreign Exchange (Monitoring & Miscellaneous Provisions) Act (FEMMPA)	Central Bank of Nigeria (CBN)	*Regulates capital importation through an authorised dealer to do business legitimately without flouting the Money Laundering laws. *Licenses authorised capital dealer, minimum share capital and how regularly to renew your licence. *Issues Certificate of Capital Importation
7	Customs & Excise Management Act	Board of Customs	Regulates importation and exportation of goods. Imposes import & export duties
8	Federal High Court Act	Federal High Court	Resolution of disputes arising from company matters
9	Industrial Inspectorate Act	Ministry of Trade & Investment	*Provides incentives and reliefs for those investing in the manufacturing sector. *Supervises activities of manufacturing industries in Nigeria that wishes to incur capital expenditure – issues Certificate of Acceptance
10	Companies Income Tax Act (CITA)	*Federal Inland Revenue Board (This is the main body set up by the law) *Federal Inland Revenue Service (FIRS) (Operative arm which collects	Regulates the taxation of company operating in Nigeria. Located in the ministry of Finance.

		the taxes from companies)	
11	Stamp Duties Act	Federal Inland Revenue Service	Prescribes the quantum of duties or taxes to be paid before registering certain document for incorporation (Memo & Art)
12	Constitution of Federal Republic of Nigeria 1999 (as amended)	Administered by all the court in Nigeria	Regulates every activity. ***Section 44 (1)***: Prohibition of compulsory acquisition without prompt compensation. And the protection of the right to own property (whether a Nigerian or alien). Companies incorporated in Nigeria are Nigerian corporate citizens (Shell: a dual corporate citizen)
13	Land Use Act (1978)		Regulates the allocation of lands for commercial purposes in Nigeria to let you know that there is no absolute ownership of land and land can be taken over for overriding public purposes
14	National Insurance Commission Act	National Insurance Commission (NICOM)	Guides the insurance activities of companies
15	Banks and other Financial Institutions Act 1991 (as amended)	Central Bank of Nigeria	Regulates Banking activities of companies

LAWS REGULATING FOREIGN PARTICIPATION IN BUSINESS IN NIGERIA

1. **Companies and Allied Matters Act (CAMA):** ***Section 148*** of the Act requires the production of a document, which is by law sufficient evidence of probate of a Will or letters of administration of an estate. ***Section 155***, on the other hand, deals with transmission of shares
2. **Nigerian Investment Promotion Commission (NIPC) Act:** ***Section 17 of the Nigerian Investment Promotion Commission Act*** which requires aliens to register with the Commission before commencing business in Nigeria.
3. **Immigration Act**: Obtaining business permit under ***Section 8***.
4. **Investments and Securities Act (ISA) 2007**: ***Section 8*** empowers the Securities and Exchange Commission (SEC) to keep and maintain Foreign Direct Investments (FDI) and Foreign Portfolio Investments (FPI) in Nigeria.
5. **Foreign Exchange (Monitoring and Miscellaneous Provisions) Act:** Regulates capital importation through an authorised dealer to do business legitimately without flouting the Money Laundering laws.

6. **Industrial Inspectorate Act:** Provides incentives and reliefs for those investing in the manufacturing sector.
7. **National Office for Technology Acquisition and Promotion Act:** makes provision for registration of technology transfer from foreigners to their partners in Nigeria.

GOVERNMENT AGENCIES REGULATING FOREIGN PARTICIPATION IN NIGERIA AND THEIR FEATURES

There are basically three government agencies regulating foreign participation in Nigeria and these are:

1. Nigerian Investment Promotion Commission (NIPC);
2. National Office of Technology Acquisition and Promotion (NOTAP); and
3. Nigeria Immigration Service.

I. Nigerian Investment Promotion Commission

A. Establishment

This was established in 1995 as a body corporate with perpetual succession under the Nigerian Investment Promotion Commission (NIPC) Decree, 1995. It is now Nigerian Investment Promotion Commission (NIPC) Act, Cap NI 17 LFN 2004. The commission shall encourage, promote and coordinate investment in the Nigerian economy.

An enterprise in which foreign participation is permitted must apply for registration with the Nigerian Investment Promotion Commission (NIPC) before commencing business in Nigeria – ***Section 20 of NIPC Act***.

B. Features/Functions

1. Coordinate and monitor all investment promotion activities to which the Act applies;
2. Initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerian and non-Nigerian investors;
3. Promote investments in and outside Nigeria through effective promotional means;
4. Provide and disseminate up-to-date information on incentives available to investors;
5. Assist incoming and existing investors by providing support services;
6. Evaluate the impact of the Commission in investments in Nigeria and recommend appropriate recommendations; and
7. Maintain liaison between investors and ministries, government departments and agencies, institutional lenders and other authorities concerned with investments - ***Section 4 NIPC Act***.

C. Investment Promotion Assurances

Under the NIPC Act, there are certain investment promotion assurances and guides to foreign investments in Nigeria to the effect that:

1. **Nationalisation of Enterprise:** No enterprise shall be nationalised or expropriated by any Government of the Federation - ***Section 25(1) (b) NIPC Act***.
2. **Surrender of Interest in the Capital:** No person who owns, wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other persons - ***Section 25(1) (b) NIPC Act***.
3. **Acquisition of Enterprise by the Government:** There would be no acquisition of an enterprise by the Federal Government unless the acquisition is in National interest or for a public purpose. In such a situation, there shall be payment of fair and adequate compensation without undue delay. The person shall have the right of access to court for

the determination of his interest and the amount of compensation to which he is entitled. ***Section 25(2) NIPC Act.***

4. **Dispute Resolution Mechanism:** There shall also be an effective dispute resolution system in accordance with international standards - ***Section 25(7) NIPC Act.***
5. **Depositing Money into Domiciliary Account without Conversion:** Depositing money into domiciliary account without converting it into naira.

II. National Office for Technology Acquisition and Promotion (NOTAP)

A. Concept

Every contract or agreement entered into by any person in Nigeria with another person outside Nigeria (foreigner) involving the transfer of foreign technology to Nigerian partners shall be registered with the National Office for Technology Acquisition and Promotion (NOTAP) in the prescribed manner, that is, not later than *60 days from the execution of the agreement* – ***Section 5(2) NOTAP Act***.

B. Features of NOTAP

1. Promote investments of foreign technology in and outside Nigeria;
2. Assist incoming and existing investors by providing support services; and
3. Promote investments in and outside Nigeria through effective promotional means.

III. Nigerian Immigration Service (NIS)

1. Regulates the entry of aliens into the country.
2. Supervises and grants visa, Business Permits, Residence permits, expatriate quota and work permit - ***Section 8.***

IV. Securities and Exchange Commission (SEC)

1. Keeps and maintains separate register for Foreign Direct Investment and Foreign Portfolio Investments.
2. Register all securities except those of private companies - ***Rule 406 SEC Rules 2013.***

NOTE - ***Rule 416 SEC Rules 2013*** which provides for exemption in event of reciprocal agreements with international organisation of securities commission (IOSCO) members – for exemption of registration of securities.

FORMS OF PARTICIPATION IN FOREIGN INVESTMENT IN NIGERIA

I. Foreign Direct Investment (FDI)

A. Concept

FDI arises in situation where foreigners buy shares in a Nigerian company either directly or through a stockbroker. This is a measure of foreign ownership of productive assets, such as factories, mines and land. Increasing foreign investment can be used as one measure of growing economic globalisation. Foreigners take part in business either by takeover of existing Nigerian companies, merger (Stanbic IBTC - Stanbic was incorporated in South Africa and IBTC was a Nigerian Bank) or forming/incorporating companies in Nigeria.

B. Steps towards Establishing a Nigerian Company with Foreign Direct Participation

1. Obtain from the Nigerian embassy, a cable visa subject to regularisation for owners and officers of the company.
2. Securing an address in Nigeria for service of documents and other pre-formation of the company.
3. Prepare and execute Joint Venture agreement and other pre-incorporation contracts if in partnership with Nigerians.
4. Incorporate the company with CAC and obtain original certificate of Incorporation and other documents.

5. Importation of capital through an Authorised Dealer (i.e. Approved Bank and obtain certificate of capital importation issued by CBN – ***Section 12 & 13 CAMA***.
6. Register the company with Nigerian Investment Promotion Commission – ***Section 19 NIPC ACT***
7. Apply to the Securities and Exchange Commission (SEC) for registration of interest of foreigner in the shares of the company
8. Obtain relevant permits from the relevant Regulatory Agencies.
9. Apply to obtain relevant incentives and reliefs available for foreign investors in Nigeria.

II. Foreign Portfolio Investment (FPI)

A. Concept

This is the entry of funds into a country where foreigners make purchases in the country's stock and bond markets. Thus, if an alien wants to invest in the shares of a company, whether public or private, he can do so through Foreign Portfolio Investment. Any acquisition that is not equal to a takeover is an FPI. The SEC is mandated to maintain register of FDI and FPI – ***Section 8 ISA***.

B. Steps towards Acquisition of Shares of a Nigerian Company by Foreign Investor (FPI)

1. Application for allotment of shares by the Foreign Investor or a capital market operator to the Nigeria Company directly at primary market (during public offer) or through the stock broker for shares quoted at the Stock Exchange (Secondary market) or private placements - ***Rule 406 & 410 SEC Rules 2013***
2. Approval of Allotment of the shares to the foreign investor by the Board of Directors, subject to requisite approvals.
3. Importation of the capital through an authorised dealer (Approved Bank) and obtain certificate of capital importation issued by CBN, and pay for the shares - ***Rule 408 SEC Rules 2013***.
4. Obtain share certificates from the company's Registrar, enlist the shares in the electronic stock holding at the Central Securities Clearing Systems Ltd (CSCS) and obtain Statements of Stock holding from the CSCS.
5. Apply to the Securities and Exchange Commission (SEC) for registration of security IN FORM SEC 6F accompanied by prescribed fee - ***Rule 415 SEC Rules 2013***.

III. Exemption from Registration

A. General Rule

Section 54(1) of CAMA generally provides that a foreign company incorporated outside Nigeria and having the intention of carrying on business in Nigeria shall obtain incorporation as a separate entity in Nigeria for that purpose.

B. Exempted Companies

However, ***Section 56(1) of CAMA*** provides that a foreign company or entity may be exempted from registration if it belongs to any of the following categories or types of companies:

1. Foreign companies (other than engineering consultants and technical experts) invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project.
2. Foreign companies, which are in Nigeria for the execution of a specific individual loan project on behalf of the donor country or international organisation (UNICEF, WHO, IMF, World Bank).
3. Foreign government-owned companies engaged solely in export promotion activities.

4. Engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person where the Federal Government has approved such contract.

C. Status of an Exempted Company

An exempted company has the status of an unregistered company - ***Section 58 CAMA***. The effect is that the company is exempted from payment of all company taxes. However, this provision does not affect the liability of a foreign company to be sued by Nigerians in Nigeria or their right to sue Nigerians in Nigeria - ***Section 60 CAMA***. An exemption is not a license to disregard any enactment or rule of law except as stated in ***Sections 55, 56, 57 & 58 CAMA***. Thus, an exempted company must deliver/file Annual Reports with the CAC in the prescribed form – ***Section 57 CAMA***.

D. Application for Exemption

Section 56(2) of CAMA provides that application for exemption is to be made to the Secretary to the Federal Government setting out eight (8) specified particulars viz –

1. Name and place of business of the foreign company outside Nigeria;
2. Name and place of business or the proposed name and place of business of the foreign company in Nigeria;
3. Name and address of each director, partner, or other principal officer of the foreign company;
4. Certified copy of the charter, statutes or memorandum and articles of association of the company or other instrument constituting or defining the constitution of the company, and if the instrument is not written in English language, a certified translation thereof;
5. Names and addresses of someone or persons resident in Nigeria authorised to accept on behalf of the foreign company service of process and any notices required to be served on the company;
6. Business or proposed business in Nigeria, of the foreign company and the duration of such business.
7. Particulars of any project previously carried out by the company as an exempt company; and
8. Such other particulars as may be required by the Secretary to the Federal Government.

E. Approval of Application and Revocation of Exemption by the President

Section 56(3) CAMA: provides that where the President upon the receipt of an application for exemption is of the opinion that the circumstances are such as to render it expedient that such an exemption should be granted, the President may, subject to such conditions as it may prescribe, exempt the foreign company from the obligations imposed by or under this Act.

Section 56(5) CAMA: provides that the President may at any time revoke any exemption granted to any company if it is of the opinion that the company has contravened any provision of this Act or has failed to fulfil any condition contained in the exemption order or for any other good or sufficient reason.

Both the grant of exemption and any revocation are required to be published in the *Gazette* – ***Section 56(6) of CAMA***.

F. Sample Draft of Application Letter for Exemption

KILLI NANCWAT & CO
Legal Practitioners and Solicitors
No 1 Compos Mentis Boulevard, Area 11, Abuja
killinancwat@hotmail.com/+234-666-556-9990
OUR REF_____YOUR REF_____

Date: 16th February, 2019

The President
Federal Republic of Nigeria
Through:
The Secretary
Government of the Federation of Nigeria

Dear Sir,

APPLICATION FOR EXEMPTION FROM REGISTRATION AS A NIGERIAN COMPANY PURSUANT TO SECTION 56(1) COMPANIES AND ALLIED MATTERS ACT CAP C20 LAWS OF THE FEDERATION OF NIGERIA, 2004

We, the solicitors, are writing on behalf of Honda Japan Incorporated. We are applying for an exemption for Honda Japan Inc, from incorporation as a Nigerian company, a company duly registered under the Japanese law and carrying on the business of building hydroelectric dams. This exemption is brought pursuant to Section 56(1) CAMA, the company having been invited to Nigeria with the approval of the Federal Government of Nigeria to build an ultra-modern hydroelectric dam on River Kogi, Lokoja, Kogi State.

Honda Japan Incorporated is the parent company registered under the laws of Japan with registration number HA/201/456 and its registered address as No 5 Carpo Road, Tokyo, Japan. In Nigeria, Honda Japan will operate as Honda Nigeria for the purposes of carrying out this project aforementioned. The managing director of the company will be Mr Ying Yang of No 10 Bakoe Close, Tokyo Japan, and the company secretary is Ms Yanyka Blair of No 23 Classical Drive, Tokyo Japan. Mr Jide Kosoko of No 53 Yinka Close, Lokoja, Kogi State is the other director of the company and he is authorised to accept services of any notice on the company.

Honda Nigeria intends to complete the hydroelectric dam within a year of commencement of the project. The estimated start date of the project is 1st June 2019 and therefore the company should have finished the project by 31st May 2020. A certified copy of the memorandum of association and articles of association of Honda Japan Incorporated including a certified translation of these documents are attached to this letter. In addition, the particulars of similar hydroelectric dams built in Hong Kong, China and Taiwan are attached to document as well as Two Japanese National awards won by Honda Japan International for its impressive work in hydroelectricity

Thank you for your consideration.

Yours faithfully,
(Signature)
Killi Nancwat
FOR: Killi Nancwat & Co

ENCLS:
1. A certified copy of the Memorandum of Association and Articles of Association of HONDA JAPAN INCORPORATED including a certified translation of these documents.
2. Particulars of the hydroelectric dams built in Hong Kong, China and Taiwan.
3. Certified True Copies of the National awards won for the leading work done by HONDA JAPAN INCORPORATED in hydroelectricity.

REGISTRATION WITH RELEVANT REGULATORY AGENCIES & CHECKLIST OF DOCUMENTS TO ACCOMPANY APPLICATION

I. Corporate Affairs Commission

A. General Rule

Section 54(1) CAMA provides that, every foreign company having the intention of carrying on business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carryon business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

B. Procedure for Incorporation with CAC

1. Engage the services of a corporate lawyer; give him all relevant instructions/information e.g. name of the company, business of company, particulars of the foreign investor, share capital, 1st directors, proposed registered office, subscribers to Memo and Articles etc.
2. Obtain incorporation forms.
3. Availability and Reservation of name to be carried out online or at any CAC office.
4. Prepare Incorporation documents.
5. Submit 2 copies each for Memo and Articles with two copies of the statement of share capital at the Federal Board of Inland Revenue Service for stamping.
6. File incorporation documents (stamped) at the CAC.
7. Issuance of Certificate of Incorporation by CAC.

This is a prima facie evidence of incorporation.

C. Effect of Carrying On Business without Registration

Any foreign company which fails to comply with the requirements of Section 54 CAMA
1. Shall be guilty of an offence and liable on conviction to a fine of not less than N2,500.00
2. Every officer or agent of the company who knowingly and wilfully authorises or permits the default or failure to comply shall, whether or not the company is also convicted of any offence be liable on conviction to a fine of not less than N250.00
3. Where the offence is a continuing one to a further fine of N25 for every day during which the default continues – ***Section 55 CAMA***.

D. Legal Personality of Unregistered Foreign Companies

An unregistered foreign company can sue and be sued in Nigeria, either in its corporate name or that of its agent. This position was stated in ***Ritz Pumem Fabrik & Co Kg v. Techno Continental Engineering Nig. Ltd*** where the plaintiff was a German company which supplied machinery to the Nigeria Company which refused to pay. See also ***Watanmal (Singapore Pte) v. Liz Olofin Co. Ltd*****;** ***Section 60(b) CAMA***.

II. Nigerian Investment Promotion Commission (NIPC)

A. General Rule

An enterprise in which foreign participation is permitted must apply for registration with the Nigerian Investment Promotion Commission (NIPC) before commencing business in Nigeria – ***Section 20 of NIPC Act***.

B. Procedure for Registration with NIPC

1. The company seeking registration with NIPC must first obtain the NIPC Form 1. A non-refundable deposit of ten thousand naira (N10, 000) must be paid and receipt obtained.
2. The form will be completed by the company and submitted at NIPC Headquarters in Abuja or State Ministries of Trade with the following:
   (a) Two copies of receipt of payment of N10, 000
   (b) Certificate of Incorporation
   (c) The memorandum and articles of association of the company.
   (d) Receipt of payment of stamp duties on the authorised share capital of the company as at the date of the application. NB - N10 million is the minimum share capital.
   (e) Tax clearance certificate of the applicant company.
   (f) Partnership (Joint Venture) Agreement unless 100% foreign ownership
   (g) Feasibility Report and Project Implementation Program of the company for its proposed business.
   (h) Title deeds of land evidencing firm commitment to acquire requisite business premises for the company's operations.
   (i) Training program for Nigerian Staff or personnel policy of the company, incorporating management succession schedule for qualified Nigerians.
   (j) CTC of FORM CAC 2 & 7 i.e. statement of share capital and return of allotment and particulars of Directors including non – resident directors "NRD" i.e. Names, addresses, nationalities and occupations of the proposed Directors of the Company including non-resident directors which should be marked "NRD".
   (k) Job title designations of expatriate quota positions required, and the academic and working experience required for the occupants of such positions.
   (l) Copies of Information Brochure on the foreign partner as testimony of Int'l expertise and credibility in the line of business.
   (m) A copy of certificate of capital importation for wholly foreign companies.
3. After the submission of the NIPC Form 1, the Commission will register the applicant company within 14 days of the receipt of the application.

III. Nigerian Immigration Service (Ministry of Internal Affairs)

(Checklist of Documents)

1. Completed Immigration Form T/1.
2. Certificate of incorporation.

3. Certified True Copies of particulars of directors, share allotment, and memorandum and articles of association of the company.
4. Current Tax Certificate.
5. Rent, Lease or Certificate of Occupancy for operating premises.
6. Evidence of imported machineries with proforma invoices, Form M, etc., or evidence of work on hand with value attached to the contract.
7. Functional feasibility report.
8. Notary public confirmatory letter of office or site location.
9. Proposed salaries of expatriates to be received, designation and qualification.
10. Training programme for Nigerians under studies.
11. Audit account.

IV. National Office of Technology Acquisition and Promotion

A. General Rule

Every contract or agreement entered into by any person in Nigeria with another person outside Nigeria (foreigner) involving the transfer of foreign technology to Nigerian partners shall be registered with the National Office for Technology Acquisition and Promotion (NOTAP) in the prescribed manner, that is, not later than 60 days from the execution of the agreement – ***Section 5(2) NOTAP Act***. It is the obligation of both the transferor and transferee of such technology to register the agreement.

B. Effect of Non-Registration with NOTAP

Non-registration with NOTAP does not render the contract void, only that repatriation of fees, profits, royalties through CBN is disallowed unless a certificate of approval of the registration with NOTAP accompanies the application to repatriate in respect of such contract – ***Section 7 NOTAP Act***.

C. Procedure for Application for Registration

1. Completing a NOTAP Prescribed Form NOIP 1-84 with CTC of the contract, company documents and related information.
2. The application form must be accompanied with the following documents:
   (a) Application fee
   (b) Memorandum and articles of association of the company (certified true copies) and certificate of incorporation
   (c) Two certified true copies of the agreement to be registered
   (d) Two copies of duly completed questionnaire (revised NOIP 2-84)
   (e) A copy of the relevant feasibility study
   (f) Annual audited accounts (if not a new company)
   (g) A copy of the statement of affairs of the company accompanied with the certificate of incorporation (if it is a new company)
3. Upon submission, NOTAP vets the agreement to determine its conformity with its evaluation criteria.
4. If the agreement is approved, NOTAP computes and advises the applicant on the fees payable as registration fees for the use of the technology and the duration approved for the agreement.
5. The NOTAP Certificate of Approval is usually issued within a period of 2 weeks (max – 6 months) of the application and valid for a period of between 1-10 years.

D. Registrable Contracts/Agreements

1. Use of trade – marks
2. Right to use patented inventions
3. The supply of technical expertise
4. The supply of basic or detailed engineering drawing
5. The supply of machinery and plant
6. The provision of operating staff or managerial assistance and training of personnel
7. Contract involving transfer of technology to Nigerian partners – ***Section 4(d) NOTAP Act***

E. Refusal to register by NOTAP

The Director of NOTAP may refuse registration (***Section 6(2) NOTAP Act***) on several grounds. The key grounds are:

1. If the technology is available in Nigeria
2. Where the contract involves the transfer of obsolete technology
3. Where the price does not commensurate with the technology to be acquired
4. Where the transferee is obliged to submit to foreign jurisdiction in any controversy arising for decision concerning the interpretation or enforcement in Nigeria of any such contract.

IMPORTATION OF CAPITAL BY FOREIGN INVESTORS

I. Modes of Importation of Foreign Capital

After a foreign company/investor have obtained registration with the NIPC, its capital can be imported by any of the following:

1. Importation of equipment/raw materials
2. Importation of cash
3. Importation of cash indirectly through the Debt-Equity conversion programme (DMO)

II. Importation of Capital through Foreign Exchange (Monitoring & Miscellaneous Provisions) Act

A foreign investor wishing to buy shares or import foreign capital/loan for doing business in Nigeria should freely import the capital through an Authorised Dealer, which currency is convertible into the Naira at the official foreign exchange market - ***Sections 12, 13 & 15 Foreign Exchange (Monitoring & Miscellaneous Provisions) Act.***

III. Procedure for Importation

1. This can be done by buying Nigeria Debt instrument abroad from any Stock Exchange at a discount rate.
2. A Certificate of Capital Importation will be issued to the Foreigner.
3. The foreign company/investor will then present the CCI-Certificate of Capital Importation to the Central Bank of Nigeria through authorised dealers usually Banks.
4. The CBN will pay the face value of the Certificate of Capital Importation in naira.

IV. Advantages of Using the Certificate of Capital Importation (CCI)

1. It enables the opening of foreign currency domiciliary accounts with Banks in Nigeria
2. Open a special non – resident Naira Account.
3. Buy shares in Nigerian companies out of the naira account.
4. It aids repatriation of capital, dividends and incomes without restrictions at autonomous market rates minus taxes - ***Rule 408(2) (a)-(d) SEC Rules 2013***.
5. Unconditional transferability of funds through an authorised dealer in freely convertible currency - ***Section 24 of the NIPC Act.***

6. The company will be exempted from money laundering investigations.
7. If the purpose is to finance foreign loan; the company will be allowed to purchase foreign currency at the official rate for servicing of the foreign loan.

PERMITS/APPROVAL/RELIEFS/INCENTIVES AVAILABLE UNDER THE LAW TO ENCOURAGE FOREIGN PARTICIPATION

I. Permits/Approvals

1. **Business Permit:** No person other than a Nigerian citizen shall on his own account or in partnership with any other person practice a profession or establish or take over any trade or business whatsoever or register or take over any company with limited liability for any such purpose without the written consent of the Minister of Internal Affairs - ***Section 8(l) (b) Immigration Act and Immigration Regulations***. This is the operational licence granted to an expatriate to enable him carry on business activities in Nigeria. The consent of the Minister of Internal Affairs is issued in the form of Business Permit. This applies only to wholly own foreign company and not one mixed with Nigerians and non-Nigerians. Note that the permit is now issued through the NIPC. The application for business permit shall be accompanied by the following documents:
   (a) Completed immigration form T/1
   (b) Certificate of incorporation
   (c) Memorandum and article of association
   (d) Feasibility study report (should be certified or registered with CAC)
   (e) CAC Form 2.3 and 2.5
   (f) Joint Venture Agreement for partnership venture between Nigerian and foreigners (original to be presented for sighting)
   (g) Companies current tax clearance certificate (original to be presented for sighting)
   (h) Lease agreement for C of O for opening premises (original to be presented for sighting)

   Note: for business permit, the authorised share capital must not be less than N10, 000, 000 in respect of each company.
2. **Expatriate Quota:** No person other than a citizen of Nigeria shall accept employment (not being employment with the Federal or a State government) without the written consent of the Chief Federal Immigration Officer - ***Section 8(l) (a) Immigration Act***. Initial expatriate quota is sought and obtained usually along with the Business Permit. There are two types of expatriate quota:
   (a) Permanent until Reviewed ("PUR") - usually for the post of Chairman of the company's Board of Directors or the Managing Director.
   (b) Temporary Quota - Directors and other employees of the company.

   The maximum number of years granted in the first instance is 5 years renewable for a further period of 2 years. Applications is made on Immigration Form T/2 accompanied with
   (a) CTC of memorandum and articles of association
   (b) Form CAC 2 and 7 (share capital and directors)
   (c) Evidence of non-availability of expertise in the country
   (d) A copy of training programme or personnel policy of the company (incorporating succession schedule)
   (e) Particulars of proposed director

(f) Job title designations of expatriate quota positions and required work and academic experience.

(g) Proposed annual salaries to be paid to the expatriates to be recruited

It is the duty of the company and not that of the employee, to apply for expatriate quota. See ***Oilfields Supply Center Ltd. versus Johnson (No.2)***.[18]

3. **Resident Permit:** Every alien may enter Nigeria and stay therein for three months without a residence visa (Tourist Visa). Any person who is not a citizen of Nigeria who desires to enter Nigeria for purpose of residence (i.e. beyond three months) must obtain a residence permit. Application is made by the employer company via letter (2 copies) accompanied by a valid passport of the alien from the company requesting permission to employ the alien, to the Immigration Department (via Consular Authorities). Also to be attached is a letter of employment and the photocopy of the Expatriate Quota. On approval, the alien is then granted an STR Visa which on arrival in Nigeria will be regularised and the alien issued a work permit.
4. **Business Visa:** this is a permit granted by the Nigerian Immigration Service that allows foreigners, business men and investors coming to Nigeria for business. This Visa is valid for 90 days but extendable.
5. **Combined Expatriate Residence Permit and Aliens Card (CERPAC):** The combined CERPAC scheme was introduced in 2002, providing for foreigners (except ECOWAS citizens, accredited diplomats and children below the age of 15 years) working or living in Nigeria to carry CERPAC card, the scheme is expected to simplify the process of acquiring residence permit and alien registration certificate. It provides a computerized unit at various points of entries like airports that is linked to a central database centre containing information on every foreigner residing in Nigeria. The residence permit allows a foreigner and his dependants or family to reside in Nigeria. This is in addition to the visa requirement as stated above, while every foreigner resident in Nigeria or visiting with the intention to remain in Nigeria for more than 56 days is required to register. Unlike the residence permit, the alien registration certificate is essentially a movement chart Under the CERPAC scheme, registration is valid for one year, after which application for revalidation must be made.

   Foreigners relocating to a different part of Nigeria must inform the nearest Aliens Office of the move. Also, if a foreigner holding an Aliens Card leaves Nigeria permanently then the Card has to be handed to the Aliens Office. The fee is US$350. On payment and submitting the completed application form, a temporary receipt is given. This receipt should be carried at all times as proof of residence. Applicants will then be told when and where to collect their cards. In conclusion, a foreigner doing business is required to have business permit, residence permit, alien registration card and visa (3 types). Only residence permit and alien registration have been combined.
6. **Registration of Securities by SEC:** The Securities and Exchange Commission is required to keep and maintain separate registers of foreign direct investments and foreign portfolio investments - ***Section 8(k)Investments and Securities Act, 2007***. No need to get a permit to allow foreigners to hold shares in the company.
7. **Transfer of Technology:** Every contract or agreement entered into by any person in Nigeria with another person outside Nigeria involving the transfer of foreign technology

[18] *[1987] 2 NWLR 625; (1987) 18 NSCC 725; [1987] 1 All NLR (part 1) 321.*

to Nigerian partners shall be registered with the National Office of Technology Acquisition and Promotion (NOTAP) in the prescribed manner not later than sixty days from the execution or conclusion of the agreement - ***Section 5(2) National Office of Technology Acquisition and Promotion Act***.

8. **Intention to Incur Capital Expenditure:** Any person proposing to start a new undertaking or in the case of an existing undertaking, to incur additional expenditure, of not less than 20,000 Naira must give to the Director of the Industrial Inspectorate Division of the Federal Ministry of Industry notice of his intention - ***Section 3(1) Industrial Inspectorate Act***. Application is in Form 1 (2 copies) obtainable from the Federal Ministry of Industries, Inspectorate Division. If the Director is satisfied with the valuation for the property, he issues a certificate of acceptance which binds other government agencies e.g. The Board of Customs and Excise, the Federal Board of Inland Revenue.
9. **Fiscal Approval**: this is in respect of fess for management, technical, consultancy agreement etc.
10. **Certificate of incorporation from CAC:** every foreign company that is desirous of doing business in Nigeria will have to be registered or incorporated with the CAC except where the company has been exempted from registration – ***Section 54 CAMA***.

II. Reliefs/Incentives

1. **Exporting not Less than 60% of Manufactured Goods:** entitle to 3 years exemption from tax, 2 additional years subsequently and 10% tax exemption for the subsequent years.
2. **Located at Export Processing Zone:** exempted from tax for 3 years and can import materials for production free import duties.
3. **Located at Economically Disadvantage Areas:** exempted from tax for 7 years and additional 5% capital depreciation allowance over the above initial capital depreciation allowance.
4. **Obtaining Foreign Loan:** interest on such loan will not be taxed
5. **Obtaining Loan from Nigerian Bank:** interest on such loan will not be taxed
6. **Using all Profits to Purchase Materials:** the company will not be taxed for that year
7. **Foreign Currency Earned from Export:** will be deposited in a domiciliary account without converting it to Naira and interest from such domiciliary account will not be taxed.
8. **Expenses Incurred in Research and Development:** will be deducted before taxing the company.
9. **Pioneer Status:** 3 years tax exemption and can be extended for another 2 years.
10. **Gas Utilization:** Exemption from tax for 7 years
11. **Utilization of Local Materials:** exemption from tax for 3 years
12. **Provision of Social Amenities to the Community in which the Company Operates:** the cost will be deducted before the company is taxed.
13. **Investment Infrastructure:** incentive granted to industries that provide facilities that ordinarily, should have been provided by the government such as roads, pipe borne water and electricity. 20% of the cost is tax deductible.
14. **Labour Intensive Mode of Production:** industries with high labour/capital ratio are entitled to tax concessions. These are industries with plants, equipment and machinery, which essentially are operated with minimal automation.

III. Sample Draft of Application Letter for Reliefs/Approvals to NIPC

KILLI NANCWAT & CO
Legal Practitioners and Solicitors
No 1 Compos Mentis Boulevard, Area 11, Abuja
killinancwat@hotmail.com/+234-666-556-9990

OUR REF_____YOUR REF_____

Date: 16th February, 2019

The Director General
Nigerian Investment and Promotion Commission
Maitaima,
Abuja

Dear Sir,

APPLICATION FOR RELIEFS/APPROVALS FOR GOLD PALMS LTD

We write as solicitors of Gold Palms Ltd ("our client") on whose instructions we make this application. Our client is a private company limited by shares with RC NO: 34435 with registered office at No 5 XYZ lane, Benin City, Edo state incorporated under Companies and allied matters act, cap C20 LFN 2004

Two aliens, Mr Abdullah Ibn Seikh and Mr Abubakri Amin are undertaking different values of share capital in the company. Mr Abdullah Ibn Seikh seeks to bring in 100,000 Euros as a loan from a Malaysian bank to expand the company's capital base.

We therefore apply for the following reliefs;

1. Rural investment allowance under CITA, CAP C21, LFN 2004.
2. Repatriation of capital through an authorised dealer
3. Tax relief of interest on foreign loans

Yours faithfully,
Killi Nancwat
FOR: Killi Nancwat & Co

NOTE-we may be asked to draft a letter seeking approvals from any of the organisation

DISPUTE RESOLUTION MECHANISM

Where a dispute arises between an investor and any government of the federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an articulate settlement. Where the dispute could not be resolved through mutual discussion, it may be submitted to arbitration at the option the aggrieved party as follows:

1. Nigerian Investor: in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act; or
2. Foreign Investor: within the framework of any bilateral or multilateral agreement on investment protection to which the federal government and the country of which the federal government and the country of which the investor is a national are parties; or
3. National or International Machinery: for the settlement of investment disputes agreed on by the parties.

Where in respect of any dispute, there is disagreement between the investor and the federal government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Dispute Rules shall apply – ***Section 26 NIPC Act***.

(Week 10)

CORPORATE GOVERNANCE I: LEGAL FRAMEWORK, CONCEPTS AND INTERNATIONAL BEST PRACTICES IN CORPORATE GOVERNANCE

MEANING, RELEVANCE AND NATURE OF CORPORATE GOVERNANCE

I. Meaning of Corporate Governance

Corporate governance is the system by which companies are directed and controlled. A system is a set of actors interacting within the framework of the law. It protects the interests of major stakeholders in a corporation by ensuring that adequate checks and balances are not just enshrined but complied with. Corporate governance address issues of ethics, accountability, transparency, and disclosure. Stakeholders of a corporation are: shareholders, directors, employees, customers, vendors/suppliers, creditors and the community. In simple terms, corporate governance involves the relationship between the company's management, Board of Directors, Shareholders, Stakeholders (employees, consumers, host community and general public).

II. Relevance of Corporate Governance

Corporate governance is set to achieve the following:

1. Good ethics and culture of business
2. Legitimate expectation of owners
3. Care for the interest of employees
4. Excellent relationship with consumers
5. Needs of the host community
6. Compliance with legal and regulatory requirements

III. General Principles of Corporate Governance

1. Integrity
2. Accountancy Standard
3. Transparency

IV. Goals to Achieve in Corporate Governance (Golden Rules)

1. High ethical standards
2. Congruence of goals
3. Strategic management

V. Essentials of Corporate Governance

1. Lay solid foundation for management oversight
2. Structure the Board in such a way as to add value
3. Promote ethical and responsible decision making process
4. Safeguard integrity in financial reporting
5. Respect the right of shareholders
6. Recognise and manage risk
7. Encourage enhanced performance
8. Remunerate fairly and responsibly
9. Recognise the legitimate interest of stakeholders

VI. Control Mechanism

1. Periodic monitoring by the Board
2. Strengthen the internal control procedure and independent internal auditor
3. Balance of powers
4. Remuneration based on performance
5. Monitoring by institutional investors

6. External corporate governance
   (a) Competition
   (b) Government regulations
   (c) Media pressure
   (d) Demand for an assessment of performance information
   (e) Labour pressure group

LEGAL FRAMEWORK AND CODES (SOURCES) OF CORPORATE GOVERNANCE

I. Legal Framework

The three major laws that govern the legal regime of corporate governance in Nigeria are:

1. Companies and Allied Matters Act 1990
2. Investment and Securities Act
3. Banks and Other Financial Institution Act

The international legislations on corporate governance include:

1. Organisation for Economic Co-operation and Development (OECD) Principles on Corporate Governance
2. United Nations Conference on Trade and Development (UNCTAD) Guidelines on Good Corporate Governance Disclosure
3. International Financial Reporting Standard
4. United Nations Intergovernmental Working Group Experts on International Standards of Accounting and Reporting

II. Codes of Corporate Governance

1. Nigeria Code of Corporate Governance 2018 (FRCN Code)
2. SEC Code of Corporate Governance for Public Companies 2011 (SEC Code)
3. Code of Corporate Governance for Banks and Discount Houses 2014 (CBN Code)
4. Code of Corporate Governance for Insurance Industry 2009 (NAICOM Code)
5. Code of Corporate Governance for Pension Fund Administrators and Pension Fund Managers (PENCOM Code)
6. Code of Corporate Governance for Telecommunication Industry (NCC Code)

CODE OF CORPORATE GOVERNANCE FOR BANKS & DISCOUNT HOUSES IN NIGERIA 2014 (CBN CODE)

1. **Frequency and Notice of Board Meetings:** The Board should meet regularly, at least 4 regular meetings in a financial year. There should be adequate notice for all Board meetings, as specified in the MEMOART.
2. **Separation of Office of Chairman Board and MD/CEO:** the position of the Board Chairman and the MD/CEO (Head of management) are to be separate. No one person shall combine the two positions in any bank at the same time – ***Article 2.3***
3. **Tenure of Non-Executive Directors:** non-executive directors of banks shall serve for a maximum of 3 terms of 4 years each (Maximum of 12 years) – ***Article 2.4***
4. **Remuneration of Non-Executive Directors:** limited to sitting allowances and expenses.
5. **Family Members as Chairman and CEO/Executive Director:** No two members of the same family should occupy the position of Chairman and CEO/Executive Director of a bank at the same time – ***Article 2.3.3***
6. **Composition of the Board:** maximum of 20 members and a minimum of 5 members – ***Article 2.2***.
7. **Independent Directors:** there shall be on the board, at least 2 independent director or 20% of the number of directors.
8. **Equity Holding:** an equity holding of 5% and above by any investor shall be subject to CBN's approval. Where such shares are acquired through the capital market, the bank shall

apply for a non-objection letter from the CBN immediately after the acquisition. Government direct and indirect equity holding in any bank shall be limited to 10% - ***Article 3.2***

9. **Whistle Blowing:** Banks shall have a whistle blowing policy make known to employees and other stakeholders. The policy shall contain mechanisms, including assurance of confidentiality, that encourage all stakeholders to report any unethical activity to the bank and/or the CBN – ***Article 5.3***
10. **Risk Management:** every bank shall have a risk management framework specifying the governance architecture, policies, procedures and processes for the identification, measurement, monitoring and control of the risks inherent in its operations – ***Article 6.***
11. **Number of Executive Board Directors and Maximum Board Size:** The number of non-executive board directors should be more than that of executive directors subject to a maximum board size of 20 directors.
12. **Determining Remuneration of Executive Directors:** A committee of non-executive directors should determine the remuneration of executive directors
13. **Disclosure of Conflicting Interests to CBN:** When board directors and companies/entities/persons related to them are engaged as service providers or suppliers to the bank, full disclosure of such interests should be made to the CBN.
14. **Exclusion of Chairman of Board/MD from being Chairman of Board Credit Committee**: The Board Credit Committee should have neither the Chairman of the Board nor the MD as its chairman.
15. **Independence of Internal Auditors:** Internal auditors should be largely independent and be members of a relevant professional body.
16. **Board Committees:** there shall be Board committees which the Board shall be responsible for determining the duties of such committees.
17. **Rotation of External Auditors:** appointment of external auditors is subject to approval by the CBN – ***Article 5.2.9***. The maximum number of years of continuous engagement is still 10.
18. **Internal Audit:** headed by at least an employee on AGM grade, and reports to the audit committee.

SEC CODE OF CORPORATE GOVERNANCE FOR PUBLIC COMPANIES

I. Introduction

The SEC code applies to all public companies in Nigeria, all public companies with listed securities and all public companies seeking to issue securities or seeking listing by introduction - ***Section 1 CCGPC***. Where there is a conflict between the provisions of the SEC Code and the provisions of any other code in relation to a company covered by the two codes, the SEC Code provides that the code with the stricter provision shall apply.

II. Salient Provisions

1. **Chairman/CEO:** a person cannot occupy the position of both the Chairman and CEO of a company at the same time.
2. **Tenure of Shareholders:** subject to the provisions of CAMA and satisfactory performance, all directors are subject to re-election at regular intervals of at least once every 3 years – ***Section 19 CCGPC***.
3. **Composition of the Board:** composition of the Board must not be less than 5 members or more than 15 members and must comprise of Executive and Non-Executive Directors. Also, not more than two members of the same family can be on the board at the same time – ***Section 7 CCGPC***.
4. **Independent Directors:** there shall be on the board, at least 1 independent director.
5. **Tenure of Executive Directors:** 2 years term of 5 years.

6. **Remuneration of Executive Directors:** the remuneration of each executive director including the CEO individually, is determined by non-executive directors.
7. **Remuneration of Non-Executive Directors**: shall be fixed by the board and approved by members at a general meeting – ***Section 14 CCGPC***.
8. **Internal Audit:** all companies are to have an effective risk-based internal audit function. Where the board decides not to exercise such a function, sufficient reasons should be disclosed in the company's annual report – ***Section 20 CCGPC***. The internal audit shall be headed by a senior management employee and report to the audit committee.
9. **Rotation of External Auditors:** in order to safeguard the integrity of the external audit process, companies shall rotate both the external audit firms and audit partners. The audit partners shall be rotated by the audit firm, while the company shall not retain the services of an audit firm continuously for more than 10 years. Firms disengaged after a continuous service for a period of 10 years, can be reappointed after the expiration of 7 years after disengagement – ***Section 33 CCGPC***.
10. **Risk Management:** the Board is responsible for the process of risk management and shall accordingly form its own opinion on the effectiveness of the process. Management is accountable to the Board for implementing and monitoring the process of risk management and integrating it into the day-to-day activities of the company – ***Section 29 CCGPC***.
11. **Meetings:** general meetings shall be conducted in an open manner, allowing for free discussion on all issues on the agenda. The Chairmen of all board committees and of the statutory audit committee, should be present at general meetings to respond to shareholders questions. The venue of a general meeting shall be accessible to shareholders. The Board shall ensure that shareholders are not disenfranchised on account of choice of venue – Section 21 CCGPC.
12. **Delegation of Duty of Board to Management:** the board shall define a framework for the delegation of its authority or duties to management, specifying matters that may be delegated and matters that are reserved for the board. The delegation of any duty to management does not in any way diminish the overall responsibility of the board and the directors for being accountable and responsible for the affairs and performance for the company.
13. **Whistle Blowing Policy:** every company shall have a whistle blowing policy that should be known to employees and stakeholders. It is responsibility of the board to implement such a policy and to establish a whistle-blowing mechanism for reporting any substantial unethical behaviour – ***Section 32 CCGPC***.
14. **Secretary:** every company shall appoint a company secretary in accordance to the qualifications and process for appointment prescribed.
15. **Board Committees:** the code recognise the establishment of Board Committees such as Audit Committee, Remuneration Committee and Risk Management Committee. The board shall determine the duties of its committees.
16. **Prohibition of Insider Dealings/Trading:** the code prohibits insider trading or dealings.

NIGERIA CODE OF CORPORATE GOVERNANCE 2018

A. Establishment

This code was established on 14th June, 2018 by the Financial Reporting Council of Nigeria to replace the 2016 Code pursuant to ***Section 11(c) & 15(c) FRCA 2011***. The companies regulated by this code are to comply by including the application of the code in their annual reports. The Financial Reporting Council of Nigeria are to monitor non-compliance, while sectoral regulators impose sanctions.

B. Objectives

1. Institutionalise highest standards, corporate governance best practices in Nigerian companies (particularly those not already covered by sectoral code)

2. Promoting public awareness of essential corporate value and ethical practice to enhance market integrity.
3. Rebuilding public confidence in the Nigerian economy
4. Facilitate trade and contribute to the ease of doing business in Nigeria

C. Applicability (Not to Non-Profit Entities)

1. All public companies whether listed or not
2. Private companies which are holding companies of public companies or regulated entities
3. Concession or privatised companies
4. Regulated private companies

D. Structure of the Code

The code is divided into 7 parts and 28 principles dealing with matters like

1. Board of Directors
2. Assurance
3. Relationship with share holders
4. Business conduct with ethics
5. Transparency
6. Sustainability

E. Recognition of Existing Codes

The Code still recognise the existence of some extant codes such as:

1. SEC Code of Corporate Governance for Public Companies 2011 (SEC Code)
2. Code of Corporate Governance for Banks and Discount Houses 2014 (CBN Code)
3. Code of Corporate Governance for Insurance Industry 2009 (NAICOM Code)
4. Code of Corporate Governance for Pension Fund Administrators and Pension Fund Managers (PENCOM Code)
5. Code of Corporate Governance for Telecommunication Industry (NCC Code)

The sectoral codes shall apply to cover aspects not already covered under the NCCG 2018.

THEORIES AND INTERNATIONAL BEST PRACTICE OF CORPORATE GOVERNANCE

I. Theories of Corporate Governance

A. Stakeholders' Theory

This theory posits that a company has more than the interest of its owners (shareholders) and employees at stake. It broadens the horizon of persons which the welfare of the corporate unit affects to include the shareholders, the management, the employees, the creditors, the society and the government.

This theory advocates for some form of corporate social responsibility which is a duty to operate in ethical ways even if that means a reduction of long-term profit for the company. In this regard, the governing boards are to be the guardian of the interests of all the stakeholders by ensuring that corporate practices take into account the principles of sustainability for surrounding communities.

Thus, while maintaining the importance and priority of shareholders' interests, the company also seeks to strike a balance between the interests of the shareholders and the interests of other people with stakes in the company.

B. Agency (Shareholders) Theory

This theory posits that the officers of the company are its agents who are to carry out the wishes of the company. This serves to distinguish the shareholders who are the principals of the company from the management team/Directors who are the agents. The principals provide the funds for the company while the agent provide managerial skills to manage funds in the company. The directors who manage the affairs of the company are expected to do so on behalf of the company. Thus, corporate governance seeks to balance divergent interests that may

ensue between the directors and the shareholders to ensure that companies are governed in such a way as to attain their objectives.
Consequently, the agency theory suggests financial rewards for the agents to motivate them to maximize the profits of the owners. This emphasizes the strict control, supervision, and monitoring of the performance of the agent to protect the interests of the principals.

C. Stewardship Theory

This theory argues that the managers or executives of a company are stewards of the owners and both groups share common goals therefore the board should not be too controlling as the agency theory suggests; instead the board should play a supporting role by empowering executives and in turn increase the potential for higher performance.

D. Resource Dependency Theory

The assertion of this theory is to the effect that a board exists as a provider of resources to executives in order to help them achieve the organization's goals. It recommends interventions by the board while advocating for strong financial, human and intangible supports to the executives.

II. International Best Practices of Corporate Governance

A. General International Best Practices

1. If possible the German model of two tier of directorship should be recommended and adopted by other countries i.e. Management Board and Supervisory Board.
2. Offices of CEO/Managing Director and Chairman of a company should no longer be fused.
3. Tenure of office of CEO should be fixed to prevent perpetuation.
4. Board of Directors should include a balance of Executive and Non – Executive Directors.
5. Transparency in procedure for appointment of auditors
6. Limitation of the number of shares that can be owned by a member.
7. Regular re-election of Directors (***Section 248 CAMA***)
8. Ensure transparent relationship between external and internal auditors of a company to avoid cooking the books of the company's financial transactions.
9. No individual should unduly hold large number of shares in large companies. ***Section 95 CAMA*** states that a person who has at least 10% unrestricted voting rights at a general meeting in a public company, shall give notice in writing to the company within 14 days after the person becomes aware that he is a substantial shareholder. A fine of N50 is payable for every day during which the default continues.
10. Rules of corporate democracy and sovereignty must be followed.
11. Transparency, Accountability and Credibility in the management of a company.
12. The interests of shareholders and stakeholders of the company must be protected.
13. Recognition of Members Direct Action to protect the rights of the minority shareholders. (***Section 300 CAMA***)
14. Regular and continuous scrutiny of the financial transactions of the company by persons independent of the company i.e. Auditors
15. The mode of arriving at decisions must follow due process. This means that the decisions are to be taken at duly convened meetings at which requisite notices had been given to members – ***(Section 211 – 215 CAMA).***
16. The Provision of a Director acting as a Secretary ought not to be abused. ***Section 294 CAMA*** provides that the Director may act as a Secretary but cannot act in both capacities at the same time e.g. signing a document.

B. Organisation for Economic Co-operation and Development Benchmark

1. CEO and Chairman of the Board should not be occupied by one individual. Compare with Rule 5.1(b) of the Corporate Governance Code for Public Companies.
2. Ensure tenure of office of CEO to prevent self-perpetuation
3. Every company should be headed by an effective board of directors

4. There should be formal, rigorous and transparent procedure for the appointment of new directors to the board
5. All directors should be submitted for re-election at regular intervals subject to continued satisfactory performance
6. No individual should hold unduly large number of shares in large numbers. The percentage should be pegged.
7. The relationship between internal and external auditors should be formal and transparent to prevent compromised financial practices leading to 'book cooking'.
8. In the preparation of financial records, up-to-date accounting standard must be consistently applied.
9. The rules of corporate democracy and corporate sovereignty should always be observed in reaching corporate decisions

In Nigeria, the move to corporate governance started by Industry regulation e.g. CBN (CEO cannot be more than 10 years in office). See how the 2011 Code from SEC aligns with OECD benchmark on corporate governance. Look at CAMA to see which provisions contradict or align with the 2011 Code.

LEGAL STATUS AND IMPACT OF CORPORATE SOCIAL RESPONSIBILITY IN CORPORATE GOVERNANCE

I. Meaning

The World Business Council for Sustainable Development defines CSR as the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the work force and their families as well as the local community and the society at large. It is also called corporate conscience, corporate citizenship, and company's sense of responsibility.

CSR has increasingly focused on corporate governance as a vehicle for incorporating social and environmental concerns into the business decision making processes, benefitting not only financial investors but also employees, consumers and communities.

NB: must separate charity (sense of helping someone) from corporate social responsibility (something done as part of the ethics of business)

II. Corporate Social Responsibility Obligations/Impacts

CSR Framework in Nigeria will require companies/corporations to:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development of affected communities
2. Respect the human rights of those affected by their activities in keeping with Nigeria's international obligations and commitments
3. Encourage local capacity through close co-operation with local community, including local business interests, as well as developing appropriate linkage lines of their corporate activities to the benefit of the communities
4. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and societies in which they operate.
5. Support and uphold good governance principles and practice
6. Abstain from any improper involvement in local political activities

(Week 11)

CORPORATE GOVERNANCE II: OFFICERS OF COMPANY (DIRECTORS AND SECRETARY) - EXAMS

DIRECTORS

INTRODUCTION

Section 63 CAMA creates two organs of a company, namely the Board of Directors and the General meeting. The Board has the general power of management subject to the provisions of CAMA and the articles. The circumstances under which the General meeting can exercise the powers of management are listed under ***Section 63(5) CAMA***. In addition to them, the general meeting will exercise management powers if that power is conferred on it by CAMA or the articles (list them. Put those in section 63(5) first, then add these last two above). The board is not bound to obey the instructions of the general meeting.

DEFINITION AND TYPES OF DIRECTORS

I. Definition of a Director

Section 244(1) CAMA defines a director as any person who is duly appointed by the company to direct and manage the affairs of the company. See ***Baffa v. Odili***.[19] ***Section 245(1) CAMA*** further provides that the term director shall include any person on whose instructions and directions the directors are accustomed to act (shadow directors). Again, Section 567 defines a director as any person occupying the position of a director by whatever name called; and it includes any person in accordance with whose instructions the directors or directions the directors are accustomed to act, but this does not apply to those who give professional advice to the directors. See ***Section 245(3); Re Forest of Dean Coal Minin Co***.

The name by which such persons are called is immaterial, as the test is whether the company has held them out as directors. See ***Section 244(2) CAMA***. Even where a person who is not duly appointed as director acts as such on behalf of the company, his acts shall not bind the company unless the company held him out as a director. See ***Section 250 CAMA***. Thus, the test is whether the company held such person out as a director.

The directors are the alter ego of the company. They are the mind, the directing mind and the brain behind the company's activities and they constitute the policy making as well as the executive organ of the company.

II. Types of Directors & Mode of Appointment

There are different types of directors. Even though there are different types of directors, CAMA did not treat them differently. Their duties, obligations, liability(s) and removal are the same. The categories of directors are:

A. Managing Director

He is an executive director who is the Chief Executive Officer (MD/CEO) and takes full responsibility for the activities of the company. A managing director must first have been appointed as director and then appointed by the board of directors as managing director – ***Section 64(b) CAMA***. The board of directors upon appointing a MD will delegate all or any of their powers to such MD – ***Section 64(b); Section 263(5) CAMA***, so, he exercises the powers delegated to him by the Board of directors.

A MD then functions in two capacities (dual capacity). First he is a director (alter ego) of the company and then he is a servant/employee of the company.

[19] (2001) 15 NWLR (Pt 737) 709

Because it is the board of directors that appointed him as a MD, the board can ONLY remove him as a MD. However, he can only be removed as a director by the company on compliance with the provisions of ***Section 262 of CAMA***. Amongst the functions of a MD is the responsibility for day to day running of the company.

The MD, as an ED, and other EDs are appointed on the basis of their skills and are entitled to remuneration which include stock options, bonuses and participation in profits. They are appointed under a Director Service Contract which fixes the terms and conditions of their appointment as MD or ED.

In banks one person cannot be appointed both MD/CEO and Chairman as it this dual position has been abolished in banks following the reforms in the banking sector in 2005. Also, in public companies with listed securities, a person cannot hold both positions as ***Article 5.1(b)*** provides that for all public companies with listed securities, the positions of the Chairman and the MD/CEO shall be separate and held by different individual to avoid the over-concentration of powers in one individual which may rob the Board of the required checks and balances in the discharge of its duties.

Pursuant to ***Section 5.2(d) of the Code of Corporate Governance for Public Companies***, the functions and responsibilities of the MD/CEO:

1. Day to day running of the company
2. Guiding the development and growth of the company
3. Acting as the company's leading representative in its dealings with its stakeholders

Under the Codes, the MD/CEO is usually appointed from among the ED or from among the employees. That is, a person appointed as MD/CEO need not be a director before he can be appointed as MD/CEO. However, once the board appoints him as MD/CEO, they can remove him and he must be presented to the General Meeting for the purpose of passing a resolution to appoint him director so that FORM CAC 7A can be duly completed and filed with CAC.

B. Executive Directors

The ED takes charge of daily activities of the company particularly in his own department and the implementation of the policy thrust of the company. He is both a director (alter ego) and an employee of the company. As an employee, he is appointed ED under a Director Service Contract which fixes the terms and conditions of his employment, his duties and responsibilities as well as his remuneration as he is entitled to remuneration.

The MD/CEO is usually appointed from among the ED or from among the employees. That is, a person appointed as MD/CEO need not be a director before he can be appointed as MD/CEO. However, once the board appoints him as MD/CEO, they can remove him and he must be presented to the General Meeting for the purpose of passing a resolution to appoint him director so that FORM CAC 7A can be duly completed and filed with CAC. Read ***Longe v. First Bank; Iwuchukwu v. Nwizu***.[20]

C. Non-Executive Director

This is a director of the company however he does not participate in the day to day running of the affairs of the company or participate in its daily management. A non-executive director is not a servant or employee of the company but one of its alter ego.

They are merely appointed directors without any additional administrative role assigned to them. They are part-time directors who are not entitled to any remuneration but only reimbursement for any out of pocket expenses.

They must attend all Board meetings and the chairman of the Board is appointed from among the non-executive directors. In fact, for public companies, ***Article 5.1(c) of the SEC Code***, the chairman should be a non-executive director.

The chairman presides over board and general meetings.

[20] (1994) 7 NWLR

D. Chairman of the Board

He is the chairman of the board and chairman of the company and presides over both board and general meetings of the company. He is appointed by the board of directors from among themselves. See ***Section 263(4) CAMA***.

The chairman is usually appointed from among the non-executive directors except if he is an executive chairman. In fact, for public companies, ***Article 5.1(c) of the SEC Code*** provides that the chairman should be a non-executive director.

In banks, one person cannot be appointed both MD/CEO and Chairman as it this dual position has been abolished in banks following the reforms in the banking sector in 2005. Also, in public companies with listed securities, a person cannot hold both positions as ***Article 5.1(b) SEC Code*** provides that for all public companies with listed securities, the positions of the Chairman and the MD/CEO shall be separate and held by different individual to avoid the over-concentration of powers in one individual which may rob the Board of the required checks and balances in the discharge of its duties.

E. Alternate Director

This is a director who is appointed or nominated by a substantive director, where so enabled by the Articles, to stand in for him, attend meetings on his behalf and act for him in the event of his absence. See ***Baffa v. Odili***.[21] It is the substantive director that appoints or nominates his alternate, but such appointment or nomination must be approved by a resolution of the general meeting. It must be noted that an alternate director ceases to hold office whenever the substantive director ceases to hold office.

The power to appoint an alternate director must be expressly stated in the Articles of the company or else, it cannot be exercised. See ***Baffa v. Odili***.[22] An alternate director is usually appointed where a foreigner (alien) is a director and he is always not around.

Although an alternate director looks like a proxy, he is not a proxy but occupies a substantive position. Although the substantive director and his alternate are two, they are counted as one for the purpose of determining the number of directors. Also, only one of them can function at a time.

An executive director cannot appoint an alternate director because he is actively involved in the day to day running of the company.

F. Life Director

A person can be a life director under ***Section 255 of CAMA***, subject to removal only under ***Section 262 CAMA***. A life director is automatically re-elected in each annual general meeting and he is not affected by rule of retirement and rotation of directors, but can be removed in accordance with Section 262 of CAMA. Note that notwithstanding that he is life director, he can also be mandated to vacate office if he falls under any of the matters provided for under ***Section 258 of CAMA***.

However as a life director, he can be removed as a director like any other director upon the company complying the provisions of Section 262 CAMA on removal of directors. See Section 255 CAMA. The only advantage a life director enjoys is that since he is not subject to the rule of retirement and rotation of directors, he does not need to lobby or canvass for votes from shareholders for re-election. However, when members want him out, he can be removed. Note also that he can vacate office. See ***Section 258 CAMA***.

G. Shadow Director

A shadow director is defined as a person who is not duly appointed as a director, but in accordance with whose directions or instructions the directors are accustomed to act – ***Section 245(1); Section 567 CAMA***. This kind of director is not seen and he is not appointed but the

[21] (2001) 15 NWLR (pt. 737) 709
[22] (2001) 15 NWLR (pt. 737) 709

company cannot do anything without him saying YES to it. Also, his name is not with CAC but he controls the action of the company. Once a person is caught carrying out the functions of a shadow director, he is subject to the liabilities and duties of directors. However, professionals giving professional advice are excluded and are not shadow directors, See ***Section 245(3) CAMA; Re Forest of Dean Coal Mining Co***. But once he turns to a semi-god, he can be regarded as shadow director.

H. Representative/Nominee Director

This is a director appointed by accompany which is a director of another company, but because the law requires a human being to represent the company in the board of that other company, the company is obliged to appoint a nominee or representative to represent it on the board for a fixed period.

Such a director should be reflected as a representative or nominee of the company appointing him in the form CAC 7 of the other company.

A representative or nominee director is appointed by ordinary resolution of the general meeting of the company he is to represent unless the Articles has reserved the power to the Board of directors. He serves for a fixed period as stated in the resolution appointing him – ***Section 257(d) of CAMA***.

III. Minimum Number of Directors in a Company

Under ***Section 246 CAMA***, every company registered under CAMA is to have a minimum of 2 directors and those registered prior to CAMA is to have a minimum of 2 directors within 6 months of coming into effect of CAMA. Thus, all companies in Nigeria must have a minimum of 2 directors. The maximum is prescribed by the articles. Where the numbers of directors in a company falls below 2, the company is given 1 month to appoint new directors and the company is not to carry on business after the expiration of 1 month – ***Section 246(2) CAMA***. If the company carries on business for a period extending beyond 60 days, the members or directors who is aware shall be liable for all liabilities and debts incurred by the company during that period when the company carried on business – ***Section 246(3) CAMA***.

APPOINTMENT OF DIRECTORS

Under appointment of directors, there is appointment of first directors and appointment of subsequent directors.

I. Appointment of First Directors

In accordance with ***Section 247 CAMA***, the first directors are appointed by the subscribers to the MEMART in the following ways:

1. In writing by the subscribers to the MEMART
2. They can be named in the Articles of Association

The procedure after such appointment is that the consent of the director so appointed is obtained and FORM CAC 7 is completed and filed with CAC.

II. Appointment of Subsequent Directors

In the absence of any provision in the articles of association on appointment of subsequent directors, they can be appointed in any of the following ways:

1. **Members in General Meeting:** In accordance with ***Section 248(1) CAMA***, the members of the company in an Annual General Meeting (AGM) shall have power to re-elect, reject directors and appoint new ones – Section 248(1). This is the usual and most common method
2. **Personal Representatives:** Pursuant to ***Section 248(2) CAMA***, in the event of the death of all the directors and shareholders of the company, any of the personal representatives shall be able to apply to the Court for an order to convene a meeting of all the personal representatives of the shareholders entitled to attend and vote at a general meeting to appoint new directors to manage the company, and if they fail to convene a meeting, the creditors, if any shall be able to do so. It must be noted that the court having jurisdiction

in this regard is the Federal High Court. See ***Section 251(1) (d) of the Constitution of the Federal Republic of Nigeria, 1999*** as amended.

This procedure for appointing new directors is very important because it is required under the Companies and Allied Matters Act that a company should have at least two directors and shareholders. If the company fails to satisfy this requirement, it would be subject to a compulsory dissolution and winding up under ***Section 408 of the Companies and Allied Matters Act***.

3. **Persons Empowered under the MEMART:** The Articles of association can confer the power to appoint subsequent directors on any person including a non-member of the company and that power is enforceable. See ***Section 41(3) of the Companies and Allied Matters Act*** which provides that the Memorandum or Articles of Association can empower any person to appoint or remove any director or other officer of the company and such power shall be enforceable by that person notwithstanding that he is not a member or officer of the company. See ***Woodland v. Gulliver***.[23]

   However, where there is a casual vacancy arising out of death, retirement, resignation or removal, the board of directors have power to appoint new directors to fill in such casual vacancy – Section 249(1) CAMA. The appointment of new director by the board of director to fill a casual vacancy is however subject to the approval by the members at the next Annual General Meeting and if the new director appointed is not approved, then he shall cease to hold office as a director - Section 249(2) CAMA. This is another method of appointing subsequent directors.

III. Procedure for Appointing Subsequent Directors

Before a person can be eligible to be appointed as subsequent director, he must, unless he is a retiring director, be either RECOMMENDED by the Board of Directors (or majority of them); or be NOMINATED by a member of the company in accordance with ***Section 259(4) CAMA***.

The procedure/mode for nomination by a member is provided for under section 259(4), it must be strictly complied with and it is as follows:

Within a period of not less than 3 nor more than 21 days before the date appointed for the meeting, a notice in writing duly signed by a member duly qualified to attend and vote at the meeting for which notice was given, shall be delivered to the Registered office or Head office of the company, stating his intention to propose a person for election or appointment as director. This notice in writing must be accompanied by another notice in writing signed by the person so nominated of his willingness to be appointed or elected as director.

NB: this procedure must be strictly complied with. However, it does not apply to retiring directors. Nomination is by at least a member, while recommendation is by board.

Full procedure for the appointment of subsequent directors, who is not a retiring director is as follows:

1. The person to be appointed is either recommended by the Board or VALIDLY nominated by a member in accordance with Section 259(4) CAMA.
2. The person to be appointed consents via a notice in writing to be elected or appointed as director.
3. Secretary sends out 21days notice of AGM (check if it is ordinary or special business)
4. At the annual general meeting, the resolution to appoint that person as director is proposed and passed.
5. The company secretary completes FORM CAC 7A and files with the CAC together with a copy of the ordinary resolution, duly signed, within 14days from the day the resolution was passed.

[23] (1948) NZLR 230

6. The register of directors and secretaries and the Particulars of Directors in Trade Catalogues are updated.

Note that if the board wants to appoint one of its members as executive director or managing director, the procedure is as follows:

1. 14 days' notice of board meeting
2. Board resolution to make appointment
3. Presenting the new ED before general meeting
4. Completion of Form CAC 7A
5. Updating register of directors and secretaries and the particulars of directors in Trade Catalogues.

IV. Mode of Voting/Resolution on Appointment of Directors

Directors are appointed by ordinary resolution. In accordance with ***Section 261(1) CAMA***, at a general meeting of a company, other than a private company, a motion for the appointment of two or more persons as directors of the company shall not be made, unless a resolution that it shall be so made has first been agreed to by all the members without any vote being given against it. That is, in a unanimous resolution. If it is made in contravention, the resolution shall be void. See ***Section 261(2) CAMA***.

Accordingly, for a private company, two or more directors can be appointed by a single resolution. But, for a public company, each director must be appointed by a separate resolution. However, if the company wants to appoint two or more directors by a single resolution, it must first pass a unanimous resolution authorising the use of a single resolution for that purpose.

NB: if you are asked to draft a resolution for appointment of directors, check if it a private or a public company before you draft. Also note when to draft a unanimous resolution before drafting the single resolution.

Accordingly if you see a question where two or more directors in a public company were appointed by a single resolution, it is wrong. This is because by section 261(2), any resolution made in contravention of section 261 is VOID.

If you see a question asking you to appoint two or more directors in a public company by a single resolution, the first resolution you will draft is a unanimous resolution authorising the use of the single resolution for that purpose; then you draft the single resolution. Therefore, you will have two resolutions.

Always draft the resolution on the company's letterhead

Note that if you are merely asked to draft the resolution and it is not for filing at CAC, then there is no need to put CAC recipient address and other indicators of a letter.

Sample Draft of Ordinary Resolution to Appoint Director

KILLI NANCWAT NIGERIA PLC
GENERAL IMPORTERS AND EXPORTERS
NO 5, Kano Crescent, Kano
Email: Knanchwat@yahoo.com
Phone: 07031112732
(RC No: 12345)

Our Ref: _____ Your Ref: _____

ORDINARY RESOLUTION TO APPOINT MR. JOEL ADAMU AS A DIRECTOR OF THE KILLI NANCWAT NIGERIA PLC PURSUANT TO SECTION 248 OF CAMA

At the 3rd Annual General Meeting of the Killi Nancwat Nigeria Plc (or use 'the above named company') held on the 7th day of April, 2019, the following was proposed and duly passed as an ordinary resolution:

"That Mr. Joel Adamu be and is hereby appointed to as a director of Killi Nancwat Nigeria Plc."

Dated this 7th day of April, 2019

_____ _____

Director Secretary

V. Casual Vacancy

Where there is a casual vacancy, the Board of directors are empowered to appoint new directors to fill such casual vacancies. See ***Section 249(1) CAMA***. By the same provision, a casual vacancy arises from any of the following:

1. Death
2. Resignation
3. Retirement
4. Removal

The appointment of a person as director to fill a casual vacancy is by board resolution. By ***Section 249(2) CAMA***, where a director is appointed to fill a casual vacancy by the Board of Directors, the appointment of such person may be approved by the members at the next Annual General Meeting, and if the appointment is not approved, he shall cease to be director immediately. Where the appointment is approved, then Form CAC 7A and the resolution approving his appointment if filed at CAC within 14 days. The register of directors and secretaries and the particulars of directors in trade catalogues are updated.

If the appointment is not approved, the company is bound by his prior acts.

The power to fill casual vacancies is very important because subsequent directors can only be appointed at AGM, not EGM and AGM is only once every year. Thus, if a casual vacancy arises not long after the previous AGM, the directors can fill it pending the next AGM.

VI. Increase/Decrease of Number of Directors

The board of directors may increase the number of directors as long as it does not exceed the maximum allowed by the articles, but the general meeting shall have the power to increase or reduce the number of directors generally and may determine in what rotation the directors shall retire. Provided that such reductions shall not invalidate the prior acts of the removed director - ***Section 249(3) CAMA***.

VII. Defective Appointment

By ***Section 260 CAMA***, the acts of a director or secretary or manager shall be valid notwithstanding any defect that may subsequently be discovered in his appointment or qualification. See also ***Iwuchukwu v Nwizu & Anor***.

VIII. Notification of Change of a Director

The CAC must be given notification of removal or appointment of director within 14 days of passing the resolution for same. The requirements for filing of notice of change in directorship of a company include the following - ***Regulation 38 of Companies Regulations:***

1. Resolution removing or appointing director(s) duly signed by a director or secretary or two directors - ordinary
2. Duly completed form for notice of changes in particulars of directorship.
3. Letters of consent - for directors to be appointed.
4. Residence permit - for foreign directors to be appointed
5. Resignation letter - for a resigning director
6. Death certificate of deceased director
7. Updated annual return filing

8. Updated section 553 filing for banking and insurance company - first Monday of February and first Tuesday in August in the form prescribed in 14th schedule to CAMA.

The foregoing contains notification for appointment, removal, resignation, death of director. Identify documents applicable to each.

IX. Particulars of Directors in Trade Catalogues

Every company is to state the names of directors on its letter, trade circulars and show cards. On letters, the fore names or initials and if the director is a foreigner, his nationality must be stated there also. The CAC in special circumstances can grant exemption by a notice in the gazette from the foregoing. Failure to comply with the foregoing is an offence and proceedings can only be instituted by the CAC with the consent of the AG of the federation - ***Section 278 CAMA***.

AGE OF A DIRECTOR (Over Age Director)

In a private company, the age of a director is not relevant as long as it satisfies the statutory minimum of not less than 18years. See ***Section 257(a) of CAMA***. There is no maximum age. In a public company, by Section 257(a), the minimum age for a director is also 18years. Although there is no maximum age, Section 256 CAMA provides that a person may be appointed as a director of a public company notwithstanding that he is 70years or more, but SPECIAL NOTICE (28 days) shall be required of any resolution appointing or approving the appointment of such a director, and such special notice given to the company and the notice of meeting given by the company to its members shall state the age of the person to be appointed. Accordingly, Section 252(1) provides that any person who is appointed or to his knowledge is proposed to be appointed as a director of a public company and who is 70 years or more, shall disclose this fact to the members at the general meeting. By ***Section 252(2) CAMA***, failure to disclose is an offence attracting a fine of N500.

NB: the company does not give its members special notice. It is the members that give the company special notice in specified instances. The special notice is a 28days notice to give the company 7days extra within which to serve 21days notice (i.e. 7 + 21 = 28)

When drafting notice or resolution for over age director, his age must be reflected. Example: "to appoint X who is 72 years to be a director…" or "that X who is 72 years be and is hereby…"

DISQUALIFICATION OF DIRECTORS

Disqualification relates to incidents prior to appointment. The following persons are disqualified from being directors:

1. An infant that is a person under the age of 18 years
2. A lunatic or person of unsound mind
3. A person disqualified under section 253, 254 & 258 of this Act
4. A corporation other than its representative appointed to the board for a given term.
5. Share qualification if the articles so requires share qualification before a director can be appointed.

On share qualification, if the article so requires it, the director on first appointment is expected to comply with the share qualification within 2 months of his appointment - ***Section 251(1) & (2) CAMA***. If the director did not take up the shares within 2 months of his appointment, then he is disqualified - Section 251(3) the offices of the director shall be vacated. If he however picks up the shares and sells his shares, he must vacate office of director forthwith. Such director cannot be re-appointed until he obtains his share qualification – Section 251(4). If on the other hand, the director fails to obtain a share qualification and does not vacate his office, he is liable to a fine of N50 for every day he acted as a director after he has been disqualified – Section 251(5). Note the following on disqualification under Section 254, 253, 258 CAMA. Section 254 provides for conviction of a person by the High Court of any offence concerning the promotion, formation or management of a company. However, what disqualifies the person

convicted is not the conviction obtained in the court but a disqualification order by the court convicting the person or any other court.
Thus after the conviction, a disqualification order from being appointed a director of any company should be obtained. Where a person is only convicted without a disqualification order, he is still qualified to be a director of any company. In a public company, a person over the age of 70 years is not disqualified from being a director only that such person must disclose his age. If he does not disclose his age then he is disqualified and the members at general meeting can disqualify him by refusing to vote him as a director.

VACATION OF OFFICE

I. Grounds for Vacating Office

In vacation of office by a director, he has been appointed but an event has occurred which disqualifies him from continuing as a director. The office of director shall be vacated if the director:

1. Fails to obtain the share qualification in accordance with section 251
2. Becomes bankrupt or makes any arrangement or composition with his creditors generally
3. Becomes prohibited from being a director by reason of the disqualification order obtained after conviction under section 254
4. Becomes of unsound mind
5. Resigns his office by notice in writing to the company
6. An over age director of a public company who did not disclose his age is to vacate office – 70 years and above

II. Modes of Disclosing Age

Where a director is over 70 years in a public company, he is to disclose his age to the members before appointment. If he discloses to members and members did not ratify his appointment, he is to vacate his office of directorship. The mode of disclosing age is as follows - ***Section 256 CAMA*****:**

1. Give special notice of his age to the board of directors. The date he attained the age must be stated in the notice.
2. The directors give special notice of appointment to the company. Intention to propose ordinary resolution appointing an over age director.
3. The company gives notice of such to its members.

Both notice by board and company must state the age of the person. The special notice to the company could read thus:

The Board of Directors
XYZ PLC
I, hereby give notice pursuant to section 256 of Companies and Allied Matters Act of my intention to propose the following ordinary resolution at an extraordinary general meeting of the company
Dated this _____ day of _____ 2013
Signed
Andrew James
Director

The body of the ordinary resolution could be:
"That Andrew James who attained the age of 72 on 12th March 2013 be re-elected (or elected) a director of the company.
Where a director has been removed pursuant to section 262 of CAMA, he is to vacate office.
Where a director retires and was not re-elected, he is also to vacate office.

RETIREMENT/ROTATION/RE-ELECTION OF DIRECTORS

Rotation of directors involves the retirement of directors usually in public limited companies. All the directors retire at the annual general meeting. However, the following is the procedure: First the article of association of the company is to be looked whether it provides for retirement of directors and the procedure following it. Where there are no retirement provisions, the provision of CAMA on retirement of directors will be followed. The procedures are:

1. At the first annual general meeting of the company, all the directors shall retire from office.
2. At every subsequent annual general meeting of the company, 1/3 of the directors shall retire from office. If the number is not three or a multiple, then the nearest number to 1/3 shall retire from office.
3. The directors that are to retire in subsequent meeting making up the 1/3 are those longest in office since their last election or re-election. If directors were elected on the same, they would be asked if any one desire to retire if not their retirement would be determined by lot – ***Section 259(2) CAMA***. They can still put themselves up for re-election.
4. The office of a retiring director may be filled by another person elected at the general meeting if not filled and the retired director putting himself up for re-election unless the company voted against by resolution or declared the office vacant, the director would be deemed to be re-elected – ***Section 259(3) CAMA***.
5. No new person can be appointed to the office of a director at any general meeting unless
   (a) A 3-21 days' notice in writing before the date appointed for the meeting have been left at the registered office or head office.
   (b) The notice is to be signed by a member duly qualified to attend and vote at the meeting.
   (c) A notice in writing signed by that person of his willingness to be elected. Thus, the new director signs, consent to act.

However, the foregoing does not apply when it is the director that is recommending the new person – board of directors. Thus, new person recommended by other directors can be appointed without prior notice. Note that the retirement of directors does not apply to a life director, whether at first annual general meeting or subsequent ones.

REMOVAL OF DIRECTORS FROM OFFICE

I. Concept

Any director of the company including a life director can be removed at any time from the office of director of a company by an ordinary resolution. This is the position notwithstanding anything contained in the articles of association of a company and in any agreement between the company and the director. The only condition precedent is that there must be compliance with provisions laid down in ***Section 262 CAMA***.

II. Methods for Removal

There are two methods by which a director can be removed while complying with section 262 viz:

1. By special notice to the company and ordinary resolution passed by the company removing the director.
2. By special notice, requisition by holders of at least 1/10 of the paid up share capital and ordinary resolution – section 215 on requisitions by members.

III. Procedure for Removal

A. Procedure

The procedure to follow in removing a director is as follows:

1. **Special Notice of Resolution to Remove & Notice of General Meeting:** Special notice of resolution to remove the director is to be given to the company. This is the 28 days' notice before the general meeting. The board of directors ought to send notice of the general meeting in which resolution on removal of the director will be passed.

2. **Requisition by Members Holding 1/10th of Paid Up Capital:** Where directors did not give notice convening the meeting, the member(s) holding 1/10th of paid up capital can deposit assigned requisition at the registered office of the company stating resolutions which he intends to propose. The directors are expected to convene a general meeting within 21 days of the requisition. If the directors did not, the requisitionist can convene the general meeting within 3 months of deposition of requisition.
3. **Service of Notice of Removal to Affected Director:** Upon giving the company the special notice to remove a director, the company is to send notice of the intended resolution to the director concerned or affected so that he can make representations against his removal.
4. **Representations by Affected Director:** Upon receipt of the notice of the propose resolution of his removal by the director, the director can make representations in writing and request that such representation be sent to members. The foregoing is the reason a written resolution cannot be used in removing a director even though written resolution is allowed in private companies. The director has the right to defend himself - ***Tradelink v. Bank of America Nig Ltd***.
5. **Service of Copies of Representations to All Members:** The representation made by the director is to be circulated to members unless the representation was received too late. However, the director may require that the representation be read out at the meeting. Failure of the company to transmit the representation to the members will entitle the affected director to be heard orally.
6. **Attendance of Meeting & Speaking on Resolution by Affected Director:** On convening the meeting, the director has a right to attend the meeting and speak on the resolution.
7. **Removal by Ordinary Resolution:** The Company then pass an ordinary resolution removing the director.
8. **Filing of Documents of Removal with CAC:** necessary returns will be made to CAC within 14 days of removal and enter the fact in register of directors and where necessary amend register.

B. Effect of Failure to Comply with Procedure

The foregoing provisions on removal of director is important and must be complied with in passing the ordinary resolution removing the director. If the resolution is in contravention of the law, the purported removal is null and void and will be set aside - ***Yalaju-Amaye v. AREC;***[24] ***Longe v. First Bank of Nigeria Plc***;[25] and ***Iwuchukwu v. Nwizu*** – the director was removed by a letter.

III. Effect of Removal as Managing Director

Board of directors can remove a director as a MD but such person remains a director until the procedure in section 262 is complied with. The interpretation of section 262(6) which provides that nothing in the section shall be taken as derogating from any power to remove a director which may exist apart from this section is that the articles may provide for more than stringent or lenient method of removal depending on who is in control. Note also that a new person may be appointed at the same meeting but special notice is also required – ***Section 262(2) CAMA***.
If the vacancy is not filled at the meeting, it may be filled as a casual vacancy by the directors – ***Section 262(4) CAMA***.
The new director appointed at the meeting to replace the removed director will be deemed to have been appointed on the day the removed director was appointed – ***Section 262(5)***. This is for the purposes of retirement by rotation. Thus if on the next annual general meeting, the old director fall under the 1/3 of directors to be retired, the new director will be retired. Along with returns to CAC, necessary charges in register of directors is to be effected.

[24] (1990) 4 NWLR (145) 422
[25] (2010) 6 NWLR (1189)

IV. Compensation for Loss of Office

Section 271 CAMA makes provision for circumstances where compensation can be made for loss of office. The fact that a director is removed does not mean that compensation or damages payable to him in respect to termination of his appointment would be denied him – ***Section 262(6) CAMA***. In compensating a removed director, it is to be determined whether the director would be entitled to compensation by virtue of the contractual agreement between him and the company. If by terms of employment he is entitled to be compensated, he will be compensated. The company can be sued for breach of a contract – ***Southern Foundaries Ltd v. Shirlaw***. There is then the non-contractual compensation. This is when by virtue of the contractual agreement he is not entitled to compensation. However, compensation can be given to the director for loss of office if:

1. Particulars with respect to the proposed payment and the amount have been disclosed to members of the company
2. The proposal is approved by the company

DIVISION OF POWERS BETWEEN THE DIRECTORS AND THE MEMBERS IN GENERAL MEETING

I. Concept

There are some powers that are reserved exclusively for either the board of directors or the members. Where powers or functions are conferred on the directors, such cannot be forced on the members. There are also areas where they both have powers to act. A company shall act through its members in general meeting or its board of directors – ***Section 63(1) CAMA***. The board of directors when acting within the powers conferred upon them by CAMA or the articles of association of the company shall not be bound to obey the directions or instructions of the members, provided that the directors acted in good faith and with diligence – ***Section 63(4) CAMA***.

Some powers may be exercised by directors while other powers may be reserved for the shareholders in general meeting - ***Avop Plc v. AG of Enugu State;***[26] ***AG of Lagos State v. Eko Hotels Ltd***.[27]

II. Powers of Directors

The following are the powers of directors namely:

1. Management of the business of the company – ***Section 63(3) CAMA***.
2. Decision that the company should sue or not sue. However, the decision of the directors not to sue can be overridden by the members in general meeting – ***Section 63(5) (b) CAMA***. Their decision to sue cannot be overridden.
3. Appointment of one director as a managing director – ***Section 64(3) CAMA***.
4. Appointment and removal of company secretary – ***Section 295 & 296 CAMA***.
5. Dividends - recommend dividends – ***Section 379 CAMA***.

III. Powers Reserved for Members

The following are the powers reserved for members and such powers cannot be exercised by the directors or by any other person. These powers may be exercised in general meeting by passing an ordinary or special resolution or by written resolution where permissible.

1. Alteration of memorandum and articles of association by special resolution – ***Section 46(1) CAMA***.
2. Removal of a director before the expiration of his term in office by ordinary resolution.
3. Changing of company's name by special resolution – ***Section 31(3) CAMA***.

[26] [2000] 7 NWLR (664) 260
[27] (2006) 12 MJCI

4. Re-registration or conversion of company by special resolution under ***Section 50 – 53 CAMA***.
5. Reduction of company's authorised share capital by special resolution – ***Section 106 CAMA***.
6. Increase of company's share capital – ***Section 102 CAMA***.
7. Appointment of subsequent auditors by ordinary resolution – ***Section 357 CAMA***.
8. Approval of non-contractual compensation to directors for loss of office – ***Section 271 CAMA***.
9. To resolve that the company be wound up voluntarily by special resolution – ***Section 401 CAMA***.
10. To authorise the directors to allot shares – ***Section 124 CAMA***.
11. To requisition a meeting – an extraordinary meeting – ***Section 215 CAMA***.
12. Declaration of dividends – ***Section 379 CAMA***.

On the concurrent powers, the numbers can act in any matter if the directors are disqualified or are unable to act because of a deadlock – ***Section 63(5) (a) CAMA***. Thus, the power reverts to the general meeting.

REMUNERATION OF DIRECTORS

I. Remuneration of Directors

The executive directors are entitled to remuneration, however no automatic remuneration for non-executive directors. Where the articles provides that the directors are to be remunerated, then they are entitle to remuneration. The remuneration shall be determined by the company in general meeting and it is to be deemed to accrue from day to day – ***Section 267(1) CAMA***. Where remuneration is fixed by the articles, it is only alterable by a special resolution – ***Section 267(2) CAMA***. The company is not bound to pay remuneration but once it agrees to, the remuneration shall be paid out of the fund of the company and once fixed, it becomes a debt due to the directors – ***Section 267 (4) & (5) CAMA***. Remuneration is gross subject to income tax and it is unlawful to pay remuneration free of tax – ***Section 269 CAMA***. The directors may also be paid all travelling, hotel and other expenses incurred by them in attending and returning from meetings – ***Section 267(2) CAMA***.

II. Remuneration of Managing Director

A managing director is entitle to receive remuneration whether by way of salary, commission or participation in profits or partly in one way and partly in another as the directors may determine – ***Section 268(1) CAMA***. Where a managing director is removed for any reason under section 262, he will have a claim for breach of contract if there is any contract or where a contract could be inferred from the terms of the articles. Where he performs some services without a contract he shall be entitled to payment on a quantum meruit. A contract of employment of more than 5 years that cannot be terminated by the company by notice but only in certain circumstances is not allowed unless it is approved by a resolution of the members – ***Section 291 CAMA***.

DUTIES OF DIRECTOR

A director is an officer and an agent of a company and as such he may when acting within his authority incur no personal liability to third parties for breach of contract entered into on behalf of the company – ***Trenco (Nig) Ltd v. African Real Estate and Investment & Anor***.[28]

I. Basic Duties of Directors as Officers & Agents of a Company

As an officer and an agent of a company, a director has two basic duties imposed on him namely:

1. Fiduciary duty

[28] [1978] ANLR 124

2. A duty of care – ***Section 279(1) CAMA***.

II. Specific Duties of Directors

1. Duty to observe the utmost good faith towards the company because the directors stand in a fiduciary relationship towards the company.
2. They owe fiduciary relationship with the company where acting as agents of a shareholder.
3. Duty to act at all times in what they believe to be the best interests of the company.
4. Duty to act in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances.
5. Duty to exercise their powers for the purpose for which they are specified.
6. Duty not to fetter their discretion to act in a particular way.
7. Duty not to delegate their power in such a way and manner as may amount to an abdication of duty – ***Section 278 & 280 CAMA***.
8. Duty not to have any conflict of interest
9. Duty not to make secret profit or achieve any other unnecessary benefits
10. Duty to give notice to the company of such matters relating to their interests in contracts.
11. Duty to disclose age to the company – ***Section 252 CAMA***.
12. As trustees to the company, the director has a duty to account for monies which they exercise control – ***Section 283 CAMA***.
13. Duty to exercise the power and discharge the duties of their office honestly, in good faith and in the best interests of the company and shall exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances – ***Section 282 CAMA***.
14. Directors have a duty to prepare the financial statements of the company for the year – ***Section 334 CAMA***.
15. Directors have a duty to lay and deliver the financial statements before the company at the general meeting – ***Section 345 CAMA***.

III. Liabilities of Directors for Breach of Duties

1. A director shall be accountable to the company for any secret profit made – ***Section 282 CAMA***.
2. The inability of the director to perform any functions or duties shall not constitute a defence to any breach.
3. A director who has resigned from a company shall still be accountable for misusing corporate information.
4. A director will not escape liability where he discloses any secret profit made after making it.
5. A director who holds multiple directorship shall be liable for his duties to each company.
6. A director is liable for negligence where he fails to take reasonable care in exercising his power and discharging his duties honestly and in good faith.
7. Each director is individually responsible for the actions of the board
8. A director is liable to refund any money improperly used.
9. Where there is diversion of loan or advance payment for the execution of a contract, then the directors and officers are personally liable to refund the money - ***Section 290 CAMA***. However, the provision does not absolve the company of its liability but gives the third party a wider remedy.
10. Liability of directors or managers of a limited company be unlimited if so provided by the memorandum – ***Section 268 CAMA***. The liability could also be made unlimited by special resolution – ***Section 289(1) CAMA***.

Because a director owes his duty to the company where he breaches his duties, it is the company that should take action. However, a member(s) under the minority protection can take action also. Remedy could be damages for negligence and breach of duty or trust. Importantly, the

action to be taken against a director or the board of directors must be appropriate to the nature of the breach for which a remedy is sought.

PROCEEDINGS OF DIRECTORS (BOARD MEETINGS)

1. **General Rule:** The directors in a board meeting are to meet together for the purpose of dispatching the business of the company. However, the first meeting shall be held not later than 6 months after the incorporation of the company – ***Section 263(1) CAMA***. Board meetings are summons by directors, a secretary can only summon on requisition of a director – ***Section 263(3) CAMA***.
2. **Agenda of First Board Meeting:** The agenda of the first meeting of the directors include the following:
   (a) Appointment of chairman of the board of directors
   (b) Appointment of secretary and auditors of the company
   (c) Appointment of additional directors of the company
   (d) Determining the accounting reference date of the company
   (e) Appointment of the solicitors of the company
   (f) Appointment of the bankers of the company
   (g) Adoption of the seal of the company
   (h) Adoption of any pre-incorporation contract
   (i) Allotment of more shares.

1. **Election, Removal & Absence of Chairman:** The directors may elect a chairman and determine the tenure of office of such chairman but if no chairman is elected or elected chairman is not present within 5 minutes of meeting, the others may choose one of their members to chair – ***Section 263(4) CAMA***.
2. **Voting Right:** In voting in board meetings, each director shall be entitled to one vote – ***Section 263(9) CAMA***. In the case of an equality of votes, the chairman shall have a second or casting vote – ***Section 263(2) CAMA***.
3. **Delegation of Powers to Committees:** The directors may delegate any of their powers to committees – ***Section 263(6) & (7) CAMA***.
4. **Notice of Meetings:** There must be 14 days' notice of the meetings to be given to every director except he is disqualified from being a director – ***Section 266(1) & (2) CAMA***. Failure to give notice of a meeting invalidates the meeting – ***Section 266(3) CAMA***. Unless the articles otherwise provides, it is not necessary to give notice to any director who is not in Nigeria (unless he informs the board of his address abroad in which case the notice must be sent there) – ***Section 266(4) CAMA***.

OTHER PROVISIONS ON DIRECTORS

I. Loans to Directors

Subject to certain exceptions, no company may make a loan to or guarantee the indebtedness of a director or a director of its holding company – ***Section 270(1) CAMA***. The following are however the exceptions

1. Expenses incurred to enable him properly perform his duties
2. Expenditure subject to the prior approval of the company.

Note that the purpose and the amount of the loan or expenses must be disclosed – ***Section 270 CAMA***.

II. Multiple Directorships

CAMA allows directors to have multiple directorship but the directors must give the company the same attention, duty and responsibility. In addition to directors duty in case of multiple directorship includes:

A duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of the other company or to his own or other person's advantage ***Section 281 CAMA***.

III. Quorum

In the board of directors, the quorum is two where there are not more than 6, but if more than 6 directors, 1/3 and where the number is not a multiple of 3 then nearest number to one third. The foregoing is subject to the provisions of articles of association of the company – ***Section 264(1) CAMA***. The quorum of committees of directors is fixed by the board and where no quorum is fixed; the whole committee shall meet and act by a majority – ***Section 264(2) CAMA***. Where the board is unable to act, the general meeting may act in its place and where a committee is unable to act, the board may act in place of the committee – ***Section 265 CAMA***. The board meetings both public and private companies can pass written resolution – ***Section 263(1) CAMA***.

COMPANY SECRETARY

INTRODUCTION

Every company shall have a secretary - ***Section 293(1) CAMA***. Where there is no company secretary, the acts of a secretary can be done by any of the following persons – ***Section 293(2) CAMA***:

1. Assistant or Deputy secretary; in their absence
2. Officer of the company authorised by the directors

When an act is to be done by a director and a secretary, it must be done by both of them; else it would be invalid – ***Section 294 CAMA***.

PERSONS WHO CAN BE APPOINTED AS COMPANY SECRETARIES

Generally, qualification for company secretary is a person who has the requisite knowledge and experience to discharge the functions of a secretary of a company – ***Section 295 CAMA***. However, for a public company, the following are the persons that can be appointed:

1. Chartered secretaries or their firm – administrators
2. A legal practitioner within the meaning of Legal Practitioners Act or their firm
3. A member of ICAN or other bodies of accountant established by the Act of National Assembly or their firm.
4. A person who held office of secretary of a company for at least 3 years of 5 years preceding his appointment – ***Section 295(a)-(e) CAMA***.

A company's secretary is appointed by the directors and may be removed by them subject to provisions of CAMA – ***Section 296(1) CAMA***.

DUAL STATUS OF A COMPANY SECRETARY

A Director of a company can also be the secretary of the same company but anything that should be done by both a director and a secretary on the same issue (such as the signing of a resolution), cannot be done by the same person. In that case, another director should sign as the director while the director (who is also the secretary) should sign as a secretary – ***Section 294 CAMA***.

APPOINTMENT & REMOVAL OF COMPANY SECRETARY

A company secretary shall be appointed by the directors and subject to the provisions of ***Section 296 CAMA***, may be removed by them. There is however procedure for removal of secretary of a public company as stated in ***Section 296(2), (3) (a)-(c) and (4) CAMA***. When the board of directors intend to remove a secretary of a public company, the board shall do the following:

1. **Service of Notice of Intendment to Remove on the Secretary:** Give notice of such intendment to the secretary, the notice shall state the following -
   (a) The intendment to remove him
   (b) The grounds of removal
   (c) Providing for a period of not less than 7 working days to make a defence or resign
2. **Failure to Make a Defence or Resign within the Specified Period:** If the secretary did not within the period specified in the notice make a defence or reply, the directors may remove him and make a report to the next general meeting.
3. **Where Defence made was Insufficient:** In the alternative, if secretary made a defence and the directors considered it insufficient -
   (a) If ground of removal is fraud or serious misconduct, the board may remove him from office and make a report to the next general meeting
   (b) If ground is that other than fraud or serious misconduct, the board shall remove him without the approval of the general meeting but they may suspend him and report to the next general meeting.
   (c) If the general meeting approves the removal, the removal may take effect from such time as may be determined by general meeting.

DUTIES OF A SECRETARY

The duties of a company secretary include the following as it relates to before general meeting/board meeting, during, after the meeting.

I. Duties before Meeting

1. Prepare the notice of the board/general meeting when instructed by the directors. This should include date, time, venue, agenda and draft proposed resolution – see ***Section 218 CAMA*** for content of notice of general meeting.
2. Send notice to persons entitled to receive notice of the meeting – ***Section 219 CAMA*** for general meeting and ***Section 266 CAMA*** for board of directors. Comply with additional notice – ***Section 222 CAMA***.
3. Check that the venue is prepared for the meeting
4. Circulate financial statements and any other documents that are to be conducted at the meeting
5. Take to the meeting
   (a) A copy of the memorandum and articles of association
   (b) Attendance book for person qualified to attend
   (c) The minute book
   (d) A copy of Companies and Allied Matters Act
   (e) The agenda of the meeting and other necessary documents

II. Duties during Meeting

1. Record the names of persons in attendance, present and report apologies for absence; and where there is provision for signing of attendance book, ensure it is done.
2. Check that quorum is present and ensure it is maintained throughout the meeting
3. Take accurate notes, minutes the decisions and note any further actions
4. Record late arrival especially of the appointed chairman of the board (if late for five minutes in Board of Director meeting, he will be replaced for that meeting; if late for one hour for general meeting, he will be replaced for that meeting).
5. Render or give necessary secretariat services about procedure, rules and regulations governing the meeting thus advise on the compliance by the meetings with all applicable rules and regulation.
6. Keep track of progress against the agenda. Advise the chairman if any agenda items have been overlooked.

III. Duties after Meeting

1. Render proper returns and give notification to the CAC.
2. Prepare the minutes of the meeting and record it in the minute book
3. Produce a final draft form of the minutes for approval and signature of the chairman
4. Notify department, branches and relevant personnel of decisions that affect them.
5. In addition, a company secretary is to maintain the registers and records required to be maintained by the company under CAMA.
6. Carry out such administrative and other secretariat duties as divided by the director or the company.

The duties are broadly provided for in Section 298 CAMA. Note that the secretary of a company shall not without authority of the board, exercise any power vested in the directors – ***Section 298(2) CAMA***.

IV. Liabilities for Breach of Duty

Ordinarily, a secretary shall not owe fiduciary duties to the company but where the secretary acts for the company as agents, he shall owe fiduciary duties to the company. Thus, the secretary will be liable – ***Section 297 CAMA***.

1. Where he makes secret profits
2. Let his duties conflict with his personal interests
3. Uses confidential information he obtained from the company for his own benefit.

V. Returns to be made by a Company Secretary

1. Notice of appointment of liquidator within 14 days of appointment
2. Notice of increase of shares within 15 days
3. Order of court sanctioning reduction of share capital within
4. Final return of accounts of company being wound up by liquidators within 7 days of meeting of members and creditors.
5. Annual returns within 42 days of holding annual general meeting
6. Special resolution within 15 days of passing same
7. Notice of change of director within 14 days of such change
8. Notice of change of secretary within 14 days of such change
9. Returns of allotment within one month of making allotment
10. Notice of removal of an auditor within 14 days of passing resolution.
11. Registration of charges within 90 days of its creation

VI. Resolutions to be forwarded to CAC

The following resolutions are enumerated to be sent to CAC within 15 days of passing the resolution for registration.

1. Special resolution
2. Unanimous resolution on issue which requires special resolution
3. Unanimous class resolution
4. Resolution requiring a company to wind up voluntarily passed under section 457(a) CAMA.

VII. Documents/Notice/Statement to Be Signed By both a Director and the Company Secretary

1. Annual return
2. Balance sheet of company to be certified by them – attached by company to annual returns
3. Application for registration.

SAMPLE DRAFTS

Nomination of First Directors, Secretary & Situation of the Registered Office

KILLI & SONS LIMITED
10 KENT ROAD
IKOYI-LAGOS
(RC No: 12345)

Our Ref: _____Your Ref: _____

NOMINATION OF FIRST DIRECTORS, SECRETARY AND SITUATION OF THE REGISTERED OFFICE OF THE COMPANY

WE, THE UNDERSIGNED, being the subscribers of the Memorandum of Association of the above named company hereby:

1. State that the number of directors of the company shall be four
2. Appoint ourselves to be its first directors
3. Appoint Chief Magmus Ole to be its first secretary
4. State that its registered office shall be at 12 Azu Lane Marina, Lagos.

Dated the 10th Day of January 2019.

SIGNED:

1. Chief Ume…….. 2. Danjuma Dudo…… 3. Remi Falaye……..

Appointment of New Directors

KILLI NIGERIA LIMITED
NO. 45 LAWSCHOOL DRIVE
ABAYOMI STREET VICTORIA ISLAND LAGOS
(RC No: 12345)

Our Ref: _____Your Ref: _____

Date:

RESOLUTION OF KILLI NIGERIA LIMITED TO APPOINT DIRECTORS PURSUANT TO SECTION 248 OF THE COMPANIES AND ALLIED-MATTERS ACT 2004

At the 2nd Annual General Meeting of the above named company held on the 15 day of March 2019 at the Company's Board room, it was proposed and duly resolved as follows:

1. That Mr. Kareem Lawrence be and is hereby appointed a director of the company as an additional director.
2. That Mr. Nwankwo Chizoba be and is hereby appointed a director of the company filling up the vacancy created by the resignation of Adewale Lanre as a director.

DATED THE 10TH DAY OF MAY 2019

…… ……

Mr. Alabi Otondo — Director

Magnus Ole — Secretary

Notice of Requisition to Remove a Director

To
The Secretary
Killi Nigeria Limited
No. 45 Law School Drive
Abayomi Street Victoria-Island Lagos.

Sir,

NOTICE OF REQUISITION TO REMOVE MR. KAREEM LAWRENECE AS A DIRECTOR OF THE COMPANY

TAKE NOTICE that I, Mr. Alabi Otondo of the above address and a shareholder holding not less than one-tenth (1/10) of the paid-up capital of the company, intend at the next general meeting of the company to move a Resolution that "Mr. Kareem Law, a director of the company, be removed from his office as a director and that Joel Adamu be appointed a director in his place".

Yours faithfully,

Mr Alabi Otondo
Abayomi Street Victoria Island Lagos
8th April, 2019

Resolution of a Company Removing Directors

KILLI NIGERIA LIMITED
NO. 45 LAWSCHOOL DRIVE
ABAYOMI STREET VICTORIA ISLAND LAGOS
(RC No: 12345)

Our Ref: _____Your Ref: _____

RESOLUTION FOR THE REMOVAL OF MR. KAREEM LAW AS A DIRECTOR OF THE COMPANY PURSUANT TO SECTION 262 OF THE COMPANIES AND ALLIED-MATTERS ACT 2004

At the Annual General Meeting of the company held on the 10 day of June 2018 at the company Conference Room, it was duly proposed and resolved as follows:
That Mr. Kareem Law be, and he is hereby removed from office as a director of the company and that Joel Adamu be, and he is hereby appointed as a director of the company in his place to hold office only during such time that Mr. Kareem Law would have held office if he had not been removed.

DATED THE 11TH DAY OF JUNE 2018

…… …….
Director Secretary

Resolution Appointing a Secretary

KILLI NIGERIA LIMITED
NO. 45 LAWSCHOOL DRIVE
ABAYOMI STREET VICTORIA ISLAND LAGOS
(RC No: 12345)

Our Ref: _____Your Ref: _____

RESOLUTION OF THE BOARD OF DIRECTORS APPOINTING A SECRETARY OF THE COMPANY PURSUANT TO SECTION 296 OF THE COMPANIES AND ALLIED-MATTERS ACT 2004

At the Board of Directors meeting of the above named company held on the 10 day of May 2018 at the Board Conference Room of the company, it was duly proposed and resolved as follows:
That Mr Owonikoko Abiodun, a chartered Secretary, be and is hereby appointed a secretary of the company at a salary of N100,000.00 per annum, and that Mr. Joel Adamu be authorised to sign on behalf of the company a Service Contract for his engagement as approved by the Board.

DATED THE 13TH DAY OF MAY 2018.

…… …….
Director Director

Notice of Board of Directors' Intention to Remove a Secretary

To
Mr. Owonikoko Abiodun
No.15 Broad Street
Bariga Lagos State.

Sir,

NOTICE OF BORAD OF DIRECTORS' INTENTION TO REMOVE YOU AS THE COMPANY SECRETARY PURSUANT TO SECTION 296 OF THE COMPANIES AND ALLIED-MATTERS ACT 2004

You are hereby given Notice of the Board's intention to remove you as the secretary of the company for failing to file statutory returns to the Corporate Affairs Commission for a period of six months now.
You are given a period of seven (7) working days to make your defence or alternatively to put in a Notice of your resignation to the Board.

Yours faithfully,
Chairman
By Order of the Board

(Week 12)

CORPORATE GOVERNANCE III: MEMBERSHIP, MEETINGS AND RESOLUTIONS

MEMBERSHIP

MEANING OF A MEMBER

A member of a company is a person who owns at least one share or an interest attracting voting rights (Ltd/Gte) in the company and whose name is on the register of members of the company. See ***Section 79 of CAMA***. Under ***Section 79(1)-(2) CAMA*** a member is defined as including two categories of persons namely:

1. The subscribers to the MEMART of a company who are deemed to have agreed to become members of the company and whose names, on registration of the company, shall be in its register of members. See ***Section 79(1) of CAMA*** and
2. Every other person who subsequently agrees in writing to become a member of a company and whose name is entered in its Register of Members. See ***Section 79(2) of CAMA***. Therefore, under this paragraph, there are two cumulative conditions that must be satisfied before a person can become a member of the company. They are (1) agreement in writing which may be through allotment of shares, transfer of shares or transmission of shares, and (2) entry of the name in the Register of Members.
   In either case, where the company is one having a share capital, each member must be a shareholder by holding at least one share. See ***Section 79(3) of CAMA***.

WAYS OF BECOMING A MEMBER OF A COMPANY

Membership of a company (that is a company with share capital) may be acquired as follows:

1. Subscription and registration of name in register of members – ***Section 79(1) CAMA***.
2. Transfer and registration of name in register of members
3. Allotment and registration of name in the register of members
4. Transmission and registration of name in register of members

CODE: STAT and registration of name in the register of members

I. Subscription

The subscribers are those who took up shares at the incorporation of the company and whose names are on the MEMART as such. They are deemed to be members of the company and their names are automatically to be put in the Register of members. See ***Section 79(1) CAMA***. Unlike persons who become members by transmission, allotment or transfer, the absence of their names (subscribers) on the register of members does not affect their status as members of the company. See ***Ezeonwu v. Onyechi***.[29]

II. Transfer

A. Concept

The shares or other interests of a member in a company shall be property transferable in the manner provided in articles of association of the company – ***Section 115 CAMA***. Any member irrespective of how he acquired the shares can transfer such shares by sale or otherwise. To make the transferee a member of the company, his name must be entered in the register of members as he is not a member until his name is so entered. See ***Section 79(2) CAMA***; ***Ezeonwu v. Onyechi***.[30]

[29] (1996) 2 SCNJ 250
[30] (1996) 2 SCNJ 250

B. Requirements for Filing of Notice of Transfer of Shares

The notice of transfer of shares shall be filed with CAC within 14 days of the transfer together with the following:

1. Duly stamped instrument of transfer
2. Evidence of payment of FRC annual dues; and
3. Payment of fees

Regulation 32 Companies Regulations

III. Transmission

A. Concept

This involves the death of a member of a company. Upon his death, his shares devolves on his personal representatives (executor appointed by will or administrators granted letters of administration) – ***Section 155, 156 CAMA***. When there are joint shareholders, the shares will devolve on the surviving shareholder. To make the person a member of the company, his name must be entered in the register of members as he is not a member until his name is so entered. See ***Section 79(2) CAMA***; ***Ezeonwu v. Onyechi***.[31]

B. Procedure of becoming a Member by Transmission

There are procedure provided under CAMA.

1. Only the legal personal representative of the deceased are the person recognised by a company as entitled to a deceased shares – ***Section 155(1) CAMA***.
2. There must be an election of himself by the personal representative to be registered as the holder of the shares – ***Section 155(2) CAMA***.
3. Nominate another as transferee of the share
4. Notice in writing electing himself to be registered or electing another person shall be delivered to the company – ***Section 155(3) CAMA***.

C. Requirements for filing Notice of Transmission

Notice is to be filed with CAC within 14 days of the date of election or instrument of transfer whichever is applicable with the following:

(a) Photocopy of death certificate
(b) Letter of administration or Will and probate
(c) Notice of election or instrument of transfer whichever is applicable
(d) Evidence of payment of FRC annual dues; and
(e) Payment of fees

D. Transmission out of Bankruptcy

Transmission could also arise out of bankruptcy in favour of the trustee in bankruptcy.

IV. Allotment

A. Concept

Both private and public company can allot its shares only that private company cannot invite the public to subscribe to its shares unless authorised by law – ***Section 22(5) (a) CAMA***. Allotment of shares is usually made by special resolution.

B. Requirements for Filing Return of Allotment of Shares

By ***Section 129 CAMA***, Return of allotment shall be filed with the commission within one month of the allotment together with the following:

1. Special resolution signed by two directors of the company
2. Duly completed form of return of allotment
3. Resolution of company for forfeiture of shares where applicable
4. Updated annual return filing
5. Updated section 553 filing where applicable
6. Evidence of payment of FRC annual dues

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7. Payment of fees - ***Regulation 31 CR***

C. Requirement where Payment is in Consideration Other than Cash

Note that where payment is in consideration other than cash, ***Section 137 CAMA*** provides that the following should be filed along other documents:

1. Deed of transfer/instrument of transfer
2. Evidence of ownership of the property
3. Valuation report
4. Resolution of board approving same

CAPACITY TO BECOME A MEMBER OF A COMPANY

I. Persons who cannot be Members

By ***Section 80 of CAMA***, the following persons cannot be members of a company:

1. A person of unsound mind and has been found to be so by a court in Nigeria or elsewhere. See ***Section 80(1) (a) CAMA***.
2. An undischarged bankrupt - ***Section 80(1)(b) CAMA***
3. A person under 18 years can be a member but cannot be counted for the purpose of determining the legal minimum number of members of a company - ***Section 80(2) CAMA***
4. A corporate body in liquidation cannot be a member of a company - ***Section 80(3) CAMA***

II. Persons who can be Members

From the foregoing, the following persons can be members of a company:

1. A natural person who has attained the age of 18 years and who is not of unsound mind and not a bankrupt who has not been discharged. An infant can be a member of a company but he will not be counted for the purpose of determining the legal minimum
2. An alien after satisfying all condition precedents
3. A corporate body not in liquidation
4. A personal representative after fulfilling necessary conditions precedent

III. Vesting of Shares of an Insane or Bankrupt on Committee or Trustee

If a person becomes insane or bankrupt while being a shareholder, his shares shall be vested in committee or trustee – ***Section 80(4) CAMA***. Transfer (purported) of shares to such persons shall remain in the purported transferor or his personal representative who shall hold the shares in trust for that person during the period of his incapacity.

RIGHTS & OBLIGATIONS OF MEMBERS OF A COMPANY

I. Rights of Members of a Company

1. Right to attend, speak and vote at every company meeting. See ***Sections 81, 114(b)*** and ***227(1) of CAMA***. However, by the ***Proviso to Section 81 CAMA***, the articles may provide that a member shall not be entitled to attend and vote unless all calls or other sums payable by him in respect of shares in the company have been paid.
2. Entitlement to notice of meeting. See ***Section 219(1) (a) CAMA***.
3. Right to transfer shares as a personal property. See ***Section 115 of CAMA***. This is however subject to any provision in the articles restricting the transferability of shares. See ***Section 115 and section 22(5) (a) CAMA***.
4. Right to receive dividend once it is declared by the board - ***Section 385 CAMA***. Dividend can only be declared by the board. However, by ***Section 385 CAMA***, once dividend is declared by the board, it becomes a special debt owed by the company to its shareholders (members) and recoverable by the shareholders within twelve (12) years by action in court. It becomes actionable only when declared. Note that by ***Section 379(3) CAMA***, the members in a general meeting have the power to decrease the amount declared or recommended as dividend, but they have no right to increase it.
5. Right to demand voting by poll. See ***Section 224(1) CAMA***.

6. Right to appoint proxy in a company limited by shares. See ***Section 230 CAMA***. However, by the ***Proviso to Section 230 CAMA***, where the company does not have a share capital; that is, it is limited by guarantee, the right to appoint a proxy is not automatic as it will only arise if it is expressly provided for the in the company's Articles of Association.
7. Right to requisition an EGM - ***Section 215(2) CAMA***
8. Right to remain a member with no extra liability if shares are fully paid up - ***Section 49 CAMA***.
9. Right to take up minority protection actions against the company
10. Right to participate in the appointment and removal of directors, auditors.
11. Right to return of capital on reduction of capital or upon winding up if there is available surplus.

II. Obligations of a Member of a Company

The main obligation of a member is to pay up all the shares allotted to him whenever a Call is made, otherwise the shares would be forfeited to the company and his membership is lost. This is because a company has a first and paramount lien on all its shares. See ***Section 139 & 140 CAMA***.

CESSER OF MEMBERSHIP

A person can cease to be member of a company in the following instances:

1. By transferring all his shares to another person. See ***Section 152 CAMA***. The transferor will cease to be a member immediately the name of the transferee is entered in the register of members.
2. By his shares being forfeited - ***Section 140 CAMA***.
3. By his shares being sold by the company for enforcing a lien, and the buyer's name is entered on the register of members. This is because a company has a first and paramount lien on all its shares - ***Section 139 CAMA***.
4. By a valid surrender of his shares. See ***Trevor v. Whitworth***.

MEETINGS OF A COMPANY

TYPES OF COMPANY MEETINGS

By ***Section 63(1) CAMA***, the two main organs of a company are the general meeting and the Board of Directors. Thus, the general meeting of a company is very important. There are three types of general meeting of a company viz:

1. Statutory meeting
2. Annual general meeting
3. Extraordinary general meeting

Court ordered meeting

I. Statutory Meeting

A. Concept

The statutory meeting is only applicable to a public companies and it is mandatory. ***Section 211(1) CAMA*** provides that every public company shall, within a period of six (6) months from the date of its incorporation, hold a general meeting of the members of the company, called the statutory meeting.

B. Conditions for Holding a Statutory Meeting

1. By ***Section 216 CAMA***, all statutory meetings must be held in Nigeria and
2. By ***Section 217 CAMA*** twenty-one (21) days' notice of meeting must be given. However, shorter notice will be valid if it is so agreed by members of the company having not less than ninety-five (95) percent in nominal value of the share giving a right to attend and vote at such meeting. See ***Section 217(2) (b) CAMA***.

C. Business Transacted at Statutory Meetings

The business transacted at statutory meetings include:

1. Adoption of common seal
2. Ratification of pre-incorporation contracts
3. Consider statutory report and matters arising therefrom
4. Matters relating to the incorporation of the company.

D. Statutory Report

By ***Section 211(2) CAMA***, the directors are under a duty to send a copy of the statutory report to every member at least twenty-one (21) days before the date on which the meeting is to be held. ***Section 211(3) CAMA*** requires that this statutory report shall be certified (signed) by at least two directors or director and the secretary; and it shall contain the following:

1. Total number of shares allotted, distinguishing between those fully or partly paid up otherwise than in cash. In the case of those partly paid up, the extent to which they are paid up and in either case, the consideration for which they have been allotted.
2. The total amount of cash received in respect of shares allotted.
3. The names, address and description of directors, auditors, managers (if any) and the company secretary.
4. Particulars of pre-incorporation contract, together with modifications or proposed modification on it.
5. Any underwriting contract which has not been carried out.
6. The arrears, if any, due on calls from directors.
7. Particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares or debentures to any director.

E. Other Requirements

1. After sending the statutory report to the members, ***Section 211(6) CAMA*** requires the directors to send a copy of the statutory report to CAC for registration.
2. By ***Section 211(9) CAMA***, any member who wishes to propose a resolution on any matter arising out of the statutory report must give 21 days' notice to the company of his intention to propose the resolution.

F. Effect of Non-Compliance

By ***Section 212 CAMA***, failure to hold a statutory meeting as required or file a statutory report as required, or any breach of section 211, attracts the following consequences:

1. It is a ground for the winding up of the company - ***Section 408(b) CAMA***
2. The company and any officer in default shall be liable to a fine of fifty (50) naira for every day the default continues - ***Section 212 CAMA***.

II. Annual General Meeting

A. Concept

The AGM is compulsory for all companies. In addition to any other meeting in that year, a company must hold its AGM. A company must hold its AGM within 18 months of incorporation. Thus, it can hold an AGM, even one day after incorporation. Not more than 15months may elapse between the holding of one AGM and the holding of the next, but so long as the company holds its first AGM within 18 months of incorporation, it needs not hold it in the year of incorporation or in the following year. After the first AGM, the CAC can extend the time for holding the subsequent AGMs by not more than three (3) months. When there is default in holding an annual general meeting, any member of the company can apply to CAC to order the calling of the meeting. AGM is provided for under ***Section 213(1) CAMA***.

B. Conditions for Holding AGM

1. Every AGM must be held in Nigeria. See ***Section 216 CAMA***
2. It must be held within 18 months of incorporation

3. Not more than 15 months may elapse between the holding of one AGM and the next. However, where the company holds its first AGM within 18 months of incorporation, it needs not hold it in the year of incorporation or in the following year.
4. Except for the first AGM, the CAC can extend the time for holding the subsequent AGMs by not more than three (3) months.

C. Businesses Transacted at an AGM

1. Ordinary Business

The ordinary businesses are the main or primary businesses of an AGM and such business can only be transacted at an AGM. They are prescribed in ***Section 214 CAMA*** which provides that all businesses transacted at an AGM shall be deemed to be special businesses except:

(a) Declaration of dividend
(b) The presentation of the financial statements, directors' report and auditors' report
(c) The election of directors in the place of those retiring (appointment of new directors)
(d) The appointment and the fixing of the remuneration of the auditors
(e) The appointment of the members of the audit committee.

2. Special Business

All business transacted at annual general meeting excluding the above are deemed to be special businesses. See ***Section 214 CAMA***. Note that the notice of meeting must also set out the proposed resolution by which the special business is to be introduced.

D. Power of CAC to Call/Direct/Compel the Convening of an AGM

1. **Application by an Aggrieved Member via Petition to CAC:** Where a company fails to hold its AGM as required by section 213(1) CAMA, the remedy to the aggrieved members as provided under ***Section 213(2) CAMA*** is that such a member can apply by way of a petition to the CAC.
2. **Calling or Directing or Compelling the Convening of AGM by CAC:** upon the application of any such member, the CAC can call or direct the calling of a general meeting and it is declared by CAMA that the direction given in this regard shall include a direction that a single member present in person or by proxy may apply to the FHC for an order to take a decision which shall bind all the members. See ***Section 213(2) CAMA***. It must be noted that in this regard a SINGLE member can apply to the CAC to compel a meeting.
3. **Deeming Meeting Held upon Direction of CAC as AGM:** By ***Section 213(3) CAMA***, a general meeting held upon the direction of CAC is deemed to the AGM of the company; but, where the meeting so held is not held in the year in which there was a default in holding an AGM, then the AGM so held shall not be deemed to the AGM for the year in which it was held unless at that meeting, the company resolves that is shall be so treated.
4. **Filing Resolution Deeming Meeting as AGM with CAC:** By ***Section 213(4) CAMA***, such a resolution of the company deeming the meeting so held to be the AGM for the year it was held shall be filed with CAC within fifteen (15) days from the day it was filed.

E. Effect of Failure to Hold AGM or Comply with CAC Direction

Section 213(5) CAMA provides that if a company fails to have its AGM or fails to comply with CAC's direction that the meeting be held, the company and every officer who is in default shall be guilty of an offence and liable to a fine of 500naira.

III. Extraordinary General Meeting

A. Concept

An EGM is a general meeting held at any time to transact a business which cannot conveniently wait for the next AGM. An EGM can hold at any time and it needs not hold in Nigeria. It can hold anywhere. This is because it is excluded from ***Section 216 CAMA*** which provides that all statutory and AGM shall be held in Nigeria.

B. Persons that can convene an EGM

1. The Board of Directors. See ***Section 215(1) CAMA***.

2. Any director can convene an EGM where there are no sufficient directors in Nigeria capable of acting to form a quorum. See ***Section 215(1) CAMA***.
3. Requisition by members. The member(s) must be holding, at the date of the requisition, not less than one-tenth of the paid up capital of the company carrying voting rights at general meeting; or If it is a company not having a share capital, the members must hold not less than one-tenth of the total voting rights of all members having at the said date a right to vote at general meeting. They must comply with the procedure for convening an EGM. See ***Section 215(2) CAMA***.
4. A resigning auditor can requisition an EGM to discuss the reasons contained in his Notice of Resignation which he believes would be of interest to the members of the company. See ***Section 366 CAMA***.

C. Procedure for Members' Requisitioned EGM

1. The member(s) must be holding, at the date of the requisition, not less than one-tenth of the paid up capital of the company carrying voting rights at general meeting; or If it is a company not having a share capital, the members must hold not less than one-tenth of the total voting rights of all members having at the said date a right to vote at general meeting. See Section 215(2) CAMA. If they fail to satisfy this condition, the directors will reject the requisition and it will not be debated or put to vote. See ***Pedley v. Inland Waterways Association Ltd***.
2. The requisitionists are to deposit a signed requisition at the registered office of the company stating the objects of the meeting and the resolutions which they intend to propose. The requisition must be signed by all the requisitionists. See ***Section 215(3) CAMA***.
3. Within twenty-one (21) days from the date of deposit of the requisition, the directors are to convene the EGM.
4. Where the directors refuse to convene the meeting within 21 days from the date of deposition of requisition, the requisitionist or any one or more of them representing more than one-half of the total voting rights of all of them may themselves convene a meeting. See ***Section 215(4) CAMA***.
5. By the ***Proviso to Section 215(4) CAMA***, such meeting must be convened within three (3) months from the date of deposit of the requisition. Once three (3) months expire, it can no longer be convened.
6. The meeting so convened by the requisitionists should be as nearly as possible in the same manner as the way in which meetings are convened by the Directors. See ***Section 215(5) CAMA***.
7. Any reasonable incurred by the requisitionists by reason of the failure of the directors to convene the meeting shall be repaid to the requisitionists by the company. See ***Section 215(6) CAMA***.
8. If no quorum is present at the requisitioned meeting within one hour from the time appointed for the meeting, it is dissolved. That is the end of the matter, there is no adjournment. See ***Section 239(3) CAMA***.

D. Business Transacted at EGM

It must be noted that by ***Section 215(8) CAMA***, all businesses transacted at an EGM shall be deemed to be special businesses.

IV. Court-Ordered Meeting

By ***Section 223 CAMA***, the FHC may suo motu or on application of any director or member of a company order a meeting of the company or of the board in the following instances:

1. **Impracticable to Call a Meeting:** Where for any reason, it is impracticable to call a meeting of a company or of the board of directors the FHC can order a meeting of the company or board to be called, held and conducted in such manner as the court thinks fit

and where any such order is made, may give such ancillary or consequential directions as it thinks expedient. See ***Section 223(1) CAMA; Iro v. Park; Okeowo v. Migloire***. It must be noted that by Section 223(2) CAMA, the direction given by the court above shall contain a direction that one member present either personally or by proxy, in the case of a company meeting or one director in the case of a board meeting, may apply to the FHC for an order to take a decision which shall be binding on all the members. See ***Section 223(2) CAMA***.

2. **Dead of All the Directors & Shareholders:** Where all the directors and shareholders die, then upon an application by any personal representative of a shareholder, the FHC can order the convening of a meeting of all the personal representative of the shareholders entitled to attend and vote at a general meeting to appoint new directors to manage the company. If the personal representative fail to do so, any creditor of the company can apply. See ***Section 248(2) CAMA***.
3. **Scheme Proposed for Merger, Arrangement & Compromise or Reconstruction:** Where there is a scheme proposed for a merger, arrangement and compromise, or reconstruction between two or more companies, any of the companies can apply to the FHC to order separate meetings of the companies – ***Section 117 & 126 ISA***.
4. **Compromise between a Company & Members or Creditors:** Where a company reaches a compromise with its members or creditors – ***Section 539(1) CAMA***; ***Iro v. Park; Okeowo v. Migloire***.

NOTICE OF MEETINGS

I. General Rule

By ***Section 217(1) CAMA***, the notice required for all types of general meetings shall be twenty-one (21) days' notice.

II. Circumstances of Calling Meeting by a Shorter Notice

However, by ***Section 217(2) CAMA***, a meeting called by a shorter notice will still be deemed to have been duly called if:

1. **Annual General Meeting:** In the case of an AGM, all the members entitled to attend and vote at the meeting duly agree (unanimous). See ***Section 217(2) (a) CAMA***.
2. **Other Types of Meeting:** In the case of every other type of meeting, a majority in number of the member having a right to attend and vote at the meeting and holding not less than 95% in nominal value of the shares that gave the right to attend and vote; or if it is a company not having a share capital, it must be an agreement by members holding 95% of the total voting rights at the meeting of all the members. See ***Section 217(2) (b) CAMA***.

III. Contents of Notice

The notice of a meeting shall specify

1. Place, date and time of the meeting. See ***Section 218(1) CAMA***.
2. General nature of business to be transacted there. Sufficient detail must be given to enable those to whom it is given to decide whether to attend or not. See ***Section 218(1) CAMA***.
3. Terms of a Special Resolution if a special resolution is to be considered at the meeting. See ***Section 218(1) CAMA***.
4. Statement that the meeting is to transact the ordinary meeting of an AGM shall be sufficient specification of the matters contained in section 214 if it is an AGM. See ***Section 218(2) CAMA***.
5. Notice of business to be transacted at the general meeting. See ***Section 218(3) CAMA***.
6. Statement that the member has the right to appoint a proxy to attend and vote instead of him, and the proxy needs not be a member of the company. See ***Section 218(4) CAMA***

IV. Effect of Error or Omission in Place, Date, Time or General Nature of the Business of a Meeting

Unless bad faith or failure to exercise due care and diligence exists, an error or omission in a notice with respect to the place, date, time or general nature of the business of a meeting shall not invalidate the meeting. Where there is accidental error or omission, the officer in charge shall make necessary corrections either before or during the meeting. See ***Section 218(5) CAMA***.

V. Persons entitled to Notice of Meeting

By ***Section 219(1) CAMA***, the persons entitled to receive notice of meeting are:

1. Members of the company
2. Persons upon whom the ownership of a share devolves by reason of their being a legal representative, receiver or a trustee in bankruptcy of a member of the company
3. Directors of the company
4. Auditors for the time being of the company
5. Company secretary: Unlike the board meeting, a company secretary is entitled to receive notice of general meetings. In the case of board meetings, although the company secretary attends the board meetings, unless he is also a director, he is not entitled to receive notice of the board meeting and therefore does not attend the board meeting as of right. Thus, in the minutes of meeting, the company secretary is expressed in the list of those who attended the meeting "In Attendance" and not "Present", as he merely attended to serve the Board in taking minutes of meeting and rendering other secretarial services in the meeting.

It must be noted that by ***Section 219(2) CAMA***, no other person outside the above shall be entitled to receive notice of meeting.

VI. Service of Notice

1. **Mode of Service:** When notices are to be given by a company to any member, it can be served –
   (a) Personally – hand delivery
   (b) By sending it by post to him or to his registered address
   (c) If such member does not have registered address in Nigeria, such notice will be sent to the address if any supplied by him to the company for the giving of notice to him.

   See ***Section 220(1) CAMA***. By this, members can agree to receive notices online via email.
2. **When Service by Post is Deemed to be Effected:** By ***Section 220(2) CAMA***, where the notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, pre-paying, and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of seven (7) days after the letter containing the same is actually posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post.
3. **Time Frame:** Form the foregoing, it is clear that the service must be effected in such a way as to give a clear twenty-one (21) days' notice or shorter period agreed. Time begins to run from the date the notice was actually sent out. However, by ***Section 220(2) CAMA***, if the notice was sent by post and the letter was properly addressed and stamped, the addressee is deemed to receive it seven (7) days after the letter is actually posted. Thus, for there to be compliance with 21 days' notice, the notice of the general meeting should be taken to the post office at least 28 days before the general meeting as the twenty-one (21) days length of notice will begin to count after the expiration of seven (7) days from the date the letter was actually posted.

VII. Effect of Failure to give Notice

By ***Section 221(1) CAMA***, failure to give notice of any meeting to person entitled to receive it shall invalidate the meeting unless such failure is an accidental omission on the part of the person or persons giving the notice.

By ***Section 221(2) CAMA***, if the failure to give notice is as a result of a misinterpretation or misrepresentation of the provisions of CAMA or the articles, such failure shall not be deemed to be an accidental omission.

VIII. Additional Notice

A public company is expected to give an additional notice by advertising notice of general meeting in at least two daily newspapers at least 21 days before any general meeting – ***Section 222 CAMA***.

SITUATIONS WHERE A SINGLE MEMBER CAN MAKE DECISION THAT WOULD BIND THE COMPANY.

Ordinarily, decisions of a company are by resolutions passed by majority of the members of the company. However, in the following instances, a single member can by order of court, make a decision binding on all other members:

1. **Failure of the Company to Hold AGM:** If a company does not hold its mandatory AGM, an aggrieved member can apply to CAC to direct that the meeting be called and that if only that member attends, he has the power to make a decision binding on the company. See ***Section 213(2) CAMA***.
2. **Impracticability of Calling Meeting Due to Deadlock or Other Reasons:** If a meeting becomes impracticable to call as a result of deadlock among the board or other reasons, a member can seek a court order to call the meeting and that if it is only him that attends, he would take a decision binding on all the members and the company. See ***Section 223(2) CAMA***.
3. **Some Members Walking Out of the Meeting for Insufficient Reasons to Affect the Quorum:** If some members walk out of the meeting so as to affect the quorum, and the chairman rules that the walk out was for insufficient reason, then the meeting would continue and if it remains only one member, he can approach the court for a direction permitting him to take a decision which would bind the company. See ***Section 232(4) CAMA***. In practice, the member would take the decision and then approach the court to sanction the decision so taken.
4. **Lack of Quorum after Meeting has been Adjourned Due to Some Members Walking Out for Sufficient Reasons:** If some members walk out of the meeting and the chairman rules that the walk out was for sufficient reasons, he will adjourn the meeting for one week. If at the adjourned meeting, quorum was not formed, the members present can form the quorum and if it is only one member present, he can approach the court for a direction permitting him to take a decision which would bind the company. See ***Section 232(5) CAMA***. In practice, the member would take the decision and then approach the court to sanction the decision so taken.

VOTING

I. General Rule

Section 224(1) CAMA provides that at any general meeting, a resolution put to the vote shall be decided on a show of hands, unless a poll is demanded before or on the declaration of the result of the show of hands.

II. Types of Voting

Resolutions of a company are passed by voting. There are basically two types of voting at a general meeting: show of hand and by Poll. See ***Section 224(1) CAMA***.

1. **Voting by Show of Hands:** Voting by show of hands which is the default method of voting, unless poll is demanded, does not depend on the number of shares held by a member, but on his presence, either personally or by proxy. It is determined by the numerical strength of the members supporting or opposing the resolution.
2. **Voting by Poll:** On the other hand, voting by poll depends on the number of shares held by the members, and not on numerical strength.

III. Persons who can Demand Voting by Poll

Section 224(1) CAMA provides that the persons who can demand poll are:

1. The chairman, where he is a shareholder or a proxy
2. At least three (3) members of the company present in person or by proxy
3. Any member(s) present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting.
4. Any member(s) having not less than one-tenth of the amount paid up on all the shares conferring a right to vote at the meeting.

IV. Modes of Voting

It must be noted that voting, whether by poll or by show of hand can be done by:

1. Electronic
2. Secret ballot means.
3. Online without a physical meeting. However, such voting online amounts to a written resolution which can only be passed by a private company and not a public company. Thus, a public company cannot use online voting.

V. Effect of Declaration by the Chairman on Voting by Show of Hands

It must be noted that by ***Section 224(2) CAMA***, unless a poll is so demanded, a declaration by the chairman that a resolution has, on show of hands, been carried by a particular majority or lost, and an entry to that effect in the minutes of the proceedings shall be conclusive evidence of that fact, without proof of the number or proportion of the votes recorded in favour of, or against the resolution.

VI. Right to Demand Poll

1. **General Rule:** By ***Section 225(1) CAMA***, the right to demand poll is sacrosanct and cannot be limited by the articles.
2. **Exceptions:** Any such limitation or restriction of this right in the articles shall be void except if it relates to the election of the chairman or the adjournment of the meeting. Thus, the articles can only validly limit poll voting in respect of those two matters mentioned above.
3. **Effect of Instrument Appointing a Proxy to Vote:** *Section 225(2) CAMA* provides that the instrument appointing a proxy to vote at a meeting of a company shall be deemed also to confer authority to demand or join in demanding a poll, and a demand for poll voting by a proxy shall be the same as a demand by the member who appointed him.
4. **Absolute Bar:** By ***Section 225(3) CAMA***, there is an absolute bar on the right to demand poll on the election of members of the audit committee. That is, where the resolution to be passed is one for the appointment of members of the audit committee, there shall be no right to demand poll.

VII. Voting on Poll (Procedure upon Demand of Poll)

1. **Effect of Demand for Poll on Previous Show of Hands:** Upon the demand for poll, the results of the previous show of hands shall be disregarded.
2. **Manner & Time for Taking a Poll:** ***Section 226(2) CAMA*** provides that if a poll is duly demanded, it shall be taken in any manner the chairman directs, and the result of the poll shall be deemed to be the resolution of the company on that point. However, this is made

subject to ***Section 226(4) CAMA*** which provides that where the poll is demanded on the question of the election of the chairman or for the adjournment of the meeting, it shall be taken forthwith (immediately). But if it is on any other point, it will be taken at such time as the chairman directs and pending the time when it would be taken, they can continue other businesses.

3. **Equality of Votes:** By ***Section 226(3) CAMA***, in the case of an equality of votes, whether on show of hands or poll, the chairman shall have a second or casting vote.
4. **Joint Holders of Shares:** ***Section 227(2) CAMA*** provides that in the case of joint holders of shares, the vote of the senior joint holder who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.
5. **Member of Unsound Mind voting Through Committee, Receiver or Curator Bonis:** ***Section 227(3) CAMA***, a member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, receiver, curator bonis, or other person in the nature of a committee, receiver or curator bonis appointed by that court, and any such committee, receiver, curator bonis or other person may vote by proxy.

VIII. Proxy

A. Concept

1. **General Rule:** ***Section 230(1) CAMA*** provides that any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him, and a proxy so appointed shall have the same right as the member to speak at the meeting.
2. **Limitation on Company not having Share Capital:** unless the articles otherwise provide, section 230(1) CAMA shall not apply in the case of a company not having a share capital. Thus, in a company LTD/GTE, which does not have a share capital, there is no automatic right to proxy. There will only be a right to proxy if the articles provide for it.

B. Statement in Notice of Meeting on Right to Appoint Proxy

Section 230(2) CAMA provides that in every notice calling a meeting of a company having a share capital, there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of him, and that a proxy need not be a member and if default is made in complying with this subsection as respects any meeting, every officer of the company who in default shall be guilty of an offence and liable to a fine of N250. Thus, the right to appoint a proxy must be expressly stated on the Notice of meeting.

C. Provision in Articles Requiring Instrument Appointing a Proxy to be received More than 48 Hours before Meeting in Order for the Appointment to be Effective

Section 230(3) CAMA provides that any provision contained in a company's articles shall be void in so far as it would have the effect of requiring the instrument appointing a proxy or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy, to be received by the company or any other person more than forty eight hours before a meeting or adjourned meeting in order that the appointment may be effective at the meeting.

D. Validity of a Vote by a Proxy

Section 230(5) CAMA provides that a vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death or insanity of the principal or revocation of the proxy or of the authority under which the proxy was executed, or the transfer of the share in respect of which the proxy is given: Provided that no intimation in writing of

such death, insanity, revocation or transfer as aforesaid has been received by the company before the commencement of the meeting or adjourned meeting at which the proxy is used.

E. Form of an Instrument Appointing a Proxy

Section 230(6) CAMA provides that the instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorised in writing or; if the appointer is a corporation, either under seal, or under the hand of an officer or attorney duly authorised.

F. Deposit of Instrument Appointing Proxy in the Registered/Head Office of the Company

Section 230(7) CAMA provides that the instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a certified copy of that power or authority shall be deposited at the registered office or head office of the company or at such other place within Nigeria as is specified for that purpose in the notice convening the meeting, not less than forty eight (48) hours before the time for holding the meeting or adjourned meeting, at which the person named in the instrument proposes to vote; or, in the case of a poll, not less than twenty four (24) hours before the time appointed for the taking of the poll; and in default, the instrument of proxy shall not be treated as valid.

G. Procedure for Appointing a Proxy

1. There must be an instrument in writing appointing the proxy under the hand of the appointer or his attorney duly authorized in writing or under seal if a company/corporation or under the hand of his officer - ***Section 230(6) CAMA***.
2. The instrument and CTC of power of attorney (where relevant) are to be deposited at the registered office or head office of the company or at such other place specified within Nigeria (for the meeting) not less than 48 hours before the time of holding of the meeting or adjourned meeting.
3. If voting is by poll, not less than 24 hours before the time appointed for the taking of the poll - ***Section 230(7) CAMA***.

H. Application of Provision on Proxy to All Types of General Meeting

The provision on proxy attendance applies to all types of general meeting - ***Section 230(8) CAMA***.

I. Rights of a Proxy

A proxy once appointed has the following right

1. Right to attend the meeting
2. Right to vote at the meeting, whether by show of hand or poll.
3. Right to demand poll if he qualifies to so demand - ***Section 224 CAMA***.
4. Right to be counted for the purpose of determining quorum - ***Section 232(3) CAMA***.

J. Revocation of Proxy

The revocation of proxy is only valid where intimation in writing of such revocation by the appointer or his attorney has been received by the company before commencement of the meeting or adjourned meeting at which the proxy is used - ***Section 230(5) CAMA***. Note that for an instrument of proxy to be invalid by reason of death, insanity of principal or revocation, notice as aforementioned must have been given to the company.

A member who has appointed a proxy is allowed to revoke the proxy and attend by himself, but unless he successfully revoked the proxy, he will not be allowed to speak or vote at the meeting as he would not be allowed a double attendance. For the proxy to be validly revoked, the Notice of Revocation must be communicated to the company timely before the commencement of the meeting or adjourned meeting in which the proxy is to be used. Consequently, the proxy's vote is valid unless the shareholder informs the company ahead of the meeting that he has revoked the proxy's appointment. This rule also applies to a personal representative of a deceased shareholder who died after appointing a proxy, to a trustee in

bankruptcy and a transferee of a shareholder who buys shares from a shareholder after the shareholder had appointed the proxy.

IX. Corporate Representation

1. **Concept:** When a company is a member of another company, such company may by resolution of its directors or other governing council/body authorize any person to act as its representative at any meeting of the company of which it is a member. See ***Section 231(1) CAMA***.
2. **Effect of Appointment of a Representative:** The person appointed can exercise, on behalf of the company, powers the corporate body might exercise if it were an individual shareholder of that other company. See ***Section 231(2) CAMA***. Thus, such person can appoint a proxy to attend and vote in the other company's general meeting.
3. **Appointment of a Proxy by the Corporate Representative:** By ***Section 231(1) CAMA***, a company which is a shareholder/member of another company is required to appoint any person, by a resolution of its board of directors or governing council, to be its representative in the general and other meetings for the company of which it is a member. Such a company is not thereby a proxy and can therefore, exercise the right of the company to appoint a proxy.

QUORUM

I. General Rule

Section 232(1) CAMA provides that unless otherwise provided by the articles of a company, no business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to transact the business and throughout the meeting. Thus, the quorum must subsist throughout the meeting.

II. Specified Quorum

Section 232(2) CAMA provides unless otherwise provided in the articles of a company, the quorum for the meeting of a company shall be 1/3 of the total number of members of the company or 25 members (whichever is less) present in person or by proxy, Provided that If the number of members is not a multiple of three, then the nearest number to 1/3 and where the number of members is six or less, the quorum shall be two members.

III. Calculating Quorum

Unless the articles have made other provisions, quorum is calculated as follows:

1. 1/3 of the total number of members of the company or 25 members (whichever is less) present in person or by proxy.
2. If the number of members is not a multiple of three, then the nearest number to 1/3
3. Where the number of members is six or less, the quorum shall be two members.

IV. Duration of Maintaining Quorum

CAMA requires quorum at the start and throughout the meeting. The provisions of the articles is construed strictly. Thus, if the articles merely require a quorum to be present at the time when the company proceeds to business, then it means that quorum is only needed at the start of the meeting. See ***Re Hartley Baird***. However, sometimes, the quorum may be depleted in the course of the meeting, even though there was a quorum at the beginning.

V. Depletion of Quorum

1. **Some Members Walking Out for Insufficient Reasons to Affect Quorum:** If some members walk out of the meeting so as to affect the quorum, and the chairman rules that the walk out was for insufficient reason, then the meeting would continue and if it remains only one member, he can approach the court for a direction permitting him to take a decision which would bind the company. See ***Section 232(4) CAMA***. In practice, the member would take the decision and then approach the court to sanction the decision so taken.

2. **Some Members Walking Out for Sufficient Reasons to Affect Quorum:** If some members walk out of the meeting and the chairman rules that the walk out was for sufficient reasons, he will adjourn the meeting for one week. If at the adjourned meeting, quorum was not formed, the members present can form the quorum and if it is only one member is present, he can approach the court for a direction permitting him to take a decision which would bind the company. See ***Section 232(5) CAMA***. In practice, the member would take the decision and then approach the court to sanction the decision so taken.

RESOLUTIONS

Decisions of a company are made by resolution arrived at through voting.

I. Types of Resolutions

The following are the types of resolutions namely

1. Unanimous resolutions
2. Ordinary resolutions
3. Special resolutions
4. Written resolutions
5. Resolutions requiring special notice

A. Ordinary Resolutions

By ***Section 233(1) CAMA***, an ordinary resolution is a resolution that requires only a simple majority of votes cast by such members of the company entitled to vote in person or by proxy at a general meeting. Simple majority is at least 51% and when CAMA provides for just resolution, then it is ordinary.

B. Special Resolutions

1. Concept

By ***Section 233(2) CAMA*** a special resolution is a resolution passed by a 3/4 majority of the votes cast of such members entitled to vote in person or proxy at a general meeting of which 21 days' notice specifying the intention to propose the resolution, has been duly given. The notice of meeting embodying the proposed resolution can be less than 21 days if agreed by members holding 95% of nominal value of shares or 95% of voting right. See ***Proviso to Section 233(2) CAMA***.

2. Instances Requiring a Special Resolution

(a) Voluntary change of name. See ***Section 31(3) CAMA***
(b) Change of object. See ***Section 46 CAMA***
(c) Alteration of articles. See ***Section 48 CAMA***
(d) Conversion and re-registration from LTD – PLC. See ***Section 50(1) CAMA***
(e) Conversion and re-registration from ULTD – LTD. See ***Section 51 CAMA***
(f) Conversion and re-registration from PLC – LTD. See ***Section 53(1) CAMA***
(g) Reduction of share capital. See ***Section 106 CAMA***
(h) Payment of interest out of capital in certain cases. See ***Section 113 CAMA***
(i) Treatment of reserved liability of a company having a share capital. See ***Section 134 CAMA***
(j) Variation of class rights under ***Section 141 CAMA***
(k) Compulsory winding up of a company. See ***Section 408 CAMA***
(l) Voluntary winding up of a company. See ***Section 457 CAMA***
(m) Arrangement on sale of a company as part of internal restructuring/re-organisation. See ***Section 538 CAMA***.

3. Return of Special Resolutions to CAC

Special resolutions are to be return to CAC within 15 days of passing the resolution. See ***Section 237(1) CAMA***.

C. Written Resolutions

1. **Concept:** ***Section 234 CAMA*** provides that all resolutions shall be passed at general meetings and shall not be effective unless so passed; Provided that in the case of a private company, a written resolution signed by all the members entitled to attend and vote shall be as valid and effective as if passed in a general meeting. In written resolution, no meeting is held.
2. **Limitation on Public Company:** A public company cannot pass a written resolution. Only private companies can pass written resolution.
3. **Dispense with Physical Attendance of Members Entitled to Attend & Vote:** A written resolution is a resolution passed without a formal physical meeting of members who are entitled to attend and vote. It dispenses with attendance, but the resolution must be duly passed.
4. **Signing by Members Entitled to Attend & Vote:** Written resolutions must be signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at the meeting. It is achieved by the circulation of the resolution for signature.
5. **Date of Resolution:** The date of the resolution is the date when the resolution is signed by or on behalf of the last member of the company required to sign. Any resolution passed this way has the same effect as if it was passed at properly constituted meeting.
6. **Online Voting:** an online voting will produce a written resolution since there is no physical meeting.

D. Resolutions Requiring Special Notice

1. Concept

There are some resolutions that require special notice. In this regard, ***Section 236 CAMA*** provides that Where a special notice is required for a resolution, the resolution shall not be effective unless notice of the intention to move it has been given to the company not less than twenty-eight (28) days before the meeting at which it is to be moved, and the company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice thereof, either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than twenty-one (21) days before the meeting: Provided that if, after notice of the intention to move such a resolution has been given to the company, a meeting is called for a date less than twenty-eight (28) days after the notice has been given, the notice, though not given within the time required by this, shall be deemed to have been properly given for purposes thereof.

2. Procedure

(a) Special Notice to Company of Intention to Move the Resolution: The member gives special notice to the company of his intention to propose the resolution, at least twenty eight (28) days before the date of the meeting at which he intends to propose his resolution. The resolution should also be enclosed in the notice.

(b) Notice by the Company to Members: Upon receipt of the members' notice, the company in turn gives the members twenty-one (21) days' notice, and is obliged to include the resolution in the notice calling the meeting.

(c) Effect of Failure of Company to Call Meeting within 28 Days or Less: Once the company receives the notice, its failure to call a meeting for a day 28 days or less will not invalidate the meeting.

3. Examples of Resolution Requiring Special Notice

The following are examples of a resolution requiring special notice.

(a) Removal of a director
(b) Appointing or re-appointing a person over 70 years as director of a public company. See ***Section 256 CAMA***
(c) To appoint a new director to replace a removed director at the same meeting where the former director was removed. See ***Section 262(2) CAMA***
(d) Appointing as auditor a person other that a retiring auditor. See ***Section 364(1)(a) CAMA***
(e) Filling a casual vacancy in the office of an auditor. See ***Section 364(1)(b) CAMA***
(f) Reappointing as auditor a retiring auditor who was appointed by the directors to fill a casual vacancy. See ***Section 364(1)(c) CAMA***
(g) Removing an auditor before the expiration of his term of office. See ***Section 364(1)(d) CAMA***

II. Registration of Resolutions

A. Resolutions requiring Registration

By ***Section 237(4) CAMA***, the following resolutions are required to be registered:

1. Special resolution
2. Unanimous resolution on issue which requires special resolution
3. Unanimous class resolution
4. Resolution requiring a company to wind up voluntarily passed under section 457(a) CAMA

B. Time Frame for Registration

It must be noted that by ***Section 237(1) CAMA***, the registration of the aforementioned resolutions must be within fifteen (15) days from the date of the resolution.

ADJOURNMENT OF MEETINGS

1. **General Rule:** ***Section 239(1) CAMA*** provides that the chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.
2. **Notice of Adjourned Meeting:** ***Section 239(2) CAMA*** provides that when a meeting is adjourned for thirty (30) days or more, notice of the adjourned meeting shall be given as in the case of an original meeting; but otherwise it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.
3. **Lack of Quorum within One Hour Appointed for Meeting:** ***Section 239(3) CAMA*** provides that if within one hour from the time appointed for the meeting a quorum is not present, the meeting if convened upon the requisition of members shall be dissolved, but in any other case, it shall stand adjourned to the same day in the next week, at the same time and place or to such other day and at such other time and place as the chairman and in his absence, the directors may direct.
4. **Quorum & Decision at Adjourned Meeting Due to Lack of Quorum:** ***Section 239(4) CAMA*** provides that if a meeting stands adjourned under subsection (3) of this section, any two or more members present at the place and time to which it so stands adjourned shall form a quorum and their decision shall bind all shareholders, and where only one member is present, he may seek the direction of the court to take a decision.

CHAIRMAN OF THE GENERAL MEETING

1. **General Rule:** By ***Section 240(1) CAMA***, the chairman of the Board of Directors is to preside as chairman at every general meeting of the company.
2. **Lateness, Absence & Unwillingness to Act by Chairman:** If the chairman is not in the meeting within one hour or no chairman or the chairman is unwilling to act, the directors present shall elect one of their member to be chairman of the meeting.
3. **Lateness, Absence or Unwillingness of Directors to Act as Chairman in the Absence of the Chairman:** By ***Section 240(2) CAMA***, If no director is willing to act as chairman or no director is present within one hour after the time appointed for holding the meeting, the members present shall choose one of their members to be chairman of the meeting.
4. **Duties & Powers of the Chairman:** ***Section 240(3) CAMA*** provides for the duties and powers of the chairman to include the following:
   (a) Duty to preserve order and power to take such measures as are reasonably necessary to do so.
   (b) Duty to see that proceedings are conducted in a regular manner.
   (c) Duty to ensure that the true intention of the meeting is carried out in resolving any issue that arises before it.
   (d) Duty to ensure that all questions that arises are promptly decided
   (e) Duty to act bona fide in the interest of the company.
   (f) The chairman shall have the power to adjourn the meeting in accordance with Section 239(1) CAMA. See ***Section 240(5) CAMA***.

MINUTES OF MEETING

I. Minutes to be kept

By ***Section 241(1) CAMA***, the minutes to be kept are as follows:

1. Minutes of all proceedings of general meeting (a)
2. Minutes of all proceedings at meetings of its directors (b)
3. Where there are managers, all proceedings at meeting of its managers (c)

II. Minutes being Prima Facie Evidence of Proceedings

By ***Section 241(2) CAMA***, any such minute of purporting to be signed by the chairman of the meeting at which the proceedings were held, or by the chairman of the next succeeding meeting, shall be prima facie evidence of the proceedings.

III. Minutes Deeming Meeting as Duly Held and Convened

By ***Section 241(3) CAMA***, where minutes have been made of the proceedings at any general meeting of the company or meeting of directors or managers, then until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings had at the meeting to have been duly had, and all appointment of directors, managers or liquidators shall be deemed to be valid.

IV. Form of Minutes of Meeting

The law allows minutes of meeting to be kept in various forms provided such form can guarantee preservation, quick reference and guard against falsification. It must be noted that the minutes of meeting which is to be kept is the final copy and not the draft copy. By ***Section 550 CAMA***, minutes can be kept in any of the following forms:

1. Bound books
2. Loose leafs
3. Photographic film form

4. Stored on any information storage device that is capable of reproducing the required information in intelligible written form within a reasonable time, such as CDs, flash drives etc. or other recording means of acceptable commercial usage.

However, if the minutes are not kept in bound books or loose leafs, but in other electronic means, adequate precaution shall be taken for guarding against falsification and for facilitating the discovery, and it must be capable of being reproduced in legible form within reasonable time.

V. Inspection of Minutes Book

1. **General Rule:** By ***Section 242(1) CAMA***, the books containing the minutes of proceedings of any general meeting of a company shall be kept at the registered office of the company, and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, but so that no less than six hours in each day be allowed for inspection) be open to inspection by members without charge.
2. **Furnishing Member with Copy of Minutes as Requested:** By ***Section 242(2) CAMA***, any member shall be entitled to be furnished within seven (7) days after receipt of his request in that behalf to the company, with a copy of any such minutes certified by the secretary at a charge not exceeding ten (10) kobo for every hundred words.
3. **Effect of Failure to Allow Inspection or Furnishing Copy as Requested:** By ***Section 242(3) CAMA***, if any inspection required under this section is refused or if any copy required under this section is not sent within the proper time, the company and every officer of the company who is in default shall be guilty of an offence and liable in respect of each offence to a fine of N25.
4. **Compelling Inspection by Court:** By ***Section 242(4) CAMA***, in the case of any such refusal or default, the court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings, or direct that the copies required shall be sent to the persons requiring them.

VENUE OF MEETINGS

1. **Statutory Meeting & Annual General Meeting:** Company meetings that must be held in Nigeria are statutory meeting and annual general meeting – *Section 216 CAMA*.
2. **Extra–Ordinary General Meeting:** need not hold in Nigeria.

SAMPLE DRAFTS

Notice of Court Ordered Meeting

IN THE FEDERAL HIGH COURT OF NIGERIA
HOLDEN AT LAGOS

SUIT NO: FHC/L/C/123/2015

IN THE MATTER OF AN APPLICATION UNDER SECTION 539 OF THE COMPANIES AND ALLIED MATTERS ACT CAP C20 LAWS OF THE FEDERATION OF NIGERIA, 2004
AND
IN THE MATTER OF KILLI NIGERIA LTD
IN RE: KILLI NIGERIA LTD----------APPLICANT

COURT-ORDERED MEETING OF THE HOLDERS OF THE FULLY PAID ORDINARY SHARES OF KILLI NIGERIA LTD

NOTICE IS HEREBY GIVEN that by an Order of the FHC holden at Lagos (the Court) dated the 15th day of April, 2019 made in the above matter, the Court has directed that a meeting of the holders of the fully paid ordinary shares of Killi Nigeria Ltd (the Company) be convened for the purpose of considering and if thought fit, approving (with or without modification), a proposed Scheme of Arrangement pursuant to Section 539 of the CAMA. The Scheme is explained in detail in the Explanatory Statement on Pages 15 to 20 of the Scheme Document.
The meeting will hold at the Eliel Centre Main Hall at No 15 Gold and Base Street, Airforce Road, Jos Plateau State, Nigeria on Wednesday the 15th day of May, 2019 at 11am at which place the above mentioned shareholders are requested to attend.
The following resolutions will be proposed and if thought fit, passed as special resolutions at the meeting with or without modifications:

1. The holders of the fully paid ordinary shares hereby agree to surrender ten (10%) percent of their fully paid ordinary shares to the preference shareholders who have agreed to take fully paid ordinary shares in lieu of their dividend which is cumulative and in arrears, by way of a Scheme of Arrangement and Compromise pursuant to section 539 CAMA.
2. The company be and is hereby authorised to effect the transfer of the designated fully paid ordinary shares to the preference shareholders who have agreed to take fully paid ordinary shares in lieu of their dividend which is cumulative and in arrears, by way of a Scheme of Arrangement and Compromise pursuant to section 539 CAMA.

By the said Order, the Court has appointed Dr. Joel Adamu, a director of the Company or failing him, Mr. Mathias Ayuba, also a director of the company or failing them both, any other director so appointed in their stead, to act as Chairman of the meeting.
A member of the company entitled to attend and vote at the Meeting is entitled to appoint a proxy to attend, speak and vote instead of that member. A proxy need not be a member of the company.
Any member of the company entitled to attend and vote at the Meeting who is unable to attend the meeting and who wish to be represented at the Meeting by proxies, must complete and return the attached form of proxy in accordance with the instructions contained in the form of proxy so as to be received by the Company Secretary at the Registered Office of the Company at NO 5 Zaria Road, Jos, not less than 48 hours before the date of the meeting.
The Register of Members will be closed from 10th day of May, 2019 to 15th day of May, 2019, both dates inclusive, for the purpose of attendance at the Court Ordered Meeting.

Dated this 15th day of April, 2019

_____

Chukwudifu Oputa Esq
For: Olaniwun Ajayi & Co
(Solicitors to Killi Nigeria Ltd)
9th Floor Fortune Towers,
27/29 Adeyemo Alakija Street,
Victoria Island
Lagos.

Notice of First Annual General Meeting

KILLI NANCWAT LIMITED
17, Oyo Street, Ikoyi, Lagos. P.M.B 20121
www.killinancwat.com
RC No: 110

Our Ref:_____Your Ref:_____

NOTICE OF THE 1ST ANNUAL GENERAL MEETING PURSUANT TO SECTION 213 OF COMPANIES AND ALLIED MATTERS ACT

NOTICE IS HEREBY GIVEN that the first annual general meeting of Killi Nancwat Limited will be held at The Civic Centre, Victoria Island, Lagos on the 18th May, 2019 at 10:00am to transact the following business:

Ordinary Business

1. Appointment and fixing of the remuneration of the auditors
2. Appointment of the members of the audit committee

Special Business

1. Fixing the remuneration of Directors.
2. Increase in share capital

Proxies Attendance

A member of the company is entitled to appoint a proxy to attend and vote instead of him. A proxy need not be a member. A form of proxy is enclosed and if it is to be valid or the purpose of the meeting, it must be completed, stamped and deposited at the Registered office of the company at 45, Law School Road, Victoria Island Lagos not less than 48 Hours before the time fixed for holding the meeting.

Dated this 17th day of April, 2019

_____

Joel Adamu
Company Secretary

Special Resolution

KILLI NANCWAT LIMITED
17, Oyo Street, Ikoyi, Lagos. P.M.B 20121
www.killinancwat.com
RC No: 110

Our Ref:_____Your Ref:_____

SPECIAL RESOLUTION FOR THE RE-REGISTRATION OF KILLI NANCWAT LIMITED FROM A PRIVATE COMPANY TO A PUBLIC COMPANY PURSUANT TO SECTION 50 OF THE COMPANIES AND ALLIED MATTERS ACT 2004

At the 3rd Annual General Meeting of Killi Nancwat Limited held on the 2nd day of December 2018 by 10:00am at No. 17, Oyo Street, Ikoyi, Lagos State, it was duly proposed and resolved as follows:

"That Killi Nancwat Limited be re-registered from private company to public company with the name, Killis PLC."

Dated the 2nd day of December 2018

_____ _____

Director Secretary

(Week 13)

CORPORATE GOVERNANCE IV: FINANCIAL STATEMENTS, AUDITS AND ANNUAL RETURNS

FINANCIAL STATEMENTS

I. Accounting Records

By ***Section 331(1) CAMA***, every company shall keep and maintain accounting records in accordance with provision of CAMA - ***Section 331(1) CAMA***. By ***Section 331(2) CAMA***, the accounting records should disclose with reasonable accuracy, and at all times, the financial position of the company and should enable the directors ensure that any financial statement prepared under CAMA comply with the requirements of CAMA as the form and content of a company's financial statement.

II. Contents of Accounting Records

By ***Section 331(3) & (4) CAMA***, the contents of accounting records are as follows:

1. Day to day entries of the income and expenditure of the company. That is, entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure took place (this is the income and expenditure of the company)
2. A record of the assets and liabilities of the company.
3. Where the company deals in goods then, in addition, the accounting record shall contain:
   (a) Statements of stocks held by the company at the end of each year
   (b) All statements of stock taking from which any such statement of stocks has been or is to be prepared
   (c) Statements of all goods sold and purchased showing the goods and the buyers and sellers in sufficient detail to enable them to be identified - not necessary in case of goods sold by way of ordinary retail trade - subsection (4).

III. Location of Accounting Records

By ***Section 332(1) CAMA***, the accounting records of a company is to be kept in the registered office or such other place in Nigeria as the directors think fit and it must, at all times, be available or open for inspection by the officers of the company. Thus, it is not open to shareholders, debenture holders and employees of the company. The members can only apply to CAC to appoint inspectors to investigate the activities of the company and have access to the financial statement.

IV. Duration for Keeping Accounting Records

1. **General Rule:** By ***Section 332(2) CAMA***, Accounting records are to be preserved for a period of 6 years from the date on which they were made, after which the company is at liberty to destroy them.
2. **Exception:** This is not applicable where a company is wound up and its records are disposed. Legal obligation to preserve them terminates after 6 years.
3. **Rationale of Rule:** The above is for the purpose of preservation of document and not for limitation period in which such record can be brought to court. Thus, an accounting record which is beyond 6 years can be brought to court.
4. **Failure to Comply with Keeping Accounting Records and preserving them for 6 Years:** amount to an offence committed by every officer of the company and they will be liable to imprisonment of 6 months or a fine of N500. An officer can escape liability if he can prove that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable - ***Section 333(1)-(3) CAMA***.

V. Preparation of Annual Accounts (Financial Statements) by Directors

A. General Rule

By ***Section 334(1) CAMA***, in every company, the directors shall, in respect of each year, prepare financial statements for the year. Financial statements are statements showing true and fair value of the financial position of the company in each year issued to members and the public who may then decide to invest or de-invest from the company.

B. Types of Financial Statements

1. Profit and loss account
2. Balance sheet

C. Contents of Financial Statements (Exams)

Section 334(2) CAMA provides for the contents of the financial statements as follows:

1. Statement of accounting policies (not compulsory for private companies)
2. Balance sheet as at the last day of the year
3. Profit and loss account or, in the case of a company not trading for profit, an income and expenditure account for the year
4. Notes on the accounts
5. Auditor's report
6. Directors' report
7. Statement of the source and application of funds (not compulsory for private companies)
8. Value added statement of the year (not compulsory for private companies)
9. Five year financial summary (not compulsory for private companies)
10. Group financial statements, in the case of a holding company.

VI. Fixing Financial Year by Directors

1. **General Rule:** ***Section 334(4) CAMA*** empowers directors to fix the financial year of the company by providing that the directors shall, at their first meeting after the incorporation of the company, determine the period of the financial year of the company and must give notice of the specified period to the CAC within 14 days from the day it was determined.
2. **Specific Regulatory Agencies:** although the directors have the power to fix financial year, regulatory agencies can also fix financial year. For instance, in the banking sector, the CBN pursuant to the BOFIA has issued a regulation that the financial year of every bank must be between 1st January and 31st December yearly. Where a regulatory agency fixes the financial year for companies in that sector, such companies are bound by the financial year so fixed. This is because CAMA is a general law covering and regulating companies generally in Nigeria where a specific law such as BOFIA covering a business sector provides otherwise, such law would override the provision of CAMA.
   The directives of the CBN can be supported with two different arguments. First, from accounting perspective. Accounting period is 9 months and if AGM is held earlier than September, then company are likely to carryover accounting record to the following year. This would create room for improper accounting and mismanagement. Secondly, from the legal perspective. Banking sector is a legal and regulated business. CAMA regulates every type of business/company and BOFIA regulate only banks. Thus, so far as conflict between CAMA and BOFIA relate to banks, the provisions of BOFIA will supercede.
3. **Holding Company & Subsidiaries:** ***Section 334(5) CAMA*** requires that in the case of a holding company, except where there are reasons against it, the directors should ensure that the financial year of its subsidiaries coincide with the financial year of the holding company.

VII. Persons entitled to Receive Financial Statements

A. **Persons entitle as of Right:** The persons entitled to receive financial statements are provided for under ***Section 344(1) CAMA*** which provides that in every company, not less

than 21 days before the date of the meeting at which they are to be laid, a copy of the company's financial statements for the year shall be sent to the following persons:

1. Members of the company (whether or not entitled to receive notice of general meeting).
2. Debenture holders of the company (whether or not so entitled)
3. All other persons other than members and debenture holders being persons so entitled.

B. Persons Completed Excluded (Company without Share Capital – Ltd/Gte): where the company does not have a share capital that is a company LTD/GTE, then a copy of the financial statement shall not be sent to:

1. Any member who is not entitled to receive notice of general meeting or to
2. A debenture holder who is also not so entitled. See ***Section 344(2) CAMA***.

C. Persons not entitled as of Right: By ***Section 344(3) CAMA***, notwithstanding section 344(1), a company is not under a duty to send copies of the financial statements to the following persons:

1. A member of the company or a debenture holder being in either case a person who is not entitled to receive notices of general meetings and of whose address the company is unaware
2. More than one of the joint holders of any shares or debentures, none of whom are entitled to receive such notices.

D. Exception to 21 Days' Notice: By ***Section 344(4) CAMA***, if the financial statement is sent out less than 21days before the date of the meeting, it will be deemed to have been duly sent if it is so agreed by all the members entitled to attend and vote at that meeting. (Unanimous).

E. Failure to Send Financial Statements to Persons Entitled: any person entitled to the financial statements, but is not given can apply to the company and the company must give him a copy within seven (7) days of demand. See ***Section 349(1) & (2) CAMA***. Failure to comply is an offence attracting fine of N100. See ***Section 349(2) CAMA.***

VIII. Laying Financial Statements at AGM by Directors

1. General Rule: The directors have a duty to lay financial statements at a general meeting of a company. Thus, in respect of each year, the directors shall at a date not later than eighteen (18) months after incorporation of the company and subsequently once at least in every year, lay before the company in a general meeting copies of the financial statements of the company made up to a date not exceeding nine (9) months previous to the date of the meeting – ***Section 345(1) CAMA***. The duty of the directors to lay financial statements commences eighteen (18) months after the incorporation of the company; and then subsequently, at least once in every year.

2. Account for 9 Months Preceding Date of Meeting: The financial statement so laid and delivered should account for the nine (9) months immediately previous to the date of the meeting, so that the account would be for the 9months preceding the date of the meeting. Even if the company fails to hold a general meeting for three (3) years, the financial statement to be laid when the meeting is finally held is the one accounting for the nine (9) months immediately preceding the date of the meeting.

IX. Directors' Report

Directors' report is among matters to be contained in the financial statement. By ***Section 342(1) CAMA***, the directors' report shall contain the following:

1. A fair view of the development of the business of the company and its subsidiaries during the year and of their position at the end of it.
2. The amount (if any) which they recommend should be paid as dividend and the amount (if any) which they propose to carry over to reserves
3. The names of persons who at any time during the year were directors of the company

4. The financial activities of the company and its subsidiaries in the course of the year and any significant change in those activities in the year
5. Other matters specified in parts I, II, and III of fifth (5) schedule to CAMA

X. Modified Financial Statements by Small Companies

A. Entitlement to Deliver Financial Statements in Modified Form

In certain cases, a company's directors may deliver to CAC financial statements in a modified form in respect of a year as a small company – ***Section 350 CAMA***.

B. Features of a Small Company

By virtue of ***Section 351 CAMA***, a company qualifies as a small company in a financial year if it satisfies the following conditions:

1. It is a private company having share capital
2. Its amount of turnover is not more than 2 million. Turnover is the gross earning without deduction of expenses.
3. It net asset value is not more than 1 million or such amount as may be fixed by CAC.
4. None of its member is a Government or Government Corporation, agency or its nominee.
5. None of its member is an alien
6. Its directors must hold not less than 51% of its equity share capital

XI. Publication of Financial Statements

1. **Publication of Full Financial Statements:** A company publishes its financial statements when the financial statements laid before the company in general meeting are delivered to the Commission and ***Section 354(1) CAMA*** indicates that a company publishes its full account when the complete statements laid before the company in general meeting are also those delivered to the Commission. Where a company publishes full financial statements, it must publish the relevant auditor's report with them – ***Section 354(2) of CAMA*****,** and where appropriate, its group financial statements – ***Section 354(3) and (4) of CAMA*****.**
2. **Publication of Abridged Financial Statements:** where a company is entitled to publish abridged financial statements, it needs to publish only the balance sheet or profit and loss account, otherwise than as part of full financial statements to which Section 354 applies – ***Section 355(1) of CAMA*****.**
3. **Failure to Publish Financial Statement:** A company which contravenes any provision of this section and any officer of it who is in default, shall be guilty of an offence and liable to a daily default fine of N100 – ***Section 354(6) CAMA***.

AUDIT

I. Meaning of Audit

Audit deals with examination of the books of account of a company by external experts with a view to ascertain its compliance with the accounting policy of a company and standard accounting rules. In other words, it is specialized accounting method. The accounting or financial position of the company is looked at to see whether there is compliance with the law or rules. For the purpose of auditing accounts of a company, auditors which are external to the company are appointed. In ***Livestock Feeds Plc v. Igbino Farms Ltd***, the court held that the audited statement of account of a company is the best way of showing the financial position of the company at any given time.

II. Appointment of Auditors

1. **General Rule:** By ***Section 357(1) CAMA***, every company shall at each AGM, appoint an auditor or auditors to audit the financial statements of the company and to hold office from the conclusion of that, until the conclusion of the next AGM. Thus, it can be deduced from section 357(1) CAMA that the term office of an auditor is from the conclusion of the AGM at which he was appointed to the conclusion of the next AGM. He can be re-appointed.

2. **Appointment of First Auditors**: ***Section 357(5) CAMA*** empowers the directors to appoint the first auditors at any time before the company is entitled to commence business and the auditors so appointed shall hold office until the conclusion of the next AGM. The appointment of first auditors is usually done at the first board of directors meeting. That is, the first auditors are appointed by the Directors and they hold office until the conclusion of the next AGM.
3. **Removal of First Auditors**: the company may at a general meeting remove any such auditors (first auditors) and appoint in their place any other person who has been nominated for appointment by any member of the company and of whose nomination, notice has been given to the members of the company not less than fourteen (14) before the date of the meeting. See ***Paragraph (a) of the Proviso to Section 357(5) CAMA***. Thus, the members can requisition an EGM to remove such first auditors. However, a special notice would be required to remove an auditor (first auditor) under this provision. See ***Section 364(1)(d) CAMA.***
4. **Failure by Directors to Appoint First Auditors**: where the directors fail to appoint the first auditors, then the company may, in a general meeting convened for that purpose, appoint the first auditors and thereupon, the power of the directors to appoint the first auditors shall cease and become extinct, and the directors will no longer be empowered to appoint first auditors - ***Paragraph (b) of the Proviso to Section 357(5) CAMA***.
5. **Re-Appointment of Retiring Auditors**: By ***Section 357(2) CAMA***, at any AGM, a retiring auditor, however appointed, shall be automatically re-appointed without any resolution being passed unless:
   (a) He is not qualified for re-appointment; or
   (b) A resolution has been passed at that meeting appointing some other person instead of him or providing expressly that he shall not be re-appointed; or
   (c) He has given the company notice in writing of his unwillingness to be re-appointed.
6. **Inability to Appoint Other Persons in Place of Retiring Auditor Due to Death, Incapacity or Disqualification of Such Persons:** where notice of an intended resolution to appoint some other persons, in place of a retiring auditor, has been given but those persons could not be appointed on account of death, incapacity or disqualification, the retiring auditor(s) shall not be automatically re-appointed.
7. **Casual Vacancy Based on Non-Appointment of Company Auditor at AGM**
   (a) General Rule: By ***Section 357(3) CAMA***, where no auditors are appointed or re-appointed at an AGM, the directors may appoint a person to fill that vacancy as auditor (casual vacancy).
   (b) Notice of Directors Power to Fill Vacancy: By ***Section 357(4) CAMA***, within one (1) week after the power of the directors to appoint auditors to fill vacancy becomes exercisable, the company must give notice of that fact to the CAC within one (1) week from the date the power became exercisable. Failure to give such notice is an offence attracting N100 fine for each day of the default.
   (c) Surviving or Continuing Auditors acting During Vacancy: in furtherance of section 357(3) CAMA, ***Section 357(6) CAMA*** provides that the directors may fill any casual vacancy in the office of an auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors, if any, may act. See ***Section 357(6) CAMA***.

III. Persons who can be appointed as Company Auditor (Qualification of Auditors)

A. **General Rule:** Under ***Section 358(1) of CAMA***, there are no required qualifications for appointment as company auditor both in terms of profession or professional body. However, auditors are usually qualified accountants since auditing is a specialized branch of accountancy. They must be independent of the company.

B. Disqualified Persons: The following persons cannot be appointed as auditors of a company:

1. An officer or servant of the company
2. A person who is a partner of or in the employment of an officer or servant of the company
3. A body corporate (company) – ***Section 358(1) (a)-(c) CAMA***.
4. Persons who in respect of any period of an audit where in the employment of the company or where otherwise connected therewith in any manner. See ***Section 358(2) CAMA***.
5. A person disqualified from acting as auditor of a company's subsidiary or holding company. See ***Section 358(3) CAMA***.
6. A firm whose partners are not all qualified to be appointed as auditors - ***Section 358(4) CAMA***.

C. Acting as Auditors without Qualification: No person is to act in the office of an auditor if he knows that he is not qualified to be appointed as an auditor in the company and an already appointed auditor upon knowledge of his disqualification is to give notice in writing to the company and vacate the office – ***Section 358(5) CAMA***.

IV. Auditor's Report

By virtue of ***Section 359(1) CAMA***, the auditors shall make a report on the account examined by them. This is the auditor's report and the report shall be based on the account examined on every balance sheet, profit and loss accounts, and all group financial statements which ought to be laid at the general meeting during the auditor's tenure of office.

V. Audit Committee

A. General Rule: By ***Section 359(3) CAMA***, every public company shall have an audit committee and the auditors shall send a copy of the audit report to the audit committee.

B. Composition: The composition of the audit committee is as provided by ***Section 359(4) CAMA*** as follows: the audit committee shall have a maximum number of six (6) members comprising an equal number of directors and shareholders. Thus, there can only be even membership. That is, two (2) members (one director, one shareholder), or four (4) members (two directors and two shareholders) or six (6) members (three (3) directors and three (3) shareholders).

C. Remuneration & Re-Election: By the ***Proviso to Section 359(4) CAMA***, the members of the audit committee shall not be entitled to remuneration and shall be subject to re-election annually. Thus, they are not entitled to remuneration, but they are entitled to sitting allowance.

D. Nomination of Share Holder as Member of Audit Committee: By ***Section 359(5) CAMA,*** any member may nominate a shareholder as a member of the audit committee by giving notice in writing of such nomination to the company secretary at least twenty-one (21) days before the AGM.

E. Prohibition of Appointment of Members of Audit Committee via Poll: Under ***Section 225(3) CAMA***, the members of the audit committee cannot be appointed through voting by poll. It is absolutely prohibited.

F. Functions & Powers of Audit Committee: The functions and powers of the audit committee are provided under ***Section 359(6) CAMA*** as follows: In addition to other functions and powers that the company's articles of association may stipulate, the following are the objectives and functions of the audit committee.

1. Ascertaining whether the accounting and reporting policies of the company are in accordance with legal requirements and agreed ethical practices
2. Reviewing the scope and planning of audit requirements

3. Reviewing the findings on management matters in conjunction with the external auditor and departmental responses thereon
4. Keeping under review the effectiveness of the company's system of accounting and internal control
5. Make recommendations to the board in regard to the appointment, removal and remuneration of the external auditors of the company
6. Authorize the internal auditor to carry out investigation into any activities of the company which may be of interest or concern to the committee

VI. Remuneration of an Auditor

An auditor is entitled to remuneration. By ***Section 361(1) (a) & (b) CAMA***, where the auditor is appointed by the directors, his remuneration may be fixed by the directors; or by the company in general meeting or in such manner as the company in general meeting may determine. By ***Section 361(2) CAMA***, the remuneration shall include sums paid by the company in respect of the auditor's expenses.

VII. Removal of an Auditor

By ***Section 362 CAMA***, a company may by ordinary resolution remove an auditor before the expiration of his term of office notwithstanding anything in any agreement between it and him. Thus, the procedure for the removal is as follows:

1. Special notice of intended resolution to remove the auditor.
2. Sending copy of special notice to the affected auditor
3. Making representations in writing by the affected auditor and sending it to the company
4. Sending of copies of the representation to members by the company
5. Reading out representations orally at meeting where copies were not sent to members by the company
6. Removal of affected auditor by members in general meeting via ordinary resolution
7. Sending of notice of fact of removal to CAC in the prescribed form by the company within 14 days from the date of removal. Failure amounts to an offence punishable with N100 fine.
8. Compensation for termination of appointment where the auditor is removed contrary to the terms of his employment. However, where the removal before expiration is caused by an intervening event for instance, directive of CBN or other sector specific Regulatory agency, he shall not be entitled to any compensation. ***Paragraph 8(2) of the Code of Corporate Governance for Banks 2010 (COCG Banks)***, released by the CBN restricts the tenure of a Bank's auditor to a *cumulative period of ten (10) years and eligible for re-appointment after another ten years*. Consequently, any bank auditor that has worked for a cumulative period of ten (10) years is liable to resign or stands automatically removed. Since this removal comes as a directive from a regulatory body, it is a supervening event and the auditor so removed shall not be entitled to compensation under section 362(3) CAMA for the termination of his appointment.

VIII. Auditor's Right to Attend Company's Meetings

A. Right to Attend before Removal: By ***Section 363(1) CAMA***, an auditor's rights in relation to any general meeting of the company is as follows:

1. A company's auditors shall be entitled to attend any general meeting of the company
2. To receive all notices of and other communications relating to any general meeting which a member of the company is entitled to receive
3. To be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditor.

B. Right to Attend after Removal: By ***Section 363(2) (a) & (b) CAMA*** even when an auditor of a company has been removed, he shall be entitled to attend:

1. The general meeting at which his term of office would otherwise have expired

2. Any general meeting at which it is proposed to fill the vacancy caused by his removal
3. In this regard, he is to receive all notices of and other communications relating to any such meeting which any member of the company is entitled to receive and to be heard at any such meeting which he attends on any part of the business of the meeting which concerns him as former auditor of the company.

IX. Special Notices in Respect of the Company Auditors

By ***Section 364(1) CAMA***, a special notice shall be required for a resolution of a general meeting of a company:

1. Appointing as auditor a person other than a retiring auditor (notice will be given to the retiring auditor. See ***Section 364(1) (a) CAMA***. In this case, then by ***Section 364(2)(b) CAMA***, the company shall send a copy of the notice of the intended/proposed resolution to the retiring auditor
2. Filling a casual vacancy in the office of auditor. See ***Section 364(1) (b) CAMA***. In this case, then by ***Section 364(2)(c) CAMA***, if the vacancy was as a result of the resignation of an auditor, then the company shall send the notice to the auditor who resigned.
3. Re-appointing as auditor a retiring auditor who was appointed by the directors to fill a casual vacancy. See ***Section 364(1) (c) CAMA***. In this case, then by ***Section 364(2)(c) CAMA***, if the vacancy was as a result of the resignation of an auditor, then the company shall send the notice to the auditor who resigned.
4. Removing an auditor before the expiration of his term of office. See ***Section 364(1) (d) CAMA***.

The company on receiving the special notice is to send notice of such an intended resolution to persons involved and members of the company

X. Resignation of Auditors

A. Procedure for Resignation

By ***Section 365(1) CAMA***, an auditor may resign by depositing a notice in writing to that effect at the company's registered office; and the auditor's resignation becomes effective on the date on which the notice is deposited at the company or on such other date as may be stated in the notice. Therefore, notice of resignation by press conference, newspaper etc. or any other means is invalid.

From the above, where an auditor intends to resign from the office of auditor, there are three procedural steps involved of which was provided for by section 365. The following are the steps involved:

1. **Depositing a Notice in Writing to the Company's Registered Office:** An auditor of a company may resign his office by depositing a notice in writing to that effect at the company's registered office
2. **Contents of an Effective Notice:** An auditor's notice of resignation is only effective if it contains either -
   (a) A statement to the effect that there are no circumstances connected with his resignation which he considers should be brought to the notice of the members or creditors of the company
   (b) A statement of any such circumstances connected with his resignation which he considers should be brought to the notice of the members or creditors of the company – ***Section 365(2) CAMA***.
3. **Sending Copy of Notice to CAC & Persons Entitle to Receive Financial Statements:** Upon the deposition of the notice in writing, the company is to send a copy of the notice within 14 days to Corporate Affairs Commission and persons entitled to be sent financial statements if the notice contains statement which should be brought to notice of creditors and members of company – ***Section 365(3) CAMA***.

4. **Application to FHC by an Aggrieved Member:** By ***Section 365(4) CAMA***, where a company or any person is aggrieved by the statements of the auditor, an application can be made to the court (FHC) within 14 days of receipt of such notice on the ground that the auditor is using the notice to secure needless publicity for defamatory matter.
5. **Setting Aside Notice by the Court:** where the court is satisfied that the auditor is using the notice to secure needless publicity for defamatory matter (such as where the auditor is blackmailing the company or fraternising with a competitor company), the court may order that the copies of the notice need not be sent out and award cost of application by the company against the auditor even though he is not a party to the application - ***Section 365(5) CAMA.***
6. **Sending Statement to CAC & Persons Entitled to Receive Financial Statements Setting out the Effect of the Order:** where the court makes the foregoing orders, the company is to send a statement setting out the effect of the order to the CAC and the persons entitled to receive the financial statements. Where the court does not make such order, send a copy of the notice containing the statement to the CAC and the persons entitled to receive the financial statements. See ***Section 365(6) CAMA***.
7. **Effect of Non-Compliance:** Where there is default in complying with subsection (3) and (6) of s. 365 CAMA, the company and every officer of the company who is in default shall be guilty of an offence and liable to a fine of N100 – ***Section 365(7) CAMA***.

B. Right of a Resigning Auditor to Requisition EGM

1. **General Rule:** Under ***Section 366(1) CAMA***, a resigning auditor has the right to requisition an EGM. Thus, where his notice of resignation contains a statement to the effect that the circumstances surrounding his resignation are of such a nature as to interest the members and creditors of the company, then he can deposit it along with a notice of requisition of an EGM, for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting.
2. **Circulating Notice to Members of the Company before the Next AGM/EGM:** Generally, an auditor may request the company to circulate it to its members before the next AGM or EGM convened by his requisition or at which it is proposed to fill the vacancy (not exceeding a reasonable length) of the circumstances connected with his resignation – ***Section 366(2) (i) CAMA***.
3. **Failure to Convene Extraordinary Meeting Requisitioned For:** amounts to an offence and directors shall be liable to a fine of N500 – ***Section 366(4) CAMA***.
4. **Rights of Auditor to Receive Notice of Meetings, Attend Meetings & be heard:** By ***Section 366(7) CAMA***, an auditor who has resigned is entitled to attend any such EGM and receive notice of meeting in respect of it. He is also entitled to attend any meeting, receive its notice and be heard where it concerns him as a former auditor of the company.

XI. Auditor's Powers, Duties and Liabilities
(Read CAMA – Sections 367, 368, 369)

A. Powers

1. Every auditor of a company has a right of access, at all times, to the company's book, accounts and vouchers
2. Also, he is entitled to require from the company's office such information and explanations as he thinks necessary for the performance of the auditor's duties – ***Section 360(3) CAMA***.

B. Duties

1. The duties of the company's auditor include carrying out investigations in preparing their report as may enable them to form an opinion on:
   (a) Whether proper accounting records have been kept by the company and proper returns adequate for their audit have been received from branches not visited by them

(b) Whether the company's balance sheet and (if not consolidated) its profit and loss account are in agreement with the accounting records and returns

Where the foregoing have not been done or not in existence, the auditors shall state the fact in their report – ***Section 360(1) (2) CAMA***.

2. The auditors also have the duty to consider whether the information given in the directors' report for the year for which the accounts are prepared is consistent with those accounts and if they are of opinion that it is not, they shall state the fact in their report – ***Section 360(5) CAMA***.

C. Liabilities

1. **Liability in Negligence:** A company's auditor shall in the performance of his duties exercise all such care, diligence and skill as is reasonably necessary in each particular circumstances – ***Section 368(1) CAMA***. This is a fiduciary duty imposed on an auditor(s). Where a company suffers loss or damages as a result of the failure of its auditor to discharge the fiduciary duty imposed on him, the auditor shall be liable for negligence and the directors may institute an action for negligence against him in court – ***Section 368(2) CAMA***. In ***Re Thomas Gerrard & Sons Ltd***, the court held that the auditors were liable where they failed to audit the accounts properly so as to detect that dividend was paid not from distributable profits.
2. **Failure of Directors to Institute Action:** If the directors fail to institute an action against the auditor, any member may do so after the expiration of 30 days' notice to the company of his intention to institute such action – ***Section 368(3) CAMA***. The above position is extant even where an officer of the company knowingly or recklessly makes to a company's auditor, misleading, deceptive or false information required by the auditor. However, such officer commits an offence and is liable to a fine of N500 or imprisonment for one year or both – ***Section 369(1) (2) CAMA***.

ANNUAL RETURNS

I. Making & Delivery to CAC Annual Return

1. **General Rule:** By ***Section 370 CAMA***, every company shall, at least once in every year make and deliver to CAC an annual return in the form and containing matters specified by provisions of CAMA – ***Section 370 CAMA***. It is a return on the current situation of the organisation, in terms of membership, address, activities, finance and other compliances within the financial year. Thus, it is to be filed at least once in every year.
2. **Purpose:** The annual returns is a statutory obligation on registered companies, business names and incorporated trustees to confirm that they are a going concern and regularly update their records at the CAC Registry.
3. **Exception:** However, by the ***Proviso to Section 370 CAMA***, a company need not make annual return in the year of its incorporation or in the following year so long as it holds its first AGM within 18months of incorporation. Thus, the obligation to start filing annual returns starts after eighteen (18) months of incorporation

II. Time to File Annual Returns with CAC

1. **Company:** ***Section 374 CAMA*** and ***Regulation 40(2) CR 2012*** prescribes that for a company the time to file annual returns with CAC shall be within 42 days after the AGM for that year and a copy duly signed by both a director and the secretary shall be forwarded to the CAC.
2. **Business Name:** ***Section 587 CAMA*** provides that every business name shall, not later than 30th of June in each year, except the year of its registration, deliver its annual returns in the prescribed form to the CAC to cover a period of January 1 to December 31.

3. **Incorporated Trustees:** ***Section 607 CAMA*** provides that the trustees of an incorporated trustees shall not earlier than 30th of June or later than 31st of December in each year, except the year in which it was incorporated, deliver to the CAC, its annual returns in the prescribed form.

III. Requirements for filing of Annual Returns

Regulation 40(1) of the Companies Regulation 2012 provides that the requirements for filing of annual returns shall include the following:

1. Duly completed form for annual return
2. Audited financial statement signed by two directors and duly certified by a chartered accountant where applicable
3. Evidence of payment of FRC annual dues
4. Payment of fees

IV. Consequences of Non-Compliance with Section 370-376 CAMA

1. **Liability for an Offence by Officers of the Company:** By ***Section 387(1) CAMA***, non-compliance with provisions in section 370-376 is an offence, the company and every officer in default are liable to a fine of N1000 if public company or N100 if a private company. Officers would include those falling into definition of shadow director – ***Section 378(2) CAMA***.
2. **Enforcement of Duty to File Annual Returns by CAC:** Under ***Section 565(1) CAMA***, the CAC can enforce the duty of the company to file returns. Within 14 days after the CAC serves on the company, a notice to file its annual returns as required by law, a member, creditor or the CAC itself can apply to the Federal High Court to order the company to comply and file its annual returns.
3. **Striking off the Company from Register of Companies by CAC:** Under ***Section 525 CAMA***, the CAC can strike off the company from its register of companies on the grounds that it is a defunct company. Where a company does not file annual return, the CAC can presume that such company is no longer carrying on the business for which it was registered or in operation and so, CAC can strike it off as a defunct company

V. Procedure for Striking off the Name of a Company as a Defunct Company under Section 525 CAMA

1. **Posting of Letter of Inquiry to Company by CAC:** Where the CAC has reasonable cause to believe that a company is not in operation or carrying on business, then the CAC shall send a letter to the company by post inquiring whether the company is in operation or carrying on business. See ***Section 525(1) CAMA***.
2. **Posting of Registered Letter to Company by CAC:** If within one month after sending the letter, the CAC does not receive any answer from the company, then within fourteen (14) days after the expiration of the one (1) month, the CAC shall post a Registered Letter to the company, which must refer to the first letter and state that no reply to it has been received by the CAC. See ***Section 525(2) CAMA***.
3. **Statement by CAC to Publish in Gazette Intention to Strike off the Name of the Company:** The second registered letter shall also state that if an answer to the second letter is not received by the CAC within one (1) month from the date of the letter, a Notice shall be published in the Gazette with a view to striking off the name of the company off the register. See ***Section 525(2) CAMA***.
4. **Publication of Notice in Gazette to Strike off the Name of the Company:** If the CAC receives an answer to the effect that the company is not in operation or does not carry on business, or if after one month after sending the second letter, the CAC does not receive any answer or reply, then CAC shall publish a notice in the Gazette for the purpose of striking off the name of the company. See ***Section 525(3) CAMA***.

5. **Posting of Notice to Company by CAC on Striking off the Name of the Company & Dissolution:** After the publication of the notice in the gazette, the CAC shall send, by post, a Notice to the company stating that at the expiration of three (3) months from the date of the notice, then, unless cause is shown to the contrary, the company shall be struck off from the register of companies and the company shall be dissolved. See ***Section 525(3) CAMA***.
6. **Striking off of the Name of the Company from the Register & Publication of Notice of Same in a Gazette:** At the expiration of the time stated in the notice, then unless cause to the contrary had previously been shown by the company, the CAC shall strike off the name of the name of the company from the register and shall publish a notice thereof in the Gazette. See ***Section 525(5) CAMA***.
7. **Dissolution of the Company:** Upon the publication of the notice in the Gazette, the company shall stand dissolved. See ***Section 525(5) CAMA***. However,
   (a) The dissolution of the company shall not affect the liabilities of any director or member of the company and they can be enforced as if the company had not been dissolved. See ***Section 525(5)(a) CAMA***; and
   (b) The court can still wind up the company, notwithstanding that its name has been struck off the register of companies. See ***Section 525(5) (b) CAMA***.
8. **Declaration of Dissolved Company's Properties as Bona Vacantia:** By ***Section 526 CAMA***, upon the dissolution of a company, all its properties and rights shall be declared *bona vacantia.* That is, all its properties and rights, except those held by it on trust for some other person, shall fall to the State without further assurance as Bona Vacancia. This is however subject to and without prejudice to any order of court in that regards.

VI. Procedure to Restore Struck off Company

The procedure to restore the name of a struck off company is provided under ***Section 525(6) CAMA*** and is as follows:

1. **Application by Company, Creditor or Member to FHC:** Within 20 years from the date of the publication of the notice dissolving the company under section 525(5), the company or any creditor or member aggrieved with the striking off can apply to the FHC for an order restoring the name of the company to the companies register at the CAC. This application must be made within 20 years from the day the notice dissolving the company was published.
2. **Order by the Court for Restoration of Company's Name in the Companies Register:** if the court is satisfied that at the time of striking off, the company was carrying on business or in operation or that otherwise, it is just to restore it to the register then the court shall make an order that its name be restored to the register and the court may give such direction as it deems fit to make in the circumstances.
3. **Delivery of Copy of Order to CAC & Registration:** Upon delivery of an office copy of the order to the CAC for registration, the order shall have effect according to its tenor and may be registered accordingly.

(Week 14)

CORPORATE GOVERNANCE V: MAJORITY RULE, MINORITY PROTECTION AND INVESTIGATION OF COMPANIES

PRINCIPLES OF CORPORATE SOVEREIGNTY & THE SCOPE OF THE RULE OF FOSS V HARBOTTLE

I. General Rule

The principle in ***Foss v. Harbottle*** is that subject to certain exceptions, where an irregularity has been committed in the course of the company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify that irregular conduct. See ***Section 299 of CAMA, Elufioye & Ors v. Halilu & Ors***. The two principles flowing from this rule are as follows:

1. Actions in respect of wrongs done to a company must be brought by the company itself and in its own name. Since the company is distinct from its members, the company is the proper plaintiff to sue in respect of wrongs done to the company.
2. The court will not interfere in the internal management of the company where the wrong done or irregularity complained of is within the vires of the majority of the members to rectify or ratify by an ordinary resolution of the simple majority. See also ***Macdougall v. Gardiner***.

II. The Rationale for the Rule

1. It is the logical consequence of the fact that a company is a separate legal person. It is the company that has suffered a wrong, therefore it is the company which seeks a remedy.
2. It preserves the principle of majority rule. If wrong can be ratified in general meeting by the company, it would be futile to have litigation about it.
3. It protects corporate sovereignty by restricting the interference of the courts in corporate matters
4. It prevents multiplicity of futile actions. If each shareholders were permitted to sue, the company might be subject to many law suits started by numerous plaintiffs
5. If wrong can be ratified in general meeting by the company, it would be futile to have litigation about it.

III. Application of the Rule to Incorporated Trustees, Clubs, Political Parties & Associations

The rule in Foss v. Harbottle as codified under section 299 CAMA applies also to registered trade unions, incorporated trustees, clubs, political parties, associations etc. See ***PDP v. Abubakar,[32] Ejikeme v. Amaechi,[33]*** and ***Cotter v. National Union of Seamen***.

IV. Exceptions to the Rule in Foss v. Harbottle (Protection of Minority)

The exceptions to the rule in Foss v. Harbottle as codified under section 299 CAMA came as a form of minority protection. The exceptions which are recognized under common law are specifically provided under ***Section 300(a) – (f) CAMA***. They are:

A. Entering into any Transaction which is Illegal or Ultra Vires

[32] (2007) 41 WRN 61

[33]

1. **Concept:** Ultra vires here is when the company is acting outside the object clause or exceeding its power under the memorandum of its association. See ***Section 300(a) CAMA, Hogg v. Cramphorn, Hutton v. West Cork Railway***.
2. **Remedies Available:** By ***Section 300 CAMA***, the only remedies available here are declaration and injunction as there is absolutely no entitlement to damages.
3. **Suitable Type of Action:** The best action to take in redressing an illegal or ultra vires act of the company is a Derivative Action (i.e. to sue in the name of the company) if the end of it will be for the benefit of the company or to get back the properties illegally taken. If a Members Direct Action (Personal or Representative) is to be used (i.e. to sue in the name of the minority shareholder), it is only an Order of injunction or declaration that can be given. However, the court may award him costs whether his action succeeds or not. See ***Section 301(3) CAMA***.

B. Purporting to do by Ordinary Resolution any Act which by Its Constitution or the Act is Required to be Done by Special Resolution

1. **Concept:** This would amount to irregular procedure. For instance when ordinary resolution is used for reduction of share capital, change of name and object clause. The minority shareholder can go to court and set aside the ordinary resolution. See ***Section 300(B) CAMA, Edwards v. Haliwell***.
2. **Remedies Available:** By ***Section 300 CAMA***, the only remedies available here are declaration and injunction as there is absolutely no entitlement to damages.
3. **Suitable Type of Action:** the action would be a Members Direct Action (Personal or Representative) under ***Section 301(1) & (2) CAMA***. However, the court may award him costs whether his action succeeds or not. See ***Section 301(3) CAMA***.

C. Act or Omission Affecting the Applicant's Individual Rights as a Member

1. **Concept:** For instance where dividends is declared, it becomes a debt due to the shareholder and if shareholder is not paid, he can sue as it infringes his personal right. Other examples include failure to give notice of meeting, failure to admit duly appointed proxy to company meetings, denying member of his right to vote, etc. See ***Section 300(c) CAMA***, ***Pender v. Lushington.***

   Dividends is the money declared by a company as its distributable income to the members/shareholders of a company realised from the business of the company. The Law is that a company is not compelled to pay dividends but if it decides to, it must be from the profits of the company. The Board of Directors recommends the amount to be declared as dividends to the Annual General Meeting (AGM), which may in turn reduce or approve it. The AGM cannot increase it - ***Section 379(3) of CAMA***. Once dividend has been approved or declared, it must be paid and it can be recovered as a debt by action in court within 12 years of the dividend being in arrears.
2. **Remedies Available:** by ***Section 300 CAMA***, the only remedies available here are declaration and injunction as there is absolutely no entitlement to damages.
3. **Suitable Type of Action:** the action would be Members Direct Action (Personal or Representative Action) under ***Section 301(1) & (2) CAMA***. However, the court may award him costs whether his action succeeds or not. See ***Section 301(3) CAMA***. However, Derivative Action can be used if the breach of the member's right will require him to recover money or property from the company (e.g. is where dividends on shares held were declared and is in arrears within 12 years of the declaration of the dividend) it is better to use a derivative action - ***Section 303 of CAMA***.

D. Committing Fraud on Either the Company or the Minority Shareholders where the Directors Fail to Take Appropriate Action to Redress the Wrong Done

1. **Concept:** An example of this ground is the misappropriation of the company's property/money by the directors or majority shareholders – ***Section 300(d) CAMA, Cook v. Deeks.*** The fraud alleged here need not be criminal fraud. It includes any unconscionable act or conduct by those in control of the company at the expense of the minority of the company such as misappropriation of the company's funds or property.
2. **Remedies Available:** Minority is to seek order of injunction or declaration to stop or set aside an act that is set to defraud him or the company - ***Parke v. Daily News***; ***Section 301 CAMA.***
3. **Proof of Fraud against the Company:** Most times, fraud is always on the company and there must be proof. In bringing an action where fraud was committed against the company, the following will be proved:
   (a) What was taken belong to the company
   (b) It passed to those against whom the claim is made or their protégé
   (c) Those who appropriated the company's property are in control of the company
   (d) They acted fraudulently and not merely negligently. This is because if they acted negligently then the action should be founded on section 300(f) CAMA.

   It is not enough to allege series of facts and if only negligence can be proved, proceed under Section 300(f) CAMA. Note that if the third party who purchased company's property is an innocent party, the director cannot be sued under the exception. This is where the company's property was sold at gross under-value - ***Daniels v. Daniels***.
4. **Suitable Type of Action**: the action would be Members Direct Action (Personal or Representative Action) under ***Section 301(1) & (2) CAMA***. However, the court may award him costs whether his action succeeds or not. See ***Section 301(3) CAMA*****.** However, the best action to take in redressing this is a Derivative Action where the company must be the plaintiff and the wrong doers the defendants.

E. Where a Company Meeting cannot be called in Time to Be of Practical Use in Redressing the Wrong done to the Company or Minority Shareholders

1. **Concept:** Usually the meeting to redress the wrong ought to be an EGM but even where the EGM cannot be requisitioned to meet the emergency, then the members can sue under this heading. See ***Section 300(e) CAMA, Hogson v. Nalgo***.
2. **Remedies Available:** by ***Section 300 CAMA***, the only remedies available here are declaration and injunction only as there is absolutely no entitlement to damages.
3. **Suitable Type of Action:** the action would be Members Direct Action (Personal or Representative Action) under ***Section 301(1) & (2) CAMA***. However, the court may award him costs whether his action succeeds or not. See ***Section 301(3) CAMA***.

F. Where the Directors are Likely to Derive a Profit or Benefit or Have Profited or Benefited from their Negligence or from their Breach of Duty

1. **Concept:** In ***Daniels v. Daniels***, property of the company was sold by the two directors being the majority shareholders and husband and wife to the wife at a gross under-value. Fraud could not be proved but negligence was proved. The court held them liable as they derived benefit from their act.
2. **Remedies Available:** by ***Section 300 CAMA***, the only remedies available here are declaration and injunction only as there is absolutely no entitlement to damages.

3. **Suitable Type of Action:** the action would be Members Direct Action (Personal or Representative Action) under ***Section 301(1) & (2) CAMA***. However, the court may award him costs whether his action succeeds or not. See ***Section 301(3) CAMA***. However, where the Directors have benefited or profited, the action should be Derivative Action as it would enable a refund of the benefits so derived from the company to the company - ***Daniels v. Daniels***.

PERSONS WHO CAN BRING AN ACTION AGAINST THE COMPANY

1. Member
2. Personal representatives of a deceased member
3. Persons whom shares have been transferred or transmitted by operation of the law
4. Director/Officer of the company
5. Retired Director/Officer of the company
6. Creditor
7. Corporate Affairs Commission
8. Registered owner or beneficial owner of a security of the company
9. Former registered owner or beneficial owner of a security of the company
10. Any proper person who can make such application in the discretion of the court

FORMS OF MINORITY PROTECTION ACTIONS

I. Members Direct Action

A. Concept: Breach of Section 300 CAMA entitles a member/shareholder to bring a members direct action to enforce his rights – ***Section 301 CAMA***.

B. Types of Members Direct Action: The members' direct action can be brought in two forms as follows:

1. **Personal Action:** A member can institute a personal action to enforce a right due to him personally - ***Section 301(1) CAMA***. Personal action is restricted to such infringements directed at the individual membership rights in the company e.g. entitlement to notice of meeting, voting, attendance to meetings, payment of dividend when declared etc.
2. **Representative Action**: Members can bring action in a representative capacity for the enforcement of personal rights due to them. Such members must nominate those who are member or members to bring action in a representative capacity for the enforcement of rights due to them. They can be named in the suit as their representatives and satisfy all the conditions for instituting representative actions in court - ***Section 301 (2) CAMA***.

C. Proper Parties to a Members Direct Action: The member of the company sues in his name or in representative capacity as the plaintiff while the company and the directors are made defendants to the action.

D. Persons Who Can Bring a Members Direct Action

1. Member
2. Debenture holder secured by floating charge
3. Shareholder – ***Section 79 CAMA***
4. Personal representative of a deceased member
5. Any person to whom shares have been transferred or transmitted

See ***Section 301 & 302 CAMA***.

E. Reliefs Available to a Person Instituting a Members Direct Action

1. **Declaration:** Where the act has been done, the member should seek for declarations.
2. **Injunction:** restraining the company and/or directors from doing a particular act. Where the act has not been done; the member should seek for an injunction.
3. **Cost for Instituting the Action:** may be awarded to the member personally whether or not his action succeeds - ***Section 301 (1) (2) & (3) CAMA***.

Note: The members bringing MDA are not entitled to Compensation or Damages

E. Award for Costs: The court may order that the member shall give security for costs - ***Section 301 (4) CAMA***.

F. Meaning of Member: ***Section 302 CAMA*** defines the term member as used for the purpose of a member's direct action. It provides that for the purpose of sections 300 and 301 of CAMA, "member" includes:

1. The members themselves
2. The personal representatives of a deceased member
3. A person to whom shares have been transferred or transmitted by operation of law.

II. Derivative Action

A. Concept: They are actions which ought to have been brought by the company through the directors. Thus, the plaintiff's right of action derives from that of the company.

B. Modes of Derivative Action

1. A member can commence a derivative action in the name of the company or
2. In a representative capacity on behalf of the company.

C. Persons Who Can Apply for Derivative Action: by virtue of ***Section 309 CAMA***; the following persons can apply for Derivative action for a company:

1. A registered holder (member) or beneficial owner (by Transfer or Transmission) and a former registered holder or beneficial owner of a company's security (debenture holder).
2. A director or officer or a former Director or Officer of a company.
3. Corporate Affairs Commission.
4. Any other person the Court may permit to make the application.

D. Procedure for Bringing Derivative Action

1. **Application to Obtain Leave of Court:** Obtain leave of court by way of originating summons at the Federal high Court with an Affidavit in support and a Written address (NB: drafting of originating summons)
2. **Conditions Precedent for Application for Derivative Actions:** by virtue of ***Section 303(2) CAMA***, the Affidavit in support of the Originating summons must show the following:
   (a) That the wrong doers are the directors in control of the company who will not take the necessary steps to redress the illegality
   (b) That a reasonable Notice of intention to seek redress in Court has been given to them
   (c) The Applicant is acting in good faith; and
   (d) It appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued

   Note: all the conditions are cumulative and must be present.

F. Remedies the Court can Grant: The court may upon a successful derivative action grant general reliefs as well as specific reliefs as follows:

1. An Order that the amount illegally collected from the company be returned to it
2. An order authorising the applicant or any other person to control the conduct of the action;
3. An order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the company instead of to the company.
4. An order requiring the company to pay reasonable legal fees incurred by the Applicant
5. A direction that a Director of the company controls the action in Court to redress the illegal act or to recover the company's property - ***Section 304(2) CAMA***
6. Appointment of a receiver/manager of the property of the company
7. Direct the company or its member to institute specific actions
8. Vary or set aside a contract which the company is a party
9. Restrain a person from a specific action
10. Require a person to do a specific act or thing - ***Section 312 of CAMA***

G. Proper Parties to a Derivative Action: The appropriate parties in a derivative action should be PLAINTIFF - the company and the Applicant as Plaintiffs/Applicants and DEFENDANT - the Directors, third party or wrongdoer as the Defendant/Respondent. NB - ***Agip (Nig.) Ltd v. Agip Petrol Int'l*** - the company was reflected as plaintiff as well as Defendant. However, for Law School purpose, the company cannot be on both sides of the Plaintiff and the Defendant; it can be on only one side.

H. Difference between Derivative Action and Members Direct Action

1. Derivative action is different from members' direct action in that, members' direct action seeks to protect the rights of members and shareholder whereas derivative action seeks to protect the company.
2. Derivative action is normally used where the act of the Directors have been concluded while Members Direct Action is normally used where the act is continuous.

RELIEF ON THE GROUNDS OF UNFAIRLY PREJUDICIAL AND OPPRESSIVE CONDUCT (Omnibus Exception to the Rule in Foss v. Harbottle)

A. Concept: Here, the affairs of the company are being conducted in an illegal or oppressive manner or unfairly prejudicial or discriminatory against a member or members' interest or in disregard of public interest - ***Section 311 CAMA*****.**

B. Procedure: The member should file a PETITION to the Federal High Court – ***Section 311 CAMA; Omololu Mulele v. Ijale Properties Co. Ltd***. The petitioner must prove pecuniary loss here.

C. Grounds for Petition: by virtue of ***Section 311(2) (a) CAMA***, the grounds for bringing a petition are:

1. Affairs of the company are being conducted in an illegal or oppressive manner
2. Affairs of the company are unfairly discriminatory against the members
3. The company disregards the interests of the members
4. An act or omission or resolution is unfairly prejudicial, discriminatory or unfair to the interests of the members

D. Persons Who Can Bring a Petition: The following persons have locus standi to institute action by Petition to the Federal High Court under Section 311 - ***Section 310(1) & (2) CAMA***,

1. A member of the company,

2. The personal representative of a deceased member
3. Any person to whom shares have been transferred or transmitted by operation of law.
4. Director or officer or former Director or Officer of the company.
5. A Creditor;
6. Corporate Affairs Commission; or
7. Any other person who, in the discretion of the Court, is the proper to make the application.

NB: It is only CAC that can petition on the ground that the affairs of the company are being conducted against the members in a manner which is in disregard to public interests - ***Section 311(2) (c) CAMA***. The others can bring action on the ground that it would unfairly would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, or which is in a manner in disregard of the interests of that person – ***Section 311(2) (b) CAMA***.

E. Possible Reliefs/Orders the Court can Grant Upon Successful Petition: ***Section 312(2) CAMA*** lists the several reliefs which may be ordered by the court as follows:

1. Winding up of the company;
2. Regulating the conduct of the affairs of the company in future;
3. Purchase of the shares of any member by other members of the company;
4. Purchase of the shares of any member by the company and for the reduction accordingly of the company's capital;
5. Directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorising a member or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company;
6. Varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;
7. Directing an investigation to be made by the CAC;
8. Appointing a receiver or a receiver and manager of property of the company;
9. Restraining a person from engaging in specific conduct or from doing a specific act or thing;
10. Requiring a person to do a specific act or thing.

INVESTIGATION OF COMPANY

I. Concept

The CAC may appoint one or more competent inspectors to investigate the affairs of a company and to report on them in such manner as it may direct - ***Section 314 (1) CAMA***. This is an instance of lifting the veil.

II. Persons Who Can Prompt an Investigation Into Company's Affairs

By ***Section 314 (2) CAMA***, the following can prompt such investigation:

1. **Company Having Shares:** In case of a company having shares (Ltd, Plc, Ultd); on the application of members holding not less than ¼ of the issued shares.
2. **Company not Having Share Capital:** In the case of a company not having share capital (Ltd/Gte); on the application of not less than ¼ of members listed in the Register of members.
3. **Any Other Case:** In any other case, on the application of the company.
4. **Court Order:** by Court order directing that the affairs of the company be investigated - ***Section 315(1) CAMA; Spectra Ltd v. Stabilini Visioni.***

III. Circumstances Warranting an Application for Investigation of Company

By ***Section 315 (2) CAMA***, the CAC may order investigation if:

1. The company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some part of its members; or
2. Any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial or
3. That the company was formed for any fraudulent or unlawful purpose or;
4. Persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members.
5. The company's members have not been given all the information with respect to its affairs, which they might reasonably expect.

IV. Powers of Inspectors & Duties of Investigated Company

A. Powers of Inspectors

1. Demand for production of books or documents
2. To demand appearance of any officer
3. To demand from the officers assistance for the investigation – ***Section 317 CAMA***
4. Power to call for directors' bank account – ***Section 318 CAMA***

B. Duties of Investigated Company

1. Produce for inspection, all books and documents relating to the company
2. Attend before the inspector when required to do so
3. Give the inspector all assistance in connection with the investigation, which he is reasonably able to give

V. Inspection Report

A. Concept

The inspector, if so directed by the Commission, shall make an interim reports the Commission and at the conclusion of the inspection shall make a final report and deliver to it and such report shall be written and printed as the Commission may direct – ***Section 320 (1) CAMA***.

B. Forwarding of Report

1. **Company:** the Commission may direct that a copy of the report be forwarded to the company at its head office or registered office – ***Section 320(2) CAMA***.
2. **Court**: Where the inspector was appointed pursuant to an order of court then the Commission shall forward a copy of the report to the Court – ***Section 320(3) CAMA***.
3. **Other Instances:** In any other case, the Commission if it thinks fit forward a copy of the report upon application and payment of the prescribed fee to the following persons:
   (a) Any member of the company or body corporate which is subject to the report;
   (b) Any person whose conduct is referred to in the report;
   (c) Auditors of that company or body corporate;
   (d) Applicants of the investigation;
   (e) Any other person whose financial interest appears to the Commission to be affected by matters covered in the report; whether creditor of the company or body corporate – ***Section 320(4) (a) CAMA***.

C. Publication of Report

The Commission if it thinks fit direct that the report be printed and published – ***Section 320(4) (b) CAMA***.

D. Uses of the Inspection Report by the CAC

The CAC has power to:

1. Bring civil proceedings on behalf of the company on the basis of the Inspector's Report – ***Section 321 CAMA.***
2. Send the Inspector's Report to the Attorney General of the Federation for criminal prosecution or other proceedings – ***Section 322 CAMA***.
3. Bring winding up petition in respect of the company.

OTHER FORMS OF MINORITY PROTECTION UNDER CAMA

1. **Winding up on Just & Equitable Grounds:** Winding up where the court is of the opinion that it is just and equitable to do so - ***Section 408(e) of CAMA***. It is to file a petition for winding up in Court - ***Okeowu v. Milgore***.
2. **Cancellation of Variation of Class Right:** If the company is carrying out a variation of class rights, 15 % holders of the issued shares of that class of shares of the company can apply to the Federal High Court to cancel the variation - ***Section 142 of CAMA***
3. **Cancellation of Special Resolution for Altering of Object/Business of the Company:** If the company is cancelling or altering the object/business of the company, 15% of the dissenting members as holders of nominal share capital or holders of 15% of the company's debentures of the company can apply to the Court for its cancellation - ***Section 46(2) (a) & (b) of CAMA***.
4. **Scheme of Reconstruction & Amalgamation:** Upon the re-registration of a public company (PLC) to a private company, 5 % of the holders of the issued shares or 5% of company's members may apply to the Court to cancel it - ***Section 53(3) of CAMA***.
5. **Requisition of a Meeting:** by the minority members notwithstanding the provisions in the articles - ***Section 215(2) CAMA***

STATUTORY SAFEGUARDS FOR ACTIONS COMMENCED FOR MINORITY PROTECTION

1. **Alteration of Memo or Articles by the Court:** Where court alters or adds to the memo or articles, such alteration shall have effect as it had been duly made by a Resolution of the company; the company shall not have power, without the leave of court, to make further alteration to the memo and articles inconsistent with provisions of the court order - ***Section 312 (4) CAMA***.
2. **Delivery of CTC of Order Altering Memo or Articles to CAC:** Within 14 DAYS of altering the memo and articles by the court, a certified true copy of the Order should be delivered to CAC and it is an offence to default - ***Section 312 (5) CAMA***.
3. **Non-Stay of Derivative Action:** A Derivative action shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or a duty owed to the company has been or may be approved by the shareholders. However, evidence of approval by the shareholders may be taken into account by the court in making an order under Section 304 CAMA - ***Section 305 CAMA.***

SAMPLE DRAFTS

Application for Derivative Action & Investigation

IN THE FEDERAL HIGH COURT OF NIGERIA
HOLDING AT ABUJA

SUIT NO: FHC/98/15

IN THE MATTER OF KILLI & SONS PLC
AND
IN THE MATTER OF COMPANIES AND ALLIED MATTERS ACT

BETWEEN
KILLI & SONS PLC…….PLAINTIFF/APPLICANT
AND
MATHIAS AYUBA……..……DEFENDANT/RESPONDENT

MOTION ON NOTICE

BROUGHT PURSUANT TO RULE 2(2) COMPANIES PROCEEDING RULES 1992, SECTION 303 COMPANIES AND ALLIED MATTERS ACT AND THE INHERENT JURISDICTION OF THE COURT

TAKE NOTICE that this honourable court shall be moved on the 17th day of May, 2019 at the hour of 9 O'clock or so soon thereafter as Counsel to the Applicant may be heard praying the court for the following reliefs:

1. AN ORDER FOR LEAVE of court to bring an action in the name or on behalf of the company to which the company is a party for the purpose of prosecuting the action on behalf of the company.
2. AN ORDER directing an investigation to be made into the approval of a new remuneration for the Managing Director of the company by the Corporate Affairs Commission.
3. AN ORDER varying or setting aside the resolution of the Board of Director approving a new remuneration for the Managing Director pending the investigation by the Corporate Affairs Commission.
4. AND FOR SUCH FURTHER ORDER OR ORDERS as the honourable court may deem fit to make in the circumstances.

Dated the 19th day of April, 2019.

_____
SOLICITOR FOR THE APPLICANT
Joel Aduma.
Adamu & Co. (Glory Chamber)
No 2B Akinsway, Maitama,
Abuja.

FOR SERVICE ON:
Respondent's Counsel
Kunleowo Iyaloja Esq
Plot G1 Plaza Motel, Wuse,
Abuja.

IN THE FEDERAL HIGH COURT OF NIGERIA
HOLDING AT ABUJA

SUIT NO: FHC/98/15

IN THE MATTER OF KILLI & SONS PLC
AND
IN THE MATTER OF COMPANIES AND ALLIED MATTERS ACT

BETWEEN
KILLI & SONS PLC…….PLAINTIFF/APPLICANT
AND
MATHIAS AYUBA……..……DEFENDANT/RESPONDENT

AFFIDAVIT IN SUPPORT OF MOTION

I, Adebola Ogunbgayi, Female, Christian, Director of Killi and Sons Plc, of No 2B Kennybabe Way, Garki, Abuja and a Nigerian Citizen do hereby depose to this affidavit and state as follows:

1. I am a Director of the Applicant, a company incorporated under the Allied Matters Act 2004 whose registered address is situate at No 2B Kennybabe Way, Garki, Abuja by virtue of which I am conversant with the facts of this case and other related facts.
2. A resolution was passed by the Board of Directors without the consent of some members of the company increasing the remuneration to an unreasonable amount.
3. The wrongdoers are the directors who are in control and will not take necessary action.
4. The applicant has given reasonable notice to the directors of the company of his intention to apply to the court if the directors do not bring or diligently prosecute or defend or discontinue the action.
5. The applicant is acting in good faith.
6. It appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.
7. The grant of this application would be in the interest of the company.
8. I swear to this affidavit in good faith believing same to be true and correct to the best of my knowledge and in accordance with the Oath Act.

Deponent

Sworn to at the Federal High Court Registry, Abuja
This 17th day of April 2019.

BEFORE ME:

COMMISSIONER FOR OATHS

(Week 15)

COMPANY SECURITIES I: SHARES & DEBENTURES AND ENFORCEMENT OF SECURITIES

SHARES

INTRODUCTION

I. Meaning of Securities

Section 315 ISA defines securities to include shares, debentures, notes, options, bonds (whether corporate or government), commodities, futures and other derivatives. The following are company's securities:

1. Shares
2. Debenture
3. Stock
4. Bond

A company's capital may either be equity capital or loan capital. Equity capital is raised internally from members/shareholders through the issuance and subscription of shares; while loan capital is raised externally through the issuance of debentures (borrowing). Equity capital is better and more advantageous than loan capital.

II. Meaning & Nature of Shares

Shares represent the bundle of rights and liabilities which a shareholder has in a company's share capital as provided in the terms of issue and the articles of the company. ***Section 114 CAMA*** provides that subject to the provisions of CAMA, the rights and liabilities attaching to the shares of a company are dependent on the terms of issue and the company's article.

It must be noted that by ***Section 114(b) CAMA***, notwithstanding anything contained in the terms of issue or articles, every share shall carry a right to attend every general meeting of a company and to vote at such a meeting.

By ***Section 115 CAMA***, the shares in a company are transferrable properties and can be transferred in the manner provided in articles of association of the company. See ***Okoya v. Santili***.

III. Legal Nature (Features) of a Share

1. Personal property (a chose in action) which is transferrable
2. An intangible personal right or stake, which a person has in a company.
3. A res in persona
4. It confers a bundle of rights and liabilities on the holder

IV. Technical Terms Used in Relation to Shares

1. **Capital Gearing:** It is used in describing the proportion of preference shares to ordinary shares**.** If the percentage of preference shares is higher than that of ordinary shares, it is said TO BE HIGH GEARED. If percentage is lower, it is LOW GEARED. If it is equal, it is MEDIUM GEARED.
2. **Authorised Share Capital:** The authorised share capital is the amount of capital a company proposes to be incorporated with and the share capital of the company at every material time the company is a going concern – ***Section 99 CAMA*****.** The authorised share capital should not at any time fall below the authorised minimum share capital as stipulated by ***Section 27(2) CAMA*****.**

3. **Issued Share Capital:** This is the proportion of the share capital actually issued or allotted to shareholders who have either paid or agreed to pay for it. The issued share capital shall not be less than 25% of the authorised share capital.
4. **Fully Paid Up Shares**: This is the portion of the issued share capital, which has been fully paid up or credited as paid up by members. It should not be less than 25%.
5. **Unpaid Capital**: This is the amount still unpaid on the issued capital and which can be called up at any time when needed.
6. **Unissued Shares**: These are the reserved shares, which have not been made available or issued to members. It is also referred to as reserved capital. It cannot be called except in the event of winding up or other contingencies as determined by the company.
7. **Call on Shares:** This is a notice by the directors of a company, which is served on members to pay up the amount remaining unpaid on the shares subscribed by them. The time stipulated shall not be less than one month from the last preceding call – Section 133 CAMA.
8. **Lien on Shares**: The Company has first and paramount lien on all its issued shares which have remained unpaid – ***Section 139 CAMA***.
9. **Share Warrants**: No company as from commencement of CAMA has the power to issue share warrants. See ***Section 149(1) CAMA*** which abolished share warrants. Previously issued share warrants are to be cancelled within 30 days of commencement of CAMA.
10. **Dividend Warrants/Negotiable Instrument**: Dividend warrants is the instrument used for paying dividend due on profit to members. It is now regarded as negotiable instrument.
11. **Mortgage of Shares**: Shares are property transferable as security for an advance. The mortgage may be legal or equitable.
12. **Attachment of Shares**: Shares held by a judgment debtor in public company or corporation may be attached and sold by the judgment debtor – ***Order 5 Rule 1 JE Rules***

TYPES OF SHARES

The following are the types of shares that a company can have:

1. Ordinary shares
2. Preferential shares
3. Founder/Deferred/Management shares
4. Weighted & Non-Voting shares (Prohibited by CAMA)
5. Premium shares

I. Ordinary Shares

A. Concept

Majority of shareholders in a company hold ordinary shares. These shares have no special rights apart from those attached to shares.

B. Features

1. They bear the financial risk of the company
2. When dividends are declared, the ordinary shareholders are the last persons to be paid
3. They are entitled to the balance of the distributable profits. That is, as they bear the lion risk of the company, they also take the lion share of the profit when the company is successful.

II. Preference Shares

A. Concept

CAMA did not make provision for classes of shares but leaves it to the companies to create classes of shares by its articles. See Section 119 CAMA which provides that a share in a company may be issued with such preferred, deferred or other special rights or such restrictions, whether with regards to dividend, return of capital or otherwise, as the company may from time to time determine by a special resolution. Preference shares is a special class of shares in that they can be seen as hybrid of shares and debentures. That is, a preference share is a hybrid of equity capital and loan capital. This type of shares entitles the holder to a fixed preferential dividend, this means that the dividend payable by the company to the holder of such shares is fixed at a specific figure e.g. 5%, 10% etc.

B. Features of Preference Shareholders

1. They are not interested in taking risks in the company
2. There is a fixed rate of what they would earn at the end of the year. That is, they are entitled to a fixed income. But this income is dependent on the declaration of dividend.
3. Generally, they do not have any right to enjoy the benefit of any extra or excessive income once they have been paid their agreed fixed income.
4. Once dividends have been declared, they are paid before the ordinary shareholders
5. If dividend is not declared in any year, then the income accumulates and rolls over to the next year if the preference share is a cumulative preference share. This is one advantage it has over non-cumulative preference shares and ordinary shares in that if dividend is not declared in any year, they lose out for that year.
6. When a company is being wound up, the preference shareholders will not be paid dividends as dividends is paid from profit. However after paying creditors, they are the next to be paid from the assets of the company.

C. Types of Preference Shares

1. **Cumulative Preference Shares:** Here, if the company due to insufficient profits is unable to pay a dividend in one year, it must accumulate the arrears of dividend to the next year or subsequent years until they are fully paid from the profit of later years. The presumption is that preference shares are cumulative unless it is specifically stated as non – cumulative.
2. **Non-Cumulative Preference Shares**: Do not carry the right to roll over unpaid dividend to the following financial year. Once the dividend is not paid in a particular year that is the end of the matter.
3. **Participating Preference Shares:** These are preference shares which apart from receiving their fixed dividend in the usual way, also have the right to participate equally with the ordinary shareholders in surplus assets.
4. **Redeemable Preference Shares:** Generally, shares are not redeemable by the company without the court's consent nor can a company purchase its own shares - ***Section 160 CAMA.*** The Act however allows a company limited by shares, on the authorisation of its articles to issue preference shares which are redeemable at the company's option – ***Section 122 CAMA*****.** The conditions for such redemption by the company are provided in ***Section 158(2) CAMA*****:** The shares shall not be redeemed unless:
   (a) They are fully paid, and
   (b) Redemption shall be made only out of-
      i. Profits of the company which would otherwise be available for dividend; or
      ii. The proceeds of a fresh issue of shares made for the purposes of the redemption.

III. Founders/Deferred Shares

This share is normally issued out to promoters or founders of the company. It is usually cheaper than other shares.

IV. Prohibition of Weighted Shares and Non-Voting Shares

A. General Rule

Weighted shares are shares that carry more than one vote. Non-voting shares are shares that do not carry the right of voting. CAMA provides that notwithstanding anything contrary in a company's articles, attached to a share is the right to vote and attend general meeting of a company. See ***Section 114(b) CAMA***. Therefore, ***Section 116(1) CAMA*** provides that unless another enactment provides otherwise, every share issued by a company must carry one vote and no company may by its articles or otherwise, authorise the issue of shares which carry more than one vote in respect of each share or which do not carry any vote or right to vote.

B. Effect of Default

By ***Section 116(2) CAMA*** default attracts a penalty of N50 and any resolution providing for such is void.

C. Exception on Preference Shares

Section 116(3) CAMA provides that nothing above shall affect any right attached to any preference share under section 143 CAMA which provides for the right of a preference share to more than one vote. The said ***Section 143(1) CAMA*** provides that notwithstanding section 116 CAMA a company may by its articles provide that preference shares shall have a right to more than one vote per share in the following circumstance, but not otherwise:

1. Upon any resolution during such period as the preferential dividend or any part of it remains in arrears and unpaid, such period starting from a date not more than 12 months or such lesser period as the articles may provide, after the due date of the dividend
2. Upon any resolution which varies the rights attached to preferential shares
3. Upon any resolution to remove an auditor of the company or to appoint another person in place of such auditor
4. Upon any resolution for the winding up of the company or during the winding up of the company

Weighted shares in line with the above circumstances must be provided for by articles of the company and used in voting by poll and in preferential shares.

RIGHTS & LIABILITIES OF SHAREHOLDERS

I. Rights of a Shareholder

1. Right to attend and vote in any general meeting of the company whether in person or by proxy – ***Section 114(2) CAMA***.
2. Right to receive dividend when it is declared. Upon declaration of dividend, it becomes special debt due from the company to a shareholder and it is recoverable within 12 years – ***Section 385 CAMA***
3. Right to share in company's capital surplus in the process of winding up of the company – ***Section 480 CAMA***; when debtors have been paid and no contrary provision in the articles of the company.
4. Right to petition for winding up of the company where necessary – ***Section 410(1) (e) CAMA***
5. Right against unfairly prejudicial, oppressive and discriminatory conduct – ***Section 310-311 CAMA***

6. Right to transfer shares in accordance with the articles of the company – ***Section 115 CAMA***
7. Right to the balance sheet of the company
8. Right of access to the minute book
9. Right to demand a poll
10. Right to bonus
11. Right to have name in register of members
12. Right to a copy of memorandum and articles of association
13. Right to notice of meetings
14. Right to bring a derivative action
15. Right to instigate the investigation of the company

Note - Rights of shareholders is the same with rights of members

II. Liabilities of a Shareholder

1. To pay for shares issued to him in the company
2. To forfeit his shares where calls are made for the shares and he is unable to pay within the time limit
3. Liable to contribute to the company upon winding up – to the extent of the amount of shares unpaid held by the individual in the company (for limited liability companies) - ***Section 92(1) CAMA***.
4. Where the veil of the company is lifted and it is discovered that it is carrying on business with less than the statutory minimum, the directors and members are individually liable

III. Determinant of Rights & Liabilities of a Shareholder

The rights and liabilities attaching to the shares of a company shall be dependent on the terms of issue and the terms in the articles of association - ***Section 114(a) CAMA***.

IV. Pre-Emptive Right

Where there is pre-emptive right provided for in the articles of association of a company, the company's right to issue shares up to the total number of authorized share capital in the memorandum is subject to that pre-emptive right. See ***Section 117 CAMA***.

This right is available to both public and private companies limited by shares but can only be activated if it is expressly provided for in the Articles. Examples of a pre-emptive right clause is "the company shall not allot any new or unissued shares unless the same are offered in the first instance to all the shareholders or to all the shareholders of the class or classes being issued in proportion as nearly as may be to their existing holdings". Thus, newly issued shares are first to be offered to the existing shareholders.

ISSUE OF SHARES

I. Issue of Shares at a Premium

1. **Concept:** Premium means that shares are issued and sold at a price above the nominal value. FORM CAC 2 is concerned with nominal value of a unit of share and not its market value. The market value of a share is placed at the stock exchange and the margin between market price and nominal value is the premium. ***Section 120(1) CAMA*** provides that shares of a company may be issued at a premium.
2. **Share Premium Account:** ***Section 120(2) CAMA*** provides that where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premium on those shares shall be transferred to an account called the Share Premium Account.

3. **Application Funds in Share Premium Account:** By ***Section 120(3) CAMA***, the funds from the share premium account may be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares in writing off:
   (a) The preliminary expenses of the company
   (b) The expenses of, or the commission paid or discount allowed on any issue of shares of the company or in providing for the premium payable on redemption of any redeemable share of the company.

II. Issue of Shares at a Discount

1. **Concept:** Issue of shares at a discount is the opposite of issuing shares at premium. The shares are issued at a price below the nominal value. CAMA provides that it shall be lawful for a company to issue, at a discount, shares in the company - ***Section 121(1) CAMA***.
2. **Conditions for Issue of Shares at a Discount:** ***Section 121(1) CAMA*** provides that it shall be lawful for a company to issue shares at a discount if the following conditions are satisfied:
   (a) The company must pass an ordinary resolution in a general meeting authorising the issue of shares at a discount
   (b) The resolution is to specify the maximum rate of discount at which the shares are to be issued
   (c) The resolution must be sanctioned by the FHC
   (d) The shares are to be issued within one month after the date on which the issue was sanctioned by the court or within such extended time as the court may allow.
3. **Indicating Particulars of Discount allowed on Shares in the Prospectus:** by ***Section 121(3) CAMA***, every prospectus must include particulars of the discount allowed on the issue of the shares.

III. Issue of Redeemable Preference Shares

Redeemable shares are usually issued to investors who just want to invest within a period of time and this will be brought back from the company after sometime. This is to raise capital from venture capitalist.

By ***Section 122 CAMA***, subject to the provisions of section 158 CAMA, a company limited by shares may if so authorized by its articles, issue preference shares which shall or at the option of the company be liable to be redeemed. ***Section 158 CAMA*** provides the details for the redemption of redeemable preference shares.

CALL ON SHARES, PAYMENT OF SHARES AND NUMBERING OF SHARES

I. Call on Shares

A. **Concept:** ***Section 133 CAMA*** provides that subject to the terms of issue of shares and of articles of the company, the directors may from time make calls upon the members in respect of any moneys unpaid on their shares whether on account of nominal value of the shares or by way of premium.

B. **Conditions for Calling on Shares:** The following are conditions for calling on shares:
   (a) Only at most ¼ of the nominal value can be called on A call shall not exceed one-quarter ¼ of the nominal value of the share
   (b) No call can be made payable at less than one month from the date fixed for the payment of the last preceding call.
   (c) Each member has the right of receiving at least 14 days' notice specifying the time and place of payment

C. **Revocation & Postponement of Call on Shares by Directors:** the directors have the power to revoke or postpone the call.

D. **Payment upon Call Made & Interest:** Payment upon call can be made instalmentally – ***Section 133(2) CAMA***. If the sum is not paid on the day appointed, interest shall be due on it – ***Section 133(4) CAMA***. This can be waived by the directors. The interest is not to exceed the current bank rate per annum.

II. Payment of Shares

A. **Mode of Payment of Shares:** The payment of shares can be made in cash or in consideration other than cash. Generally, payment in cash is when the company has received money/cash in respect of the shares. ***Section 135 CAMA*** provides that the shares of a company or any premium thereon shall be paid for in cash, or where the articles so permit, by a valuable consideration other than cash or partly in cash and partly by a valuable consideration other than cash. By ***Section 136 CAMA***, shares shall not be deemed to have been paid for in cash except to the extent that the company shall actually have received cash for them at the time of, or subsequently to, the agreement to issue the shares.

B. **Procedure for Payment of Shares in Consideration Other than Cash:** Payment for shares in consideration other than cash is governed by ***Section 137 CAMA***. The Procedure is as follows:

1. **Empowerment under Articles of Association to Accept Consideration other than Cash:** The articles of association of the company must give the company the power to accept consideration other than cash.
2. **Valuation of the Non-Cash Consideration:** Appointment of an independent valuer by the company to value the consideration other than cash. The valuer must be independent of the company and shareholder. The valuer may be an accountant, surveyor or auditor. The valuer, values the consideration with necessary information obtained from the officers of the company. See ***Section 137(1) & (6) CAMA***.
3. **Issuance of Valuation Report to the Company:** After valuation, a valuer's report (valuation report) is issued to the company together with the particulars of valuation.
4. **Sending Copy of Valuation Report by the Company to the Proposed Purchaser:** Within three (3) days after receiving the valuer's report, the company shall send a copy of it to the proposed purchaser of the shares, indicating to him whether or not the company would accept the consideration as payment or part-payment for its shares.
5. **Equation of Consideration to the Nominal Value of the Shares Given:** Before the company can accept the consideration other than cash, the value must equate with the nominal value of shares given to the proposed shareholder. That is, the true value of the consideration shall not be less than the value of the shares being exchanged.
6. **Allotment of Shares to the Proposed Purchaser:** The shares are allotted to the proposed purchaser
7. **Preparation & Filing Form CAC 2 with CAC:** Within one (1) months after the allotment, prepare and file form CAC 2A, accompanied by the following documents listed under ***Section 129 CAMA***:
   (a) Contract or agreement transferring the title of the allottee in the property used as consideration to the company or a MOU for services rendered. Where the property is land or interest in land, then Deed of Transfer
   (b) The valuation report by the independent valuer

(c) Where the allotment is post incorporation, then board resolution accepting the consideration and approving the allotment of shares.
(d) If the allotment is pre-incorporation, then resolution of the promoters approving the allotment, subject to ratification upon incorporation.
(e) The particulars of the valuation
(f) Certificate of ownership of the property

8. **Application under the Industrial Inspectorate Act:** If consideration involves capital investment of N20,000 or more, apply under the Industrial Inspectorate Act

III. Numbering Shares of a Company

Each share of a company having a share capital shall be distinguished by its appropriate number – ***Section 145 CAMA*** However, shares of the class which have been fully paid up and rank *pari passu* need not have a distinguished number as long as they remain so.
Shares are numbered and are paid for either in cash or by consideration other than cash such as property, expertise, service for promotion etc. but the court has the power to interfere where the consideration is much lower than the price of the shares.

SHARE CERTIFICATE

A. Concept: every company must within two (2) months after allotment and within three (3) months after lodging of transfer, complete and deliver share certificate to such entitled shareholders – ***Section 146(1) CAMA***. A share certificate is a document issued by a company under its seal signifying that the holder of the share certificate is entitled to the number of shares stipulated therein.

B. Issuance of Share Certificate to Members: Every person whose name has been entered in register of members is entitled to be issued the certificate for all his shares – ***Section 146(2) CAMA***. Where shares are jointly owned by several persons they are entitled to only one certificate.

C. Failure to Issue Share Certificate by the Company: If the share certificate is not delivered to the entitled shareholder, he has a right to demand for it and if it is not delivered, he can do any of the following:

1. Issue a notice to the company requesting the share certificate
2. After ten (10) days of the demand, an action can be instituted at FHC to recover the certificate with damages for detinue

The action is by originating summons pursuant to ***Section 146(5) CAMA***, supported by verifying affidavit showing the chronology of fact of acquisition of shares, delay in delivering certificates and the expiration of the ten (10) days demand period.

D. Impression of Common Seal on Share Certificate & Effect: The Company's seal is to be impressed on the certificate and a certificate under the common seal of the company specifying any shares held by any member shall be prima facie evidence of the title of the member to the shares – ***Section 147(1) CAMA***.

E. Evidence of Ownership & Quantity of Shares: By virtue of ***Sections 147(2) and 79(2) & (3) CAMA***, share certificate serves as the evidence of ownership of shares of a company and details of the quantity of shareholding of the member.

F. Inaccurate Statements in Share Certificate: If any person changes his position to his detriment in good faith on the continued accuracy of the statements made in a certificate, the company shall be estopped from denying the continued accuracy of such statements and such person shall be compensated by the company for any loss suffered by him in

reliance on them. The loss must be that which he would not have suffered if the statements had been or continued to be accurate – ***Section 147(2) CAMA***.

G. Dematerialisation of Share Certificate

1. **Concept:** This the process of converting paper share certificates into an electronic format maintained by a central depository system. That is, the shareholder relinquishes his paper share certificates to the central depository in exchange of a statement showing the list of companies in which he has shares and the number of shares he has in such companies. The responsibility of the safekeeping of the investment is consequently transferred to the depository who updates the shareholder's holding each time he makes a transaction on his account.
2. **Procedure for the Dematerialisation of Share Certificates**
   (a) You must first open an account with CSCS Ltd. This is done through your stock broker who makes sure you fulfil all Know Your Customer (KYC) requirements.
   (b) You submit your share certificate(s) to your stock broker who will also open a brokerage account for you, if you do not have one. This account tracks transactions between you and your stock broking company and it is different from the CSCS account which principally keeps records of your shareholdings in different companies
   (c) Your stock broker gives you a set of forms to fill including the share transfer form.
   (d) You fill the share transfer form quoting the details in each of the certificates you are dematerialising.
   (e) Provide and complete KYC documentation. That is provide documents to show that you are the owner of the account being opened and also the owner of the share certificates being submitted for verification (passport and specimen signature will be obtained)
   (f) Your stock broker will prepare a Certificate Deposit Form and forward it along with your share certificates to the Share Registrar.
   (g) The registrar confirms your signature and certifies that the share certificates so submitted belongs to the named shareholder. This is known as the process of Verification
   (h) After verification, the Registrar forwards the certificates to the CSCS Ltd electronically via the Data Exchange Platform
   (i) The CSCS now updates the investor's account with the corresponding units and securities and issues a statement of stockholding.
3. **Benefits of Dematerialisation of Share Certificates**
   (a) Efficiency and transparency of the market
   (b) Minimises fraud and forgery in carrying out transactions at the capital market and thus, can restore investors' confidence in the market
   (c) Reduces delay in trading practices, creating an investments friendly atmosphere
   (d) Safe and convenient way to hold securities
   (e) Safety and liquidity of the market.

MODE OF ACQUISITION OF SHARES AND THEIR FEATURES

The following are the modes of acquisition of shares

1. Subscription
2. Allotment – ***Section 124 CAMA***
3. Transfer - ***Section 151 CAMA***.
4. Transmission or operation of the law - ***Section 155(4) CAMA***

I. Allotment

A. Concept

Section 124 CAMA provides that subject to the provisions of ISA, the power to allot shares is vested in the company, which may delegate it to the directors subject to any condition or directions that may be imposed by the articles by the general meeting. Note that the power is on the company and can be delegated to the directors. Allotment by a public company is subject to compliance with ISA and SEC Rules. Only public company can offer its shares to the public – ***Section 22 CAMA***.

The allotment of shares by the director is an acceptance of the offer made by the proposed shareholder and the contract takes effect on the date on which the allotment was made by the company. See ***Section 126 CAMA; STB Plc v. Olusola.***

B. Procedure for Allotment of Shares

1. **Issuance of Prospectus & Subscription List:** For public offer of a public company, Prospectus and Subscription List are issued. If private company or public company where the offer is not public, no prospectus is issued out. Public offers by companies are not offers. It is an invitation to treat and it is the proposed shareholder that makes the offer by filing the necessary application form.
2. **Applications by Interested Applicants:** Application forms from interested applicants are received by the company and recorded in application and allotment sheets. Before any company allots its shares, it must ensure that it has sufficient unissued authorised share capital to accommodate the allotment. If it does not have this, then it must increase its share capital first before it can make the allotment. See ***Okoya v Santili***
3. **Passing of Resolution for Allotment of Shares:** General meeting is convened or if delegated to the board, then a Board meeting is convened and a resolution passed authorising the allotment. (Note that if it is a public company, then the meeting and resolution would be that of the Allotment Committee).
4. **Issuance of Letters of Allotment/Regret:** The directors issue Letters of Allotment notifying the allottee of the fact of allotment and number of shares allotted (or Letters of Regret if refused) within forty two (42) days of approval. See ***Section 125(c) CAMA.*** Where the company fails or refuses to allot the entire amount of shares applied for or does not issue at all or issues only some part of it, the company must write a Letter of Regret to the client and enclose a Return Cheque for the amount paid by the applicant or the outstanding amount for the shares not issued to him. See ***Dangote Industries Ltd v. Bank PHB Plc.***
5. **Dealing with Letters of Renunciation:** By ***Section 125(d) CAMA***, an applicant has the right to withdraw his application by a written notice to the company, but such withdrawal can only be made at any time before the allotment. Any applicant who decides to withdraw must write a Letter of Renunciation to the company. He may nominate someone else to substitute him, in which case, the company would decide whether or not to allot the shares to the nominee or to refund to the applicant his money.

6. **Preparation & Delivery of Share Certificate to Allottee:** Prepare and deliver share certificate to the allottee within two (2) months of the allotment.
7. **Entering of Allottees' Name in Register of Members:** Enter allottee's name in the Register of Members within 3 months of allotment. See ***Ezeonwu v. Onyechi.***
8. **Filing Return of Allotment with CAC:** File Return of Allotment, post incorporation (form CAC 2A) with CAC within one (1) month of allotment - ***Section 129(1) CAMA***; ***Regulation 31(2) Companies regulations, 2012***. By virtue of ***Regulation 31(1) Companies Regulation, 2012***, the following documents are to be filed with CAC for the registration of the allotment:
   (a) Special resolution signed by two directors of the company
   (b) Duly completed form for return of allotment (Form CAC 2A)
   (c) Resolution of the company for forfeiture of shares, where applicable
   (d) Updated annual returns
   (e) Updated section 553 of CAMA filing
   (f) Evidence of payment of FRC annual dues
   (g) Evidence of payment of filing fees
   (h) Valuation report (if the shares were allotted for consideration other than cash)

C. Procedure for Allotment of Shares for Consideration other than Cash

1. **Empowerment under Articles of Association to Accept Consideration other than Cash:** The articles of association of the company must give the company the power to accept consideration other than cash.
2. **Appointment of an Independent Valuer by the Company to Value the Consideration Other Than Cash**: The valuer must be independent of the company and shareholder. The valuer may be an accountant, surveyor, auditor, etc. The valuer values the consideration with necessary information obtained from the officers of the company. See ***Section 137(1) & (6) CAMA***.
3. **Issuance of Valuation Report & Particulars of Valuation to the Company:** After valuation, a valuer's report (valuation report) is issued to the company together with the particulars of valuation.
4. **Sending Copy of Valuation Report to the Proposed Purchaser of Shares:** Within three (3) days after receiving the valuer's report, the company shall send a copy of it to the proposed purchaser of the shares, indicating to him whether or not the company would accept the consideration as payment or part-payment for its shares
5. **Equating Value of Consideration to Nominal Value of Shares Given:** Before the company can accept the consideration other than cash, the value must equate with the nominal value of shares given to the proposed shareholder. That is, the true value of the consideration shall not be less than the value of the shares being exchanged.
6. **Allotment of Shares to the Proposed Purchaser:** The shares are allotted to the proposed purchaser
7. **Preparation & Filing of Form CAC 2A with CAC:** Within one (1) month after the allotment, prepare and file form CAC 2A, accompanied by the following documents listed under ***Section 129 CAMA***:
   (a) Contract or agreement transferring the title of the allottee in the property used as consideration to the company or a MOU for services rendered. Where the property is land or interest in land, then Deed of Transfer.
   (b) The valuation report by the independent valuer

(c) Where the allotment is post incorporation, then board resolution accepting the consideration and approving the allotment of shares.
(d) If the allotment is pre-incorporation, then resolution of the promoters approving the allotment, subject to ratification upon incorporation.
(e) The particulars of the valuation
(f) Certificate of ownership of the property

8. **Application under the Industrial Inspectorate Act:** If consideration involves capital investment of N20,000 or more, apply under the Industrial Inspectorate Act

II. Transfer of Shares

A. Concept

Transfer of shares is an arrangement between a shareholder and another person to transfer all or part of his shares to him. This does not involve the company. The legal way of effecting a transfer is by an Instrument of Transfer, and the entry of the name of the transferee in the register of members.

Section 115 CAMA provides that the shares and other interests of a member in a company is a transferable property and can be transferred in the manner provided by the articles. The transfer of shares is regulated by ***Section 151 CAMA*** which provides that the transfer of a company's share shall be by instrument of transfer and except as expressly provided in the articles, the transfer of shares shall be without restrictions.

B. Restrictions on the Right to Transfer Shares

However, the right to transfer shares may be restricted in the following instances:

1. When the shares are not fully paid up
2. When there is a lien on the shares sought to be transferred. See ***Section 152(3) CAMA***
3. Where the articles restrict its transferability. See ***Section 22(2) CAMA*** which provides that every private company limited by shares must by its articles, restrict the transferability of its shares.

C. Entering Name of Transferee in Register of Members

By ***Section 152(2) CAMA***, until the name of the transferee is entered in the register of members in respect of the transferred share, the transferor is deemed to remain the holder of the share. By ***Section 153(1) CAMA***, if the company refuses to register the transfer of any shares, it shall within Two (2) months after the date on which the transfer was lodged with it, send notice of the refusal to the transferee.

D. Transfer of Shares by a Personal Representative

By ***Section 154 CAMA***, a transfer of shares by a personal representative is valid. The said section provides that a transfer of shares or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer was executed.

E. Procedure for Transfer of Shares

The procedure for the transfer of shares depends on the following instances:

1. **Where the Shareholder Transfer All His Shares to One Purchaser**
   (a) **Preparation & Execution of Instrument of Transfer by the Transferor & Transferee:** An Instrument of Transfer is prepared and executed by the transferor (shareholder) and the transferee (purchaser).

(b) Delivery of Instrument of Transfer & Share Certificate to the Transferee by the Transferor: The transferor delivers the Instrument of Transfer and the share certificate to the transferee.

(c) Registration of Instrument of Transfer & Share Certificate at the Registered Office of the Company: The transferor or the transferee takes the Instrument of Transfer and Certificate of Shares to the registered office of the company for registration. By ***Section 153(1) CAMA***, if the company refuses to register the transfer of any shares, it shall within Two (2) months after the date on which the transfer was lodged with it, send notice of the refusal to the transferee.

(d) Entering Name of Transferee in the Register of Members of the Company & Issuance of New Share Certificate: Upon registration, the old share certificate is cancelled, and the name of the transferee is entered in the Register of Members which then he is issued a new share certificate. It must be noted that until the name of the transferee is entered in the Register of Members in respect to such transfer, the transferor still remains the holder of the shares - ***Section 152(2) CAMA.***

(e) Issuance of New Share Certificate: The new share certificate must be issued within three (3) months from the date of entering the transferee's name into the register of members.

(f) Sending Notice of Transfer to CAC: Within fourteen (14) days of the transfer, a notice of the transfer must be sent to the CAC. By ***Regulation 32(1) Companies Regulations, 2012***, the following documents must accompany the notice:

i. Duly stamped instrument of transfer
ii. Evidence of payment of FRC annual dues
iii. Payment of fees

2. Where the Shareholder wants to Transfer Some of His Shares to a Single Transferee or All of His Shares to More than One Person

(a) Preparation & Execution of Instrument of Transfer by Transferor & Transferee: An Instrument of Transfer is prepared and executed by the transferor (shareholder) and the transferee (purchaser), transferring the units of shares.

(b) Taking Instrument of Transfer & Share Certificate to Registered Office of the Company for Recognition & Registration: The transferor (shareholder) takes the Instrument of Transfer and Share Certificate to the registered office of the company with a request that the instrument of transfer be "recognised and registered". See ***Section 157(1) CAMA***.

(c) Recognition of Instrument of Transfer by the Company: The Company recognises the instrument of transfer by endorsing the following words on it "Certificate Lodged". See ***Section 157(2) CAMA***.

(d) Keeping Share Certificate for Cancellation & Registration of Names of Transferee(s) in the Register of Members: The Company keeps the share certificate for cancellation and registers the name or names of the transferees in the Register of Members.

(e) Alteration of Quantity of Shares of the Transferor & Issuance of Units Transferred to the Transferee: The company alters the quantity of shares held by the transferor and issues to the transferees the units transferred to them.

(g) Issuance of New Share Certificate to Transferor & Transferee: The Company issues new share certificates for the transferor and for the transferee(s) within 3 months from the date on which a transfer of any such share was made.

(h) Sending Notice of Transfer to CAC: Within fourteen (14) days of the transfer, a notice of the transfer must be sent to the CAC. By ***Regulation 32(1) Companies Regulations, 2012***, the following documents must accompany the notice:

i. Duly stamped instrument of transfer
ii. Evidence of payment of FRC annual dues
iii. Payment of fees

F. Effect of Endorsing the Words "Certificate Lodged" on the Instrument of Transfer

1. **General Rule:** By ***Section 157(2) CAMA***, the endorsement of "certificate lodged" on the Instrument of Transfer means that the company has recognised the transfer. See also ***Section 157(5) (a) CAMA.***
2. **Recognition to Serve as Representation by the Company to the Transferor:** By ***Section 157(3) CAMA***, the recognition by a company of any instrument of transfer of shares in the company shall be taken as representation by the company to any person acting on the faith of the recognition that there has been produced to the company such documents as on the face of them show a prima facie title to the shares in the transferor named in the instrument of transfer but not as a representation that the transferor has any title to the shares.
3. **Effect of False & Negligent Recognition by the Company:** By ***Section 157(4) CAMA***, where any person acts on the faith of a false recognition by a company and the recognition was made negligently the company shall be liable and it shall be under the same liability as if the recognition had been made fraudulently. On account of the effect of ***Section 157(4) CAMA***, in practice, companies usually require, from the transferor, an indemnity for certification of the transfer.

G. Refusal by a Company to Recognise and Register Instrument of Transfer

1. **Conditions for Registration:** The company may refuse the registration of instrument of transfer or its recognition unless:
   (a) The fees prescribed by the company are paid
   (b) the instrument of transfer is accompanied with the certificate of the shares
   (c) the instrument of transfer is in respect of only one class of shares
   See ***Section 152(4) CAMA***.
2. **Grounds for Refusal to Recognise & Register Transfer:** from the foregoing, a company may refuse to register and recognise the transfer in the following instances:
   (a) If the shares are not fully paid up and the company does not approve of the transferee
   (b) where the company has a lien on the shares
   (c) non-payment of requisite fees on Instrument of transfer
   (d) the instrument of transfer is in respect of more than one class of shares
3. **Sending Notice of Refusal to Transferee:** By ***Section 153(1) CAMA***, where the company refuses to register the transfer of shares, the company is under a duty to send a Notice of Refusal to the transferee within two (2) months from the date on which the transfer was lodged with it. Liability for failing to comply is N200 by the company and every officer in default. See ***Section 153(2) CAMA***.
4. **Effect of Non-Registration of Transferred Shares:** The effect of non-registration of transferred shares is provided under ***Section 151(3) CAMA*** and ***Section 152(2) CAMA***.

By the combined effect of those provisions, until the name of the transferee is registered in the Register of Members in respect of the shares transferred, the transferor shall continue to be deemed to be the holder of those shares and be entitled to all the rights and bear all the liabilities arising from those shares.

H. Remedies Available to a Transferee who is entitled to Shares but is not registered as a Member

1. Apply to the FHC for a rectification of the Register of Members in his favour pursuant to ***Section 90 CAMA***
2. Serve on the company a notice and affidavit of interest in the company's shares pursuant to ***Section 156 CAMA***
3. The transferee may bring an action against the transferor to account for the benefits derived within the period his interest was subsisting, especially dividend paid out during that period.

III. Transmission of Shares

A. Concept

By ***Section 155(1) CAMA***, upon the death of a shareholder, his shares vest in his personal representatives or his survivors if he was a joint holder; or upon bankruptcy, the shares shall vest in his trustees in bankruptcy.

B. Registration of Personal Representative or His Nominee as Holder of the Shares

By ***Section 155(2) CAMA***, any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may, from time to time, properly be required by the directors, elect either to be registered himself as holder of the share, or to have some person, nominated by him, to be registered as the transferee of the share. But in either case, the company shall have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy, as the case may be.

C. Notice of Election to be Registered or Executing Transfer of Shares

By ***Section 155(3) CAMA***, if the personal representative so entitled elects to be registered, he shall deliver or send to the company a Notice in writing signed by him stating that he so elects and if he elects to have another person registered, he shall testify his election by executing a transfer of the shares in favour of that person.

D. Receiving Dividends & Other Benefits by Personal Representatives without Registration

By ***Section 155(4) CAMA***, the personal representatives can receive dividend and other benefits without being registered. However, by the ***Proviso to that Section 155(4) CAMA***, the directors may at any time give notice requiring any such person to elect either to be registered himself or to transfer the shares, and if the notice is not complied with within ninety (90) days the directors may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share until the requirements of the notice have been complied with

E. Filing Notice of Transmission of Shares with CAC

By ***Regulation 33(2) Companies Regulation 2012***, notice of transmission of shares shall be filed with CAC within 14days after the date of the notice of election or instrument of transfer, whichever is applicable. The requirements for filing notice of transmission of shares are provided under Regulation 33(1) as follows:

1. Photocopy of death certificate
2. Letter of administration/probate

3. Notice of election or instrument of transfer, whichever one is applicable
4. Evidence of payment of FRC annual dues
5. Payment of fees

F. Protection of Beneficial Interest in Shares

Any person claiming to be interested in any shares or the dividend/interest thereon may protect his interest by serving on the company concerned a Notice and Affidavit of Interest. See ***Section 156(1) CAMA***.

There may be instances where a beneficiary/legal representative of a deceased shareholder may not have successfully obtained the requisite probate/letter of administration to enable him properly deal with the shares of the deceased. Such a person needs to take steps to protect his interest in the shares of the deceased since the interests of a beneficiary are equitable until the shares are transferred to him and his name is entered in the register of members. Consequently any person claiming interest in any shares or dividends or interest in them may protect his interest in the company concerned by serving a Notice and Affidavit of Interest on the company.

OTHER MATTERS CONCERNING SHARES

I. Lien over Shares by Company

By ***Section 139(1) CAMA***, a company shall have a first and paramount lien on every share, (not being a fully paid share for all moneys (whether currently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a first and paramount lien on all shares (other than fully paid shares) standing registered in the name of a single person or all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this subsection. It must be noted that by ***Section 139(2) CAMA***, a company's lien on a share extends to dividends payable on that share.

II. Forfeiture of Shares

Where a member failed to pay for called up shares on the day appointed, a notice not less than 14 days will be served on him by the directors requiring him to pay the amount and interests which may be due on it – ***Section 140(1) CAMA***. If the member refuse to comply with the notice, the shares may at any time thereafter be forfeited by a resolution of the directors – ***Section 140(3) CAMA***. Forfeited shares can be sold or disposed of in any manner the directors deem fit – ***Section 140(4) CAMA***. A person whose shares have been forfeited ceases to be a member in respect of the forfeited shares but shall be liable to pay for shares not forfeited – ***Section 140(5) CAMA***. A declaration by the secretary or director regarding the forfeited shares shall be prima facie evidence of the facts stated in it as against all persons claiming to be entitled to the shares – ***Section 140(6) CAMA***. Provision on forfeiture applies to non-payment of any sum which by the terms of issue of a share, becomes payable at a fixed time.

III. Rectification of Register of Members

A. Concept: A company is required to keep a register of members – ***Section 83 CAMA***. The court may upon application of:

1. The company,
2. An aggrieved person or
3. A member of the company rectify the register of members of the company

B. Grounds for Rectification: Rectification could be when a person's name without sufficient cause is:

1. Entered in the register of members

2. Omitted from the register of members of a company
3. Default is made or unnecessary delay take place in entering on the register the fact of any person having ceased to be a member – ***Section 90(1) (a) & (b) CAMA***.

C. Refusal or Grant of Application by the Court: The court may refuse the application or order rectification of the register and payment by the company of any damages sustained by the party aggrieved - ***Section 90(2) CAMA***.

IV. Attachment of Shares

Shares held by a judgment debtor in a public company or corporation may be attached and sold by the judgment creditor to satisfy the judgment debt. Only shares in a PUBLIC COMPANY held by the judgment debtor can be attached. See ***Order 5 Rule 1 JER***.

V. Prohibition of Financial Assistance by a Company for Acquisition of Its Shares

A. General Rule: It is unlawful for a company or any of its subsidiaries to give financial assistance directly or indirectly to a person for the purpose of acquiring its shares. Also, where a person has incurred liability for acquiring shares in a company or its subsidiaries to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred. See ***Section 159 (2) (a) & (b) CAMA***

B. Permissible Circumstances: by ***Section 159 (3) CAMA***, a company is permitted to give financial assistance in the following instances:

1. By lending money in the ordinary course of business, If lending money is part of the ordinary business of the company, such as banks and other financial institutions
2. The provision of money for the acquisition of fully paid shares in the company or its holding company in accordance with an employee shares scheme.
3. Loans to employees to purchase shares for their own benefits
4. Any act or transaction otherwise authorised by law.

VI. Acquisition by a Company of Its Own Shares

A. General Rule: ***Section 160(1) CAMA*** provides that a company may not purchase or otherwise acquire shares issued by it (its own shares). This is however expressly made subject to the articles and the following which are listed in ***Section 160(2) CAMA***.

B. Exceptions: The said ***Section 160(2) CAMA*** provides that a company can acquire its own shares for the purposes of:

1. Settling or compromising a debt or claim asserted by or against the company.
2. Eliminating fractional shares
3. Fulfilling the terms of a non-assistance agreement under which the company has an option to or is obliged to purchase shares owned by an officer or an employee of the company
4. Satisfying the claims of a dissenting shareholder
5. Complying with a court order
6. By way of gift from a shareholder

C. Factors to Note in Purchase by a Company of Its Own Shares

1. Such shares can only be purchased out of the profits of the company which would otherwise be available for dividend or the proceeds of a fresh issue of shares made for the purpose of the purchase. See ***Section 161(a) CAMA***.
2. Redeemable shares must not be purchased at a price greater than the lowest price at which they are redeemable or shall be redeemable at the next date thereafter at which they are due or liable to be redeemed. See ***Section 161(b) CAMA***.
3. No purchase shall done in breach of ***Section 162 CAMA***

VII. Mortgage of shares:

Section 115 CAMA provides that shares are transferable properties. Thus they can be mortgaged.

SAMPLE DRAFTS ON SHARES (EXAMS)

Resolution for the Allotment of Shares

KILLI INTERNATIONAL COMPANY LTD
NO 10 KANO ROAD BY AHMADU BELLO WAY
KADUNA, KADUNA STATE
www.killiinternational.com
(RC NO: 23450)

OUR REF_____YOUR REF_____

RESOLUTION OF THE ANNUAL GENERAL MEETING APPROVING ALLOTMENT OF SHARES PURSUANT TO SECTION 124 OF THE COMPANIES AND ALLIED MATTERS ACT 2004

At the 2nd Annual General Meeting of the above named company held on the 20th day of April, 2019 at the company's conference hall, it was proposed and duly resolved to issue additional shares of N40, 000,000.00 divided into 4, 000,000 ordinary shares of N10.00 each further allotted to the following persons:

1. Mrs. Adebola Ogungbayi of No 121 Independence Way, Kaduna, Kaduna State – 2, 000,000 ordinary shares of N10.00 each; and
2. Mr. Joel Adamu of No 121 Independence Way, Kaduna, Kaduna State – 2, 000,000 ordinary shares of N10.00 each.

And that the new shares issued will rank at *pari passu* with the existing shares of the company.

DATED THE 20TH DAY OF APRIL, 2019

…… ……..
Mathias Ayuba Killi Poncwat
Director Director

Letter of Allotment

KILLI INTERNATIONAL COMPANY LTD
NO 10 KANO ROAD BY AHMADU BELLO WAY
KADUNA, KADUNA STATE
www.killiinternational.com
(RC NO: 23450)

OUR REF_____YOUR REF_____

DATE: 21 April 2019

Mrs. Adebola Ogungbayi
No 121 Independence Way
Kaduna
Kaduna State

Dear Ma,

LETTER OF ALLOTMENT OF SHARES

Pleased to inform you that your application for the allotment of N 2, 000,000 of 2, 000,000 ordinary shares of N10.00 each in the company has been allotted to you.
You may renounce all or any of the shares in favour of another by filling up the accompanying letter of renunciation, on the understanding that you are still liable to pay all sums due on the shares should any of your nominees fail to do so.
Thank you.

Yours faithfully,

Company Secretary

Letter of Regret

KILLI INTERNATIONAL COMPANY LTD
NO 10 KANO ROAD BY AHMADU BELLO WAY
KADUNA, KADUNA STATE
www.killiinternational.com
(RC NO: 23450)

OUR REF_____YOUR REF_____

DATE: 21 April 2019

Mr. Ben Idah
No. 15 Kent Road Wuse Zone 4 Abuja.

Dear Sir,

LETTER OF REGRET

I regret to inform you that the directors were unable to allot you any shares in the above company, and I enclose herewith a cheque for N600, 000.00 being the amount paid by you on application.
Kindly fill up and return the annexed form of receipt.

Yours faithfully,

Company secretary

DEBENTURES

INTRODUCTION

I. Concept

A company may raise money (capital) both internally and/or externally. It raises it internally from its shareholders (members) by issuing shares and this capital is called equity capital. It raises money (capital) externally by borrowing and creating debentures. This type of capital is a called loan capital.

II. Meaning of a Debenture

A debenture is a company security and it is different from shares. A debenture is a written acknowledgment of a company's indebtedness. A debenture holder is like a creditor of the company. ***Section 166 CAMA*** empowers a company to borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital or any part thereof; and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company. A debenture holder lends money to the company and in turn the company gives him a written acknowledgment of the principal sum and interest.

The debenture is a document giving details of a company's indebtedness to a creditor, called the debenture holder. It is usually secured by a charge created over the company's assets or properties and this charge may be a fixed or floating charge. The issue of debentures is a means through which companies raise money (loan capital) for its operations. Debentures are therefore instruments issued to lenders to acknowledge indebtedness by a company. The instrument is often but not necessarily by deed. See ***Union Bank of Nigeria Ltd v. Tropic Foods Ltd***.

III. Regulation of Mode of Raising Capital by the MEMART

The mode of raising loan capital (borrowing) is regulated by the MEMART in terms of how to borrow, the limit to borrow, and who can exercise the borrowing powers. Where the directors exceed the borrowing limit without approval as required by the articles, such borrowing would need to be ratified by the General Meeting, as an internal measure to validate the borrowing.

However, if the borrowing is beyond the company's borrowing capacity, the borrowing may still be validated by the combined effects of ***Sections 39(3), 68 & 69 CAMA*** and the Rule in ***Royal British Bank v. Turquand***, all of which have abolished the doctrine of constructive notice, unless the creditor is shown to have an insider information about the borrowing powers of the company.

IV. Issuance of Debentures to the Public

1. **Compliance with Issuance of a Prospectus:** Where a company issues debentures to the public, there must be compliance with the requirements of ***Section 44 ISA*** relating to the issuance of a prospectus.
2. **Debenture Trust Deed:** By ***Section 183(1) CAMA***, offer of debentures by a public company to the public for subscription or purchase must be by a Debenture Trust Deed, and must be accompanied with prospectus.
3. **Delivery of Debenture or Certificate of Debenture Stock to the Registered Holder:** By ***Section 167(1) CAMA***, every company shall, within sixty days after the allotment of any of its debentures or after the registration of the transfer of any debentures, deliver to the registered holder thereof, the debenture or a certificate of the debenture stock under the common seal of the company.

4. **Issuance of Certified Copy of Debenture & Renewal of Debenture Stock Certificate:** By ***Section 167(2) CAMA***, if a debenture or debenture stock certificate is defaced, lost or destroyed, the company, at the request of the registered holder of the debenture, shall issue a certified copy of the debenture or renew the debenture stock certificate on payment of the prescribed fee and on such terms as to evidence and indemnity and the payment of the company's out of pocket expenses of investigating evidence as the company may reasonably require.
5. **Failure to Issue Debenture/Debenture Stock Certificate:** By ***Section 167(3) CAMA***, if default is made in complying with this section, the company and any officer of the company who is in default shall be liable to a fine not exceeding N25; and on application by any person entitled to have the debentures or debenture stock certificate delivered to him, the court may order the company to deliver the debenture or debenture stock certificate and may require the company and any such officer to bear all the costs of and incidental to the application.

CONTENTS OF A DEBENTURE

By ***Section 168 CAMA***, every debenture shall include a statement of the following matters:

1. **Principal Amount Borrowed**: the principal amount borrowed shall be stated in the debenture.
2. **Maximum Discount & Maximum Premium:** maximum discount which may be allowed on the issue or re-issue of the debentures, and the maximum premium at which the debentures may be made redeemable;
3. **Rate, Date & Manner of Payment of Interest on Debentures:** The rate of and the dates on which interest on the debentures issued shall be paid and the manner in which payment shall be made;
4. **Date on which Principal Amount shall be Repaid & the Manner of Redemption:** The date on which the principal amount shall be repaid or the manner in which redemption shall be effected, whether by the payment of instalments of principal or otherwise;
5. **Date & Terms of Converting Debentures to Shares:** in the case of convertible debentures, the date and terms on which the debentures may be converted into shares and the amounts which may be credited as paid up on those shares, and the dates and terms on which the holders may exercise any right to subscribe for shares in respect of the debentures held by them;
6. **Charges Securing the Debenture & Conditions at which the Debenture shall take Effect:** The charges securing the debenture and the conditions subject to which the debenture shall take effect.

EFFECTS OF STATEMENT MADE IN PROSPECTUS

The effects of the statements made in a prospectus are provided in ***Section 169(1) & (2) CAMA*** as follows:

1. Statements made in debenture or debenture stock certificates shall be prima facie evidence of the title to the debentures of the person named therein as the registered holder and of the amounts secured thereby. See ***Section 169(1) CAMA***.
2. If any person shall change his position to his detriment in reliance in good faith on the continued accuracy of any statements made in the debenture or debenture stock certificate, the company shall be estopped in favour of such person from denying the continued accuracy of such statements and shall compensate such person for any loss suffered by

him in reliance thereon and which he would not have suffered had the statement been or continued to be accurate: Provided that nothing in this subsection shall derogate from any right the company may have to be indemnified by any other person.

It must be noted that by ***Section 170 CAMA***, a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

TYPES OF DEBENTURES

1. Perpetual – ***Section 171 CAMA***
2. Convertible – ***Section 172 CAMA***
3. Secured – ***Section 173 CAMA***
4. Naked – ***Section 173 CAMA***
5. Redeemable – ***Section 174 CAMA***
6. Registered debenture
7. Bearer debenture
8. Syndicated loan debenture (also known as pari passu mortgage debenture or series of debentures)

I. Perpetual Debenture

This is a debenture which is made redeemable or irredeemable upon the happening of an event or a contingency, however remote or on the expiration of a period, however long, notwithstanding any rule of equity to the contrary. See ***Section 171 CAMA; Knight Bridge Estate Trust Ltd v. Byrne.***

II. Convertible Debentures

These are debentures issued upon the terms that in lieu of redemption or repayment, the debenture may at the option of the holder or the company be converted into shares in the company upon such terms as may be stated in the debentures. See ***Section 172 CAMA***. The conversion of the convertible debentures would amount to allotment and so, all the formalities for allotment should be complied with. Also, the consideration here would not be cash, but would be consideration other than cash and so, all the requirements of ***Sections 129 & 137 CAMA*** must be complied with.

Any creditor/debenture holders who intends to become a member of the company at a future date is advised to take a convertible debenture.

It must be noted that the conversion of convertible debentures into shares/stocks is a very good internal corporate restructuring option in arrangement and compromise. Thus, a failing company can opt for the conversion of convertible debentures instead of paying out money it cannot raise.

III. Secured and Naked Debentures

1. **Concept:** By ***Section 173(1) CAMA***, debentures may either be secured by a charge over the company's property or may be unsecured by any charge. Thus, where the debenture is secured by a charge, whether fixed or floating, it is called a secured charge. However, where it is not secured by any charge, it is a naked charge. By ***Section 173(2) CAMA***, debentures may be secured by a fixed charge on certain property of the company or a floating charge over the whole or a specified part of the company's undertaking and assets, or by both a fixed charge on certain property and a floating charge.
2. **Meaning of Fixed & Floating Charge:** A fixed charge is normally attached to a landed property or equipment of the company. Floating charge is a charge hovering over the assets of the company. The company cannot use a fixed charge without the consent of the chargee, while the company can use a floating charge without the chargee's permission.

3. **Enforceability of a Charge Security Debentures:** By ***Section 173(3) CAMA***, a charge securing debentures shall become enforceable on the occurrence of the events specified in the debentures or the deed securing the same.
4. **Proceedings to Enforce the Security of Series of Debentures:** By ***Section 173(4) CAMA*** where any legal proceedings is brought by a debenture holder to enforce the security of a series of debentures of which he holds part, the debenture holder shall sue in a representative capacity on behalf of himself and all other debenture holders of that series.
5. **Registration of Particulars of Charges Securing Debentures:** It must be noted that by ***Section 173(5) CAMA***, where debentures are secured by a charge, the provisions of ***Section 197 CAMA*** relating to registration of particulars of charges shall apply.

IV. Redeemable Debentures

These are debentures which are liable to be redeemed or which are liable to be redeemed at the option of the company redeemed. See ***Section 174 CAMA***. This kind of debenture can be redeemed at any time even before the time fixed. By ***Section 175 CAMA***, a redeemable debenture on its being redeemed by the company can be re-issued subject to the provisions of the articles or resolution of the company stating otherwise. On re-issue, the person entitled to the debentures shall have and shall be deemed always to have had the same priorities as if the debentures had never been redeemed.

V. Bearer Debenture

Unlike a registered debenture which is only repayable to the person whose name appears on the instrument, a bearer debenture is repayable to the holder or bearer of the debenture instrument. This is because it is transferable negotiable instrument and payable to the holder in due course. Thus, a bonafide transferee of a bearer debenture is not affected by any defect in the title of the transferor.

VI. Registered Debenture

Unlike a bearer debenture which is only payable to the holder or bearer of the debenture instrument, a registered debenture is only repayable to the registered holder of the instrument, that is, the person whose name appears on the instrument and whose name is in the Register of Debenture holders. A registered debenture is not a negotiable instrument and is only transferable in the manner prescribed by the debenture instrument or by the debenture trust deed. They are restricted to the registered debenture holder and operates only between the registered debenture holder and the borrower company.

VII. Syndicated Loan Debenture (Pari Passu Mortgage Debenture or Series of Debentures)

A. **Concept:** This is a where a group or consortium of lenders agree to loan money and have their debentures secured by a fixed or floating charge or both on one asset as security, the value of which outweighs the total loan advance. It is pari passu because the lenders agree that they would not observe priority of interest but that their interest shall be equal in rank.
B. **Debenture Trust Deed:** The debenture here is created by a Debenture Trust Deed so that the separate legal personalities of the individual lenders are subsumed under and held by the Trustees appointed under the Debenture Trust Deed created by the consortium, and recognised in the series of debentures which indicates each lender's contribution and creating a direct link to the borrower.
C. **Use of Pari Passu Mortgage Debenture:** Pari passu mortgage debenture is used in financing mega projects involving infrastructural developments with huge financial

requirements and which would be difficult and risky for only one lender to lend out such huge sum.

D. Essential Features of the Creation of a Pari Passu Mortgage Debenture: The essential features of the creation of a pari passu mortgage debenture are:

1. There must be at least two debentures created in series and secured by a single asset of the borrower company
2. The interests of the individual lenders are to rank pari passu or equally in priority notwithstanding their individual contributions
3. It is advisable that it be created through a Debenture Trust Deed so that the legal personalities of the individual lenders can be subsumed in the trustee

E. Filing with CAC: By ***Section 197(9) CAMA***, upon the creation of a pari passu mortgage debenture, the company shall, within ninety (90) days after the execution of the deed containing the charge or if there is no deed then after the execution of any of the series of the debenture, file with CAC, in respect of each of the issues, the following:

1. The total amount secured by the whole series;
2. The dates of the resolutions authorising the issues of the series and the date of the covering deed, if any, by which the security is created or defined;
3. A general description of the property charged; and
4. The names of the trustees, if any, for the debenture holders; together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series.

By the ***Proviso to Section 197(9) CAMA***, the foregoing particulars should be provided to CAC in respect of each issue of debentures. It provides that where more than one issue is made of debentures in the series, there shall be sent to the Commission for entry in the register particulars of the date and amount of each issues, but an omission to do this shall not affect the validity of the debentures issued.

CHARGES

I. Floating Charge

A. Concept

By ***Section 178(1) CAMA***, a floating charge means an equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future. By the same section 178(1), a floating charge shall not preclude the company from dealing with such assets until it crystallises. That is, until the charge attaches itself to the asset by crystallisation. Once a floating charge crystallises, the company (borrower) can no longer deal with the asset (security) covered by the charge.

B. Circumstances where a Floating Charge will crystallise

By ***Section 178(1) CAMA***, a floating charge will crystallise in any of the following circumstances:

1. The security crystallises or becomes enforceable; and the debenture holder, pursuant to his powers under the debenture or the deed securing the debenture, appoints a receiver or manager or enters into possession of such assets; or
2. The court appoints a receiver or manager of such assets on the application of the debenture holder; or
3. The company goes into liquidation;

By ***Section 178(2) CAMA*** if any of these things above happen, the charge shall be deemed to have crystallised and to become a fixed equitable charge on the assets which are subject to the charge. Thus, when a floating charge crystallises, it becomes fixed.

C. Reconversion of a Fixed Charge to a Floating Charge

However, if the receiver or manager is withdrawn with the consent of the chargee (debenture holder), or the chargee (debenture holder) withdraws from possession, before the charge has been fully discharged, the charge shall thereupon be deemed to cease to be a fixed charge and again to become a floating charge. That is, it will convert back to a floating charge.

D. Features of a Floating Charge

The features of a floating charge are:

1. **Charge on Assets:** It is a charge on assets, both present and future
2. **Change of Assets Covered by the Charge:** The assets covered by the charge are of such a nature that they may change from time to time in the ordinary course of the company's business. That is, by their nature, they cannot be made subject of a fixed charge.
3. **Freedom to Deal with Assets by the Company:** Until the charge attaches itself to the assets by crystallisation, the company may continue to deal with the asset unless expressly prohibited from doing so. See ***Re Yorkshire Wool Combers Association Ltd.*** The major feature of a floating charge is that the company can continue to deal with the property subject to the floating charge. See ***Siebe Gorman & Co Ltd v. Barclays Bank Ltd.*** However, it must be noted that the mere fact that there are some restrictions on the power of the company to deal with assets subject to a charge does not preclude it from being a floating charge. To preclude a charge from being a floating charge the restriction must substantially deprive the company of the power to deal with its assets in the normal course of business. Similarly, the mere fact that a charge is called a fixed charge does not necessarily make it so; if the company is free to use the assets in the normal course of its business, then it may treated as a floating charge. See ***Re Armagh Shoes Ltd***.

II. Fixed Charge

A. Concept

The fixed charge is secured or attached to a particular piece of property/asset of the company and the identity of the asset does not change, though it may be extended, during the subsistence of the charge.

B. Forms of Fixed Charge

Fixed charge can be legal or equitable. When it is in a deed form, it is legal and the charge (debenture holder) has the same rights of a legal mortgagee. Where it is a mere deposit of title deeds then it is equitable and the charge (debenture holder) has the same rights of an equitable mortgagee.

C. Features of a Fixed Charge

1. The company cannot deal with the asset
2. The company cannot create other charges ranking in priority to the present.
3. The identity of the asset does not change, though it may be extended, during the subsistence of the charge

D. Priority of a Fixed Charge over a Floating Charge

Generally, by ***Section 179 CAMA***, a fixed charge on any property has priority over a floating charge affecting that property. However, a fixed charge will not have such priority if:

1. The terms on which the floating charge was granted prohibited the company from granting any later charge having priority over the floating charge
2. The person in whose favour such later change was granted had actual notice of that prohibition at the time when the charge was granted to him.

See ***Section 179 CAMA.***

Since the charge is fixed, the asset appropriated to the satisfaction of the debt is immediately encumbered upon the creation of the charge.

E. Advantage of a Fixed Charge

To the debenture holder, the advantage of a fixed charge is that the assets are identified and kept available to satisfy his claim to redeem the debt and realise his credit, as the deal with or dispose of the assets or create other charges ranking in priority to it.

F. Disadvantage of a Fixed Charge

This advantage has a limited value. This is because the asset which has been chosen as security may lose its value even where the other assets of the company are retaining their value or even appreciating. Thus, since under a fixed charge, the debenture holder's security is the chosen asset, the debenture holder cannot proceed against other assets of the company, he can only proceed against the particular asset which might have depreciated in value.

Again, the inability of the company to deal with the assets covered by the fixed charge without the consent of the debenture holder (chargee) makes fixed charges unattractive to commercial companies who may either not have fixed assets or are not willing to encumber their specific assets.

III. Procedure for the Creation of a Charge

The following are the procedure involved in creating charges:

1. Convene board meeting to pass resolution authorizing the loan and preparation of loan documents including prospectus if necessary (if it is issued to the public)
2. Preparation, execution and stamping of the loan documents which include:
   (a) Deed of mortgage (charge by way of legal mortgage)
   (b) Power of attorney (if any)
   (c) Debenture Trust Deed (if it involves a series of debentures)
3. Obtain Governor's consent for the legal mortgage if necessary (if landed property is involved)
4. File documents at Land Registry (if landed property is involved)
5. File the following documents with CAC for registration:
   1. Duly stamped and sealed deed of mortgage with counterpart copy
   2. Duly completed form for notice of charge as in Form CAC 8, Particulars of Charge
   3. Court order where applicable (court order extending time within which to register. See ***Section 205 CAMA***)
   4. Photocopy of previous registered deed in the case of up stamping
   5. Evidence of payment of fees
   6. Evidence of application of governor's consent duly submitted to the appropriate authority, if applicable. See ***Regulation 34(1) & (3) Companies Regulation, 2012***
6. Leave copies of the documents in the records of instruments (Register of instruments) at the registered office of the company.
7. Update the necessary registers by entering the particulars of the charge in the Register of Charges and Register of Debenture holders.
8. Obtain a certificate of registration of charge from CAC and have a copy of the charge endorsed on every debenture or certificate of debenture stock issued by the company, the payment of which is secured by the charge.

IV. Registration of Charges

A. Concept: By ***Section 197(1) CAMA*** and ***Section 199(1) CAMA***, every company is under a duty to register every charge created by it. It does this by filing Form CAC 8 and other

necessary documents with CAC. By Section 197(1), such registration must be done within ninety (90) days from the date of the creation of the charge. See also ***Regulation 34(2) Companies Regulation, 2012***.

B. Documents to be Sent to CAC for Registration of Charges - ***Regulation 34(1) & (3) Companies Regulation, 2012***:

1. Duly stamped and sealed deed of mortgage with counterpart copy
2. Duly completed form for notice of charge as in Form CAC 8, Particulars of Charge
3. Court order where applicable (court order extending time within which to register. See section 205 CAMA)
4. Photocopy of previous registered deed in the case of up stamping
5. Evidence of payment of fees
6. Evidence of application of governor's consent duly submitted to the appropriate authority, if applicable.

C. Extension of Time for Registration: Note that after the expiration of the ninety (90) days, the court may extend the time for registration upon application to it under ***Section 205 CAMA***.

D. Persons who can Register Charge: by ***Section 199 CAMA***, the registration of the charge with the CAC can be done either by the company or the debenture holder or any other interested person.

E. Effect of Failure to Register/Non-Registration of a Charge Securing a Debenture: Where there is failure to register the charge within the prescribed 90 days or any other extended period, there would be effects and consequences to both the debenture holder and the company. They are provided for under ***Section 197(1) CAMA*** as follows:

(f) **Effect to the Debenture Holder:** the charge/security would be void as against the liquidator and other creditors (other debenture holders) of the company. However, the debt is not thereby discharged, but become immediately payable as the debenture is rendered Unsecured/Naked. This means that in the event of the winding up and liquidation of the company, the charged asset would not be available in favour of the debenture holder to realise his credit. Also, there would be no priority and the debenture holder would be regarded as an unsecured creditor. He would be forced to contend priority in sharing the liquidated asset with other creditors (debenture holders).

(g) **Effect to the Borrower Company:** the effect of non-registration to the borrower company is that the debt become immediately repayable and any agreed period for the repayment of the loan is terminated. Since the debenture holder loses his security, he would take steps to recover his principal sum and any accrued interest *pro rata*. See ***Capital Finance Co Ltd v Stokes***.

F. Available Remedies in the Event of Non-Registration: by ***Section 206 CAMA***, where there is a failure to register within the 90 days or where there are errors or misstatements, the available remedies which the court can grant are extension of time within which to register or a rectification of the register to correct errors or misstatements.

G. Certificate of Registration of Charge: By ***Section 198(2) CAMA***, upon the registration of a charge securing a debenture, CAC must issue a certificate, which serves as a prima facie evidence of compliance with the requirements of registration. The certificate must be endorsed on every debenture or debenture stock certificate issued by the company and secured on the charge in accordance with ***Section 203(1) CAMA***.

V. Discharge/Satisfaction of a Charge

A. Filing Memorandum of Satisfaction with CAC: By ***Section 204 CAMA***, where the debt for which the charge was given has been satisfied, the company is to file memorandum of satisfaction with the CAC. This is done by completing and filling form CAC 9 – Declaration Verifying Memorandum of Satisfaction of Charge.

B. Documents to be Filed at CAC: By ***Regulation 35(1) Companies Regulations 2012***, the document to be filed at CAC for the discharge or satisfaction of a charge are:

1. Duly stamped deed of release
2. Duly completed form for satisfaction of charge; Form CAC 9 – Declaration Verifying Memorandum of Satisfaction of Charge.
3. Evidence of payment of fees

C. Filing Notice of Release with CAC: By ***Regulation 35(2) Companies Regulation, 2012***, the notice of release or satisfaction of a charge shall be filed with CAC within fourteen (14) days after the release or satisfaction.

D. Notification of Appointment of a Receiver/Manager: By ***Section 206 CAMA***, where there is default in satisfying the debt and a receiver/manager is appointed, CAC must also be notified. By ***Regulation 36(1) Companies Regulation***, the requirement for filing the notice of appointment of receiver/manager are:

1. Appointment by the Court

(a) CTC of court order appointing the receiver/manager

(b) Copy of summary of statement received from the company and/or comment thereon where receiver/manager is appointed on behalf of holders of debentures secured by floating charge.

2. Appointment under a Power Contained in Any Instrument

(a) Deed of appointment

(b) Notice of appointment. By ***Section 206 CAMA***, this notice must be given within seven (7) days of the appointment.

VI. Procedure for Perfection of Loan

1. Obtaining Governor's consent.
2. Filing of the necessary documents (The deed of legal mortgage) at the Land Registry.
3. Filing of the documents for registration at CAC (Mortgage/charge), Particulars of charge.
4. Retaining some copies of the documents for inspection at the Registered Office of the company.
5. Entering particulars of charge in the register of charges.
6. Obtaining a certificate of registration from CAC.

RECORDS KEPT BY COMPANY UPON CREATION OF DEBENTURES/CHARGES

Every company is required to keep the following records

1. Register of charges – ***Section 191 CAMA***
2. Register of debenture holders – ***Section 193 CAMA***
3. Register/Records of instruments – ***Section 190 CAMA***

All these records are to be kept at the registered office of the company

I. Register of Charges

The following are the details to be contained in every entry

1. Description of the property charged if any
2. The amount of the charge
3. The name of the persons entitle thereto (excluding securities to bearers)

Omission leads to an officer being liable to a fine of N250 – ***Section 191(2) CAMA***. Charges include both floating and fixed charges

II. Register of Debenture Holders

A register of debenture holder shall contain the following information.

1. The names and addresses of the debenture holders
2. The principal of the debentures held by each of them
3. The amount or the highest amount of any premium payable on redemption of the debentures
4. The issue price of the debenture and the amount paid up on the issue price
5. The date on which the name of each person was entertained on the register as a debenture holder
6. The date on which each person ceased to be a debenture holder - ***Section 193(2) CAMA***.

The entry required under this section shall be made within 30 days of the conclusion of the agreement with the company to become a debenture holder or within 30 days of the date at which he ceases to be one.

III. Debenture Trust Deed

A. Concept

By ***Section 183(1) CAMA***, where debentures are offered to the public for subscription or purchase, the company must execute a debenture trust deed in respect of them and procure the execution of the deed by the trustee for the debenture holders appointed by the Deed. By ***Section 183(2) CAMA***, no debenture trust deed shall cover more than one class of debentures. Thus, a debenture trust deed usually covers only one class of debentures. Thus, if different classes are offered to the public each must be covered by a separate debenture trust deed.

B. Determinants of Classes of Debentures

By ***Section 183(4) CAMA***, classes of debentures are determined by:

1. The rates of or dates for payment of interests
2. The dates when or the instalments by which the principal of the debenture shall be repaid (redeemable/perpetual)
3. Any right to subscribe for or convert the debenture into shares in or other debentures of the company or any other company (convertible)
4. The powers of the debenture holders to realize any security (secured/naked)

C. Remedy where Trust Deed is not executed

Where a trust deed is not executed, the debenture holders may apply to the court for an order directing the company to execute the deed – ***Section 183(4) CAMA***.

D. Contents of a Debenture Trust Deed

By ***Section 184(1) CAMA***, the contents of a debenture trust deed are:

1. The maximum sum which the company may raise by issuing debentures of the same class
2. The maximum discount which may be allowed on the issue or re-issue of the debentures and the maximum premium at which the debentures may be made redeemable.
3. The nature of any assets over which a mortgage, charge or security is created by the trust deed in favour of the trustee for the benefit of the debenture holders equally except a floating charge
4. The nature of any assets over which a mortgage, charge security has been or will be created in favour of any person other than the trustee for the benefit of the debenture holders equally except a floating charge.

5. Whether the debenture will be secured for the benefit of some debenture holders under the trust deed
6. Any prohibition or restriction on the power of the company to issue debentures or to create any securities on any of its assets ranking in priority to or equally with the debentures issued under the trust deed
7. Whether the company has power over the debentures before the date of redemption
8. Date and manner the interest will be repaid
9. Date and manner the principal will be repaid
10. In the case of convertible debentures, dates and terms on which the debenture is to be converted into shares

E. Disqualification for Appointment as Trustee of Debenture Trust Deed

By ***Section 187(1) CAMA***, a person is not qualified for appointment as a trustee of a debenture trust deed if he is:

1. Officer or an employee of issuing company or one of the companies in a group of companies
2. Less than 18 years of age
3. Unsound mind and has been so found by a court in Nigeria or elsewhere
4. Undischarged bankrupt
5. Disqualified under section 257 of this Act from being appointed as director of a company
6. Substantial shareholder (a person having shares which entitle him to exercise at least 10% of the unrestricted voting rights at any general meeting of the company.

Where a trustee has been appointed and he subsequently falls into the above category of persons, he shall immediately cease to be qualified to act as a trustee of the debenture trust deed.

REMEDIES OF DEBENTURE HOLDERS IN EVENT OF DEFAULT

A debenture holder lends money to the company and he expects to be paid back the principal sum and interest. Where there is default on the part of the company, by ***Section 209 CAMA***, the following are the remedies available to the debenture holder:

1. **Recovery of Principal and Interest:** this is done by an action against the company in court. Since it is the principal sum and interest, the court with jurisdiction is the State High Court and it applies both for secured and naked debentures.
2. **Petition for Winding-Up:** The debenture holder can bring a petition for winding up of the company as a creditor – ***Section 408(d) CAMA***. The petition is to be brought at the Federal High Court. See ***Section 209(2) (b) (ii) CAMA***.
3. **Debenture Holders' Action**: This is a representative action brought by one or more of the debenture holders to recover the principal sum and interest. See ***Section 209(2) (a) CAMA***.
4. **Power of Sale:** where the debenture is secured with a fixed charge, the debenture holder can exercise power of sale. The power of sale must have arisen and be exercisable. Principles governing mortgages are applicable.
5. **Foreclosure of the Security/Property**: The application for order of foreclosure is at the FHC (same as in property law). See ***Section 209(2) (b) (i) CAMA***.
6. **Valuation of the Security:** Valuation of the security and providing proof for the balances on winding up.
7. **Appointment of Receiver/Manager:** either by the debenture holder if authorized by the instrument or FHC. It must be noted that the appointment of a receiver would necessitate

compliance the requirements of notification to CAC under ***Section 206 CAMA***. By Section 206 CAMA, where there is default in satisfying the debt and a receiver/manager is appointed, CAC must also be notified. The requirement for filing the notice of appointment of receiver/manager is provided under ***Regulation 36(1) Companies Regulation***. The powers duties and liabilities of the receiver/managers are provided for under ***Section 393 and 394 CAMA***.

(Week 16)

COMPANY SECURITIES II: FLOATATION OF SECURITIES AND COLLECTIVE INVESTMENT SCHEMES

INTRODUCTION

I. Concept

Capital floatation is simply the method by which a company can offer its securities to the public to raise money. ***Section 166 CAMA*** makes provisions for a company to borrow money. Company securities concern chooses-in-action and it is not about physical material even though they are properties. Company securities includes shares, debentures, GDR and bonds.

II. Regulatory Authorities

For floatation of securities, the regulatory bodies are:

1. Securities and Exchange Commission is the main regulatory authority on public offer of companies' securities.
2. Nigerian Stock Exchange (NSE)
3. Corporate Affairs Commission
4. Federal High Court of Nigeria
5. Central Bank of Nigeria
6. Nigerian Investment Promotion Commission

III. Applicable Laws

1. Investment and Securities Act (ISA) 2007
2. Securities and Exchange Commission Consolidated Rules 2013
3. Companies and Allied Matters Act 2004
4. NSE Listing Rules
5. Debt Management Office Act
6. Federal High Court Act

IV. Definition of Key Terms

1. **Prospectus**: this is the document with which the application and registration of securities are presented. That is, it is a document used to float securities and present them to the investing public. The following can also serve as prospectus:
   - **(a) Abridged Prospectus:** this is a summary of all that a prospectus ought to have. It contains every requirement. It has all the key elements of a prospectus, but in a summarised form.
   - **(b) Deemed Prospectus:** this is a document which substantially complies with the basic guideline of a prospectus and so, it is deemed to be a prospectus. It is used in private placement.
   - **(c) Statement in Lieu of Prospectus:** this is the statement made before embarking on public offer.
2. **Capital Market Operators**: these are the stockbrokers and professionals engaged to represent people in capital market. The rules guiding them may be different but they are all capital market operators.
3. **Issuing House**: these are bodies that present documentation for approval. The stock broking firms registered with SEC and members of Nigerian Stock Exchange. They also include banks and other financial institutions. They play intermediary roles.

4. **Right Issue**: these are offers made especially to existing shareholders with a duty to pay for the shares. Failure to pay, the shares will be relinquished and the company can take them back. That is, shares are offered to existing shareholders on favourable terms in the proportion they hold shares in the company so that they can maintain their percentage share of ownership. It helps maintain the shareholding equilibrium. Some of the advantages of rights issue is that it prevents dilution of shares; shares are sold to members at a discount; it maintains shareholding equilibrium; where existing shareholders subscribe to rights issues, it means that the shareholders have confidence in the management. When there is a rights issue, the prospectus used is called a "Rights Circular".
5. **Bonus Issue**: this is the offer made to existing shareholders. The shareholders do not pay for them and they do not relinquish as the company has paid for them.
6. **Primary Market**: the primary market is also known as the new issues market. This is where the company, by itself, is offering its securities to the public. Securities here are regarded as new issues. The primary markets provides the avenue through which governments and corporate bodies raise fresh/new funds from the public through the issuance of securities. The essential distinguishing feature between the primary market and the secondary market is that the funds raised from the investors at the primary market goes directly to the issuing entity; but in the case of the secondary market, the proceeds from the transactions go to the investors.
7. **Secondary Market**: the secondary market provides investors with the opportunity to buy and sell or trade in securities that were earlier issued in the primary market. That is, the secondary market is where those who bought and own securities trade on those securities that they own. The secondary market can be organized or unorganized. An organized market has physical location. An example is the Nigerian Stock Exchange. An unorganized market has no physical location for trading but transactions are conducted mainly through telephone calls and computer. The unorganised secondary market is also known as Over the Counter Market (OTC) which deals and trades in unquoted securities. The essential distinguishing feature between the primary market and the secondary market is that the funds raised from the investors at the primary market goes directly to the issuing entity; but in the case of the secondary market, the proceeds from the transactions go to the investors.
8. **Initial Public Offer**: where the public company is issuing to the public for the first time. That is, IPO is the name given to the first public offer by a company which is coming into the capital market for the first time. Thus, every listed company can only have an IPO once.

FINANCIAL MARKET

I. Concept

This refers to the avenue by which companies and the government raise funds. The sources of funds are two:

1. **The Money Market:** Money market is the forum where you can access funds from Banks and other financial institutions through negotiable instruments and bills. It is used to access short-term funds. Collaterals are usually required.
2. **The Capital Market:** Capital market encompasses all the arrangements that facilitate the buying and selling of securities. It is a forum where companies and governments may raise funds from the general public by trading securities on the Stock Exchange. It is believed that capital market is a better option in terms of providing funds for companies as there is

an unlimited access to funds there. There is also the absence of collateralisation. The company gets money from the public without the members of the public requesting for collateral from the company.

II. Role of the Capital Market

1. Provides opportunities for companies to borrow funds needed for long-term investment purposes.
2. Provides facilities that enable foreign businesses to offer their shares to the Nigerian market.
3. Encourages inflow of foreign capital when foreign companies or investors invest in domestic securities.
4. Government can carry out its privatisation exercise by offering its shareholdings in state owned enterprises to members of the public through the Stock exchange.
5. Creates an avenue for the public to participate in the corporate sector of the economy and share in its wealth through ownership of securities.
6. Provides employment opportunities for the ever-growing labour force.

III. Levels of the Nigerian Capital Market

The Nigerian capital market exists at two levels (Primary market and Secondary market)

A. Primary Market

1. Concept

This is where companies can access funds for their shares, which have been newly listed or issued to the public - ***Rule 405 Sec Rules***. It is otherwise known as the new issues market since it provides an avenue for those wishing to raise funds from the market by selling their securities to the public i.e. from the company to the general public. The primary markets provides the avenue through which governments and corporate bodies raise fresh/new funds from the public through the issuance of securities. The essential distinguishing feature between the primary market and the secondary market is that the funds raised from the investors at the primary market goes directly to the issuing entity; but in the case of the secondary market, the proceeds from the transactions go to the investors.

2. Forms of Primary Market

The primary market may be in the form of:

(a) Initial Public Offer (IPO): this happens when a company invites members of the public for the very first time to subscribe for its shares or debentures. The offer represents the first entry of the shares or debentures into the capital market for the purpose of raising funds.

(b) Public Offers: Subsequent entries to the capital market to issue shares for the purpose of raising funds is called public offer. Funds that are raised from the primary market go directly to the company.

3. Procedure for Public Offer of Securities

1. The bank must demonstrate need for public offer to SEC
2. Board resolution and special resolution authorising the public offer.
3. Prepare draft prospectus in line with Rule 288 SEC Rules; Section 73 & 79 ISA and submit to SEC and NSE.
4. File an application to SEC for approval in FORM SEC 6 through the issuing house accompanied by documents specified in Rule 279(2) SEC Rules 2013 as required by Section 54 ISA.

5. Upon approval, the final copy of the prospectus signed by all the directors accompanied by a registration statement; certified letters of consent; sworn declaration of full disclosure will be delivered to SEC within 48 hours for registration – ***Section 80 ISA; Rule 279(6); 280; 354 SEC Rules 2013***.
6. The printed copy will be forwarded to NSE and CAC for record purposes.

B. The Secondary Market

1. Concept

The secondary market provides investors the opportunity to buy or sell securities that were earlier issued in the primary market. Thus, this is a sale of shares by the shareholder. NB- Funds raised in the secondary market do not go to the company but the proceeds go to the shareholder/investor himself.

Note: ***Section 157 CAMA*** (transfer) applies only to sale of shares by private person. As such, it doesn't apply to shares sold on the Stock Exchange.

2. Types of Secondary Market

(a) Organised Secondary Market: An organised secondary market is a stock market with physical location, trading in designated (quoted) securities e.g. Nigerian Stock Exchange.

(b) Unorganised Secondary Market: An unorganised secondary market has no physical trading location but transactions are conducted mainly through telephone calls and the computer. It is otherwise referred to as an Over – the Counter Market (OTC). It trades in unquoted securities – CSCS.

IV. Who Can Offer Securities to the Public

1. Public Limited Companies: Only public companies (PLC) can offer its securities to the public, but only quoted public companies and government issuing Bonds can be listed at the Stock Exchange.

2. Private Companies (LTD) and Unquoted Plc: these categories of company can offer their securities through private placement but which must be registered with SEC.

V. Investment Opportunities in the Nigerian Capital Market

1. Investment in Equities/shares
2. Investment in Debentures
3. Investment in Bonds
4. Investment in Collective Investment Schemes
5. Investment in mortgage-backed securities

VI. Persons Mandated To Register Securities with SEC

The following persons shall register their securities and reports with SEC in accordance with the Investment and Securities Act (ISA) and the SEC Rules - ***Rule 279 SEC Rules; Section 54(1) ISA*****.**

1. Public quoted companies.
2. Public unquoted companies.
3. Government and Government Agencies.
4. Investment Schemes.

VII. Capital Market Operators and Consultants

These are key institutions and individuals whose intermediary activities operate the capital market. They are professional corporate bodies and individuals registered with SEC.

1. Capital Market Operators: Capital market operators include issuing houses, securities dealer, stock brokers, trustees, portfolio managers, underwriters and custodians etc. (NB: the role of all these bodies in the capital market). Underwriters are insurance companies in

the capital market – if the offer to the public fails, then they underwrite it (a form of insurance) - ***Rule 45-177 SEC Rules 2013***.

2. **Consultants:** Consultants are those professionals who render certain experts service in the capital markets and their opinions impact on capital market. They include solicitors, accountants, investment advisers, valuers, rating agencies, engineers etc. - ***Rule 178-181 SEC Rules 2013***.

VIII. Registration of Securities

A. General Rule

All securities, shares, debentures, GDR, bonds and collective investment Schemes, to be offered to the public by public companies and government and its agencies must be approved first and registered by SEC - ***Section 54 and 67 of the Investment and Securities Act (ISA); Rule 279 & 280 SEC Rules 2013; Blue Chip Acquisition And Investment Co Ltd. v. Zenith Bank Plc.*** The aim of the registration/approval is to approve the price for the securities.

B. Registrable Securities

1. Securities issue (ordinary share, bonus share, debentures, preference shares, right issue, unit of an investment trust scheme and asset backed securities.
2. Issue of securities offered to the public, state/LG bonds, investment contracts or participation in oil or gas.

C. Documents to File for Registration

The documents to file in addition to FORM SEC 6 for the registration of securities are provided for under ***Rule 279(2) SEC Rules*** as follows:

1. Duly completed Form SEC 6
2. A CTC of the resolution(s) by the general meeting authorising the offer
3. Two CTCs of the altered Memorandum and Articles of Association
4. A CTC of certificate of incorporation of the issuer,
5. A signed copy of audited accounts for the preceding five (5) years or number of years for which the issuer company has been in operation, (if less than five (5) years) or audited statement of affairs (in the case of a new company).
6. Two copies each of the draft prospectus/rights circular/placement memorandum and abridged prospectus;
7. Two copies of the draft underwriting agreement and sub-underwriting agreement, where applicable;
8. Two copies of draft vending agreement, between issuer and the issuing house.
9. Letters of consent given by the parties to the issue, sworn to before a Notary Public or Commissioner for Oaths.
10. Evidence of technical agreement (if any) reached between the issuer and technical partner(s), advisers/consultants;
11. CTC of CAC FORM 7 (particulars of directors)
12. A copy of the mandate letter by the issuer to the issuing house;
13. Evidence of payment of registration and filing fees;
14. A certificate of exemption from a recognised stock exchange (where applicable)

D. Certificate of Registration

Upon registration, SEC will issue a certificate of registration in respect of the securities and investments registered by it. See ***Section 54(4) ISA***.

E. Effective Registration

Registration can only be effective when all the professionals involved have done all that they are required by law to do. See ***Blue-Chip Acquisition & Investment Co Ltd. v. Zenith Bank Plc***, where the IST held that public offer can only be approved if all the parties to the offer namely solicitors, issuing house, stockholders, registrars, reporting accountants have complied with the provisions of ISA and SEC Rules in relation to the registration of securities. Failure to comply with rules will amount to non-registration of the securities.

F. Effect of Offering Securities to the Public without Registration

When securities are not registered and they are offered to the public, there will be sanctions: N1, 000, 000 fine or 3 years imprisonment or both. See ***Section 54(6) ISA***

METHODS OF OFFER OF SECURITIES TO THE PUBLIC

By ***Rule 279(1)(c) SEC Rules***, securities could be offered through: offer for subscription, offer for sale, rights issue, bonus issue, debt-equity conversion, private placement, offer by introduction, debenture/loan stock, government bonds, and sukuk. For the purpose of BAR part II, the methods used in offering securities to the public are:

I. Direct Public Offer

The company offers its shares to the public **through an issuing house**. Here, although the company offers its securities to the public through an issuing house; the company, and not the issuing house, still bears all the risk and liabilities if the public offer fails. The issuing house acts only as a liaison between the company, the regulatory authorities and the investing public. The terms and conditions of the offer are all contained in the prospectus. Thus, to protect itself, the company usually arranges for the issue to be **underwritten** at an agreed commission.

Since the company bears all the risk, it is permitted to underwrite (a form of insurance) in order to protect itself and the investing public from the risk of a failed public offer. Thus, the company usually arranges for the issue to be underwritten by the Issuing house, at an agreed commission (usually 10%), so that in the event of an under subscription or a failed offer, the underwriters (insurance company) would take the unsubscribed value.

The legal implication of direct public offer is that the company bears the risk of a failed offer. It must be noted that a direct public offer is cheaper for investing public.

II. Offer for Sale

Under this method, the securities are sold to the issuing house and the public is invited to purchase them directly from the issuing house usually at a higher price. The incentive given to the issuing house is that the shares are sold at a premium value or higher price. Here, the issuing house is not merely acting as an official liaison for the company but also ensures that the risk associated with an under subscription of the issue (or a failed offer) is prevented. This is because the issuing house bears the risk of failure of the issue and undertakes the responsibility to underwrite the issue. Thus, in the event of failure, the issuing house indemnifies the company. Prospectus is needed here – ***Section 69(1); 70; 82; 315 SEC Rules***.

The difference between direct offer for sale (direct public offer) and offer for sale are:

1. In a direct offer for sale, the Issuing house gets commission while in offer for sale, the issuing house gets profits.
2. In a direct offer for sale, the company undertakes the responsibility for underwriting the shares; whereas in an offer for sale, the issuing house undertakes the responsibility of underwriting the shares.

III. Placement (Private Placement)

A. Concept

Unquoted public companies and private companies can offer their securities to the public only that they cannot invite the public at large. See ***Section 22(5) CAMA***. This can be done through private placement. Thus, private placement is a method of offering shares by a public company which is not quoted on the stock exchange or by a private company upon application by members subject to its articles and SEC approval. This is usually privately done. A private company cannot allow private placements to more than 50 persons.

Essentially, the securities are not offered to the public at large but to targeted institutional investors. The issuing house can either purchase the securities and sell them to the investors, or it may just link the investors directly to the company, in which case, they would only get brokerage fees. Examples of such investors are institutional investors/cooperative society, Pension Fund Administration and corporate bodies interested in investing in other companies. Private placement is also regulated by SEC.

B. Conditions for Approval of Private Placement by Public Companies

By ***Rule 340(1) SEC Rules***, no public company shall offer securities by way of private placement without the prior approval of SEC. ***Rule 340(2)*** now provides the conditions for approval. Approval for the private placement by public companies shall be subject to the following conditions:

1. The company shall show evidence of dire need of fresh funds or technical expertise and shall satisfy the Commission that private placement remains the only viable option to achieving its objective.
2. The securities shall not be offered to more than 50 subscribers.
3. The resolution of the company authorizing the placement shall be Special as defined by CAMA and shall state the number of shares to be offered and the price.
4. The notice of the general meeting authorizing the placement shall be published in two national daily newspapers and evidence of the publications shall be filed with the Commission.
5. The aggregate number of shares to be offered through private placement by a public quoted company shall be 30% of its existing issued and paid-up capital prior to the offer: Provided that where the company is ailing, it may offer a higher number of shares, subject to the approval of the Commission.
6. The price of the securities of the company, if quoted, shall be on technical suspension during the period of placement.
7. The offer shall be for a period as proposed by the issuer and approved by the Commission but not exceeding ten (10) working days: Provided that the Commission may extend the period under special circumstances.
8. All subsequent capital raising shall be approved only upon satisfactory account of utilization of previous issue proceeds.

C. Privacy of the Placement

To ensure that the process is private, ***Rule 340(3) SEC Rules*** provides that private placements shall not be advertised, mentioned and/or discussed in the print and electronic media. Approval of a private placement may be suspended or withdrawn for violation of this rule. Any Capital Market Operator engaged in an advisory role on the private placement may also be sanctioned With regards to private placement by private companies, SEC need not be informed unless the shares would eventually get into the hands of the public.

IV. Electronic Offer and Transfer of Securities

Rule 345 SEC Rules recognizes and empowers a company to opt for the electronic mode of offering or transferring its securities provided that where an investor elects to have a certificate for his securities, the company shall issue him with a certificate. The said Rule 345 provides that "without prejudice to other provisions in these rules and regulations, an entity may offer or transfer its securities electronically: Provided that where an investor elects to have a certificate, such certificate shall be issued by the issuer. Electronic offer is usually used for OTC transactions and is currently being used at the secondary market of the stock exchange under the auspices of the CSCS Ltd.

IV. Other Methods

1. **Rights Issue:** This is the issue of shares by a company, which is directed only to existing shareholders who are expected to acquire the shares in the ratio at which they hold shares in the company - ***Rule 324-338 SEC Rules 2013***. Rights issue is meant to preserve the leverage or shareholding equilibrium. No company can have rights issue of shares unless there is pre-emptive rights clause in its Articles. Every company can have a pre-emptive rights clause in its Articles of Association (i.e. right to offer shares first to existing shareholders before transferring to the Public). A rights circular must be registered – ***Section 54 ISA & Rule 326 ISA***. Note: this should not be confused with Restriction of Transfer of Shares by a private company - ***Section 22(5) CAMA***. The disadvantages of rights issue are:
   (a) Shares are sold at a lower price than it would have been sold in the market (could lead to insider trading)
   (b) There could be the problem of the shareholders not having enough money to purchase the rights issue.
   (c) The precarious nature of the capital market or the problems associated with the management of the companies may make a shareholder reluctant to purchase new shares in the company.
2. **Hybrid Offer:** This consists of rights issue and offer of shares to the public (details and advantages and disadvantages).
3. **Debt/Equity Conversion**: not only issued by companies. It arises where a company owning debt to another person offers shares to the creditor equivalent to the value of the debt with agreement of the creditor – ***Rule 279(5) SEC Rules*****.**
4. **Offer by Introduction:** used to get securities admitted to the stock exchange. It allows a company to apply for listing without initial public offer.
5. **Bonus Issue**: no prospectus needed – ***Section 69(2) ISA*****.**
6. **Sukuk:** investment certificate or notes of equal value which evidence undivided interest/ownership of tangible assets and services or investment in the assets of particular project or special investment using Shania Principles and Concepts approved by the SEC – ***Rule 569 SEC Rules*****.**
7. **Offer for Subscription:** direct offer. It is a type of public offer which is advertised through a prospectus.
8. **State and Local Government Bonds:** government selling instruments for persons to give government loan to carryout infrastructural development repayable with interest.

STEPS AND PROCEDURE FOR FLOTATION OF SHARES, DEBENTURES, GDR, BONDS IN THE CAPITAL MARKET (PROSPECTUS)

I. Contents of a Prospectus (Exams)

The contents of a prospectus are specified in ***Section 73 & 79 ISA 2007*** and ***Rule 288(1) SEC Rules 2013*** include all documents and reports specified in ***Part I & II, 3rd Schedule to the ISA*** as well as:

1. Front cover with details and RC No of the issuing company and issuing house, amount of shares being offered and other details.
2. Detailed table of contents of the prospectus
3. Summary of the offer stating details
4. Details of the authorised share capital and indebtedness of company and details
5. Date and signature
6. Particulars of directors and parties to the issue
7. Chairman's letter or statement disclosing the profile of the company and other matters
8. Five (5) year audited financial information comprising accounting policies, balance sheet, etc.
9. Letter reviewing audited accounts for the period by reporting accountants
10. Rating report (debt issue)
11. Any statutory/general information such as incorporation details, share capital history, material contract and claims, directors' interest, subsidiaries and related companies and other information.
12. Procedure for application and allotment of the securities
13. Particulars of collecting agents
14. Particulars of receiving bank
15. Application form for the offer
16. Revised forecast (oversubscription)
17. Any other information required by SEC

II. Procedure for the Issuance and Publication of Prospectus

1. Prepare a draft Prospectus - ***Rule 288 SEC Rules 2013, Section 73 & 79(1) ISA***.
2. Submit to the NSE for approval/listing if it is an initial public offer. If the issuer of the shares is already listed, obtain an Exemption Certificate from the NSE.
3. File an application to SEC for registration through the issuing house (FORM SEC 6) accompanied by the approved draft prospectus and other documents prescribed in ***Rule 279(2) SEC Rules 2013***.
4. Get letters of consent from all the experts involved in preparation of prospectus and attach to the application.
5. Print the approved prospectus and have it duly executed by all the directors named in the prospectus accompanied by a registration statement and a sworn declaration of full disclosure of material facts – ***Section 80 ISA & Rule 279(6); 280; 354 SEC Rules 2013*****.**
6. Deliver the duly executed printed prospectus to SEC for registration within 48 hours and to CAC and NSE for record purposes.
7. Publish the prospectus in the abridged form specified in ***Rule 290 SEC Rules 2013*** and advertise to the public in line with the rules in ***Rule 284 SEC Rules 2013***.

III. Drafting of the Invitation and Offer Column

Note the rules for drafting the invitation/offer column of an abridged prospectus - ***Section 67, 68 & 71-86 of ISA***.

KILLI NIGERIA PLC (RC 300) – name and logo

"Offering by way of offer for sale of 1,250,000,000 ordinary shares of 50 kobo each at N15 per share" – statement of offer

Offer opens on 12th September 2013 and ends on 12th December 2013 – duration of offer
Issued by Dangote Insurance Ltd – issuing house and logo

See your solicitors and stockbrokers for advice/compliance with legal requirements.

IV. Circumventing the Rigorous Process of Issuing a Prospectus by a New Company

A new company can circumvent the rigorous process of issuing a prospectus. This is done by delivering a statement in lieu of prospectus signed by all the named directors in line with the fourth schedule to the ISA for registration by SEC as authorised by ***Section 84 & 92 ISA and Rule 291 SEC Rules 2013. Section 69(1) ISA*** prohibits making of a statement upon terms that the person will renounce benefit of the offer.

V. Registration of Prospectus

Section 80(1) ISA provides that no prospectus shall be issued by or on behalf of any company unless on or before the day of its publication, a copy of it was delivered to SEC for registration, signed by every person who is named in it as a director or by his agent duly authorized in writing and having endorsed on it or attached to it, any consent to the issue of the prospectus by experts who made statements in it. ***Section 80(4) ISA*** provides that SEC shall not register a prospectus unless it is satisfied that:

(a) It is dated and duly signed as required
(b) It has endorsed on it or attached to it, the documents required, if any
(c) The prospectus otherwise complies with the provisions of ISA.

The invitation column is the real job of a lawyer. This is where liability arises as any statement made in the prospectus which is false brings liability; civil and criminal liability. By ***Rule 288 SEC Rules***, the format for the invitation page is as follows:

1. The company name and RC number, usually with logo
2. Statement of the offer with the issuing quantity and unit price. It also states the mode of offer, whether by offer for sale or direct public offer. For instance, offering by way of an offer for sale of 1, 250, 000, 000 ordinary shares of 50 kobo each at N15 per share. In the above, there is the nominal value and premium price (market price).
3. Opening and closing date (duration of the offer). The duration of the offer must not exceed twenty-eight (28) working days, except in privatization which has a maximum offer period of forty (40) days. Drafted: "offer opens … and closes on…"
4. Issuing house(s) – name and logo
5. Endorsement on compliance with legal requirements for the issue of the prospectus.

V. Liabilities

1. **Liability for Non Issuance of Prospectus**: N500, 000 (body corporate) and N100, 000 (individual) - ***Section 67(2) ISA***.
2. **Liability for Issuing Application Form without Prospectus**: N100, 000 fine - ***Section 71(4) ISA***.

3. **Non Registration of Prospectus**: N25, 000 for company & N5, 000 for individuals for each day of default – ***Section 80(6) ISA***.
4. **Civil Liability for Misstatements in Prospectus**: liable to pay compensation to aggrieved person - ***Section 85 ISA; Rule 292 SEC Rules 2013***. The persons liable are director, person consenting to be named, employee, issuing house and principal officers.
5. **Criminal Liability**: Fine of N 1 billion plus 3yrs imprisonment. ***Section 86 ISA; Rule 293 SEC Rules 2013*** - Summary conviction (min) N 1 billion fine/3 month's imprisonment or both.
6. **Exemption of Experts:** Mere consent does not make him liable – ***Section 85(3) & 86(2) ISA***.

FLOATATION OF BONDS

I. Concept

Bonds are fixed income security issued as debt instrument with low interest yield. It is a loan instrument used to raise long-term capital for infrastructural development. Bonds are negotiable debt instruments. There cannot be a perpetual bond – maximum life span is 25 years. Any amount to be sold through bonds must not be more than half of the total income of the company in the preceding financial year. The two types of bonds are Government bonds and Corporate/company bonds. The parties to a bond are Issuer (Borrower) and Bondholder (Lender**).**

II. Corporate Bonds

A. Concept

This can be issued by any public company, foreign public companies and supranational bodies – ***Rule 567 SEC Rules***. Corporate bonds are issued by public companies to the investing public to finance an expansion of their industrial base and market penetration of their product, by way of industrial loan debenture/mortgage debenture stock and preferential shares. They are issued in the capital market in the same way as the floatation of shares.

B. Condition for Issuance of Corporate Bonds

By virtue of ***Rule 568 SEC Rules***, the issuance of bonds by public companies and supranational bodies shall be subject to the following conditions:

1. **Eligibility of Debt Offering**
   (a) Any public company, foreign public company or supranational body is eligible to issue.
   (b) All necessary approvals (where applicable) in relation to the issue, from other regulatory authorities shall be obtained and filed with the Commission together with the registration statement.
   (c) All issues of corporate bonds shall be rated by a rating agency (optional for private placements)
   (d) No Issuer shall offer bond if it is in default of payment of interest or repayment of principal in respect of previous debts issuance for a period of more than six (6) months.
2. **Mode of Issue:** Corporate bonds may be issued by way of an offer for subscription, rights issue or private placement.
3. **Resolution:** There shall be a resolution by the board authorising the issue of the bond and a resolution of the general meeting shall be required where:
   (a) The amount to be borrowed is beyond the specified limit on the borrowing powers of directors in the Memorandum and Articles of Association of the issuer;
   (b) The bond to be issued is convertible.

4. Disclosure and Creation of Charge

C. Procedure for Issuance of Corporate Bonds

1. Convene a board meeting and pass a resolution authorising the bond issue.
2. A resolution passed at the General Meeting will be needed if the amount to be borrowed is beyond the issuing companies borrowing limit or the bond is a convertible bond.
3. The company will file a registration statement accompanied by the following documents:
   (a) Duly completed form SEC 6;
   (b) Appropriate filing and registration fees;
   (c) Two (2) copies of the board resolution authorising the issue of the bond or special resolution if needed
   (d) Two (2) copies of the Memorandum and Articles of Association (CTC) of the Issuer
   (e) A copy of certificate of incorporation of the issuer certified by the company secretary;
   (f) A signed copy of the Issuers latest audited accounts for the preceding three (3) years, with the latest account not more than nine (9) months old at the time of filing with the Commission;
   (g) Reporting accountant report;
   (h) Consent letters of the parties to the offer;
   (i) Two (2) copies of the draft vending agreement between the issuer and the issuing house;
   (j) Draft underwriting agreement (where applicable);
   (k) Rating report by a registered rating agency;
   (l) A letter of "No Objection" from the relevant regulatory body (where applicable);
   (m) Two (2) copies of draft trust deed;
   (n) A draft prospectus, right circular, placement memorandum or any form of information Memorandum with specified contents in Rule 567(n)(i-xi) SEC Rules
   (o) Declaration by the issuer on compliance with all requirements of the Act;

III. Government Bond

A. Concept

Government bonds are issued by governments at all levels and by government wholly owned companies or corporations. Governments usually issue bonds to fund medium and long term infrastructural development. Thus, as an alternative to over taxation and deficit budget spending on infrastructural development projects, government can resort to the bond market to finance infrastructural development on medium or long term basis.

Government bonds are considered the safest and most reliable loan instrument since it is difficult for government to be insolvent as they always have guaranteed revenue from national allocation and internally generated revenue through taxation. Government bonds are secured by revenue accruable to the issuer of sponsor government from the consolidated revenue fund of the federation and encumbered by a sinking fund indemnity, with powers conferred on trustees to enforce the debt instrument obligations.

B. Persons who Can Issue Government Bond

1. Federal Government and its agencies
2. State Governments and their agencies
3. Federal Capital Territory and its agencies
4. Local Governments and
5. Any company which is wholly owned by the Federal, State, FCT and Local Government - ***Section 222 ISA 2007***.

Note: If the Federal Government issues bonds, it is called sovereign bond. States, local governments, and government agencies issue revenue bonds, while cities within local governments issue municipal bonds.

C. Law Regulating Government Bonds

1. Trustee Investment Act
2. Debt Management Office (Establishment) Act
3. ISA and SEC Rules 2013

NOTE - The debt management office is part of the Federal Ministry of Finance, which oversees issue of government securities in collaboration with SEC.

D. Conditions and Requirements for a Valid Issue of Government Bonds

1. There must be a law passed by the National Assembly, State House of Assembly or Local Government authorising the issuance of bonds.
2. The bond instrument must bear crest of the government body and be signed by the minister, commissioner or chairman or other appropriate officer of the body raising the loan – ***Section 241(1) ISA*.**
3. The total amount of out-standing loan and the bond of the issuer should not exceed more than half of its actual revenue for the preceding financial year - ***Section 223(1)a ISA; Rule 565(2) SEC Rules 2013.***
4. The bond issue must be registered with SEC - ***Rule 564 SEC Rules; Section 224(1) ISA*.**
5. Redemption date shall not exceed 25 YEARS from date of issuance of the bond – ***Section 226 (2) ISA*.**
6. Letter of authority of guarantee by the Accountant General of state or federation stating that the bond shall be paid and to deduct at source from the statutory allocation due to the issuer in the event of default or failure to meet its payment obligations.
7. A sinking fund is required to be opened by the Accountant General of the state or federation to deposit money overtime to make up for the payment of the bonds at the required date - ***Section 224(4) ISA*.**
8. A separate sinking fund shall be established for each loan raised - ***Section 251 of ISA.***
9. The bond holders must pay full purchase price before registration - ***Section 231 of ISA*.**
10. Bond Certificates must be issued to bondholders by the registrar within 2 MONTHS of the issue - ***Section 232 of ISA; Rule 565(5) of SEC Rules 2013*.**
11. A trustee (usually a company) is to be appointed to act on behalf of the bondholders **–** ***Section 224(5); Section 245(1) & (2) and Section 247 ISA*.**
12. Registered Bonds may be designated in any denominations approved by SEC – ***Section 241(2) ISA.***

E. Procedure for the Registration of Government Bonds

Fill Application FORM SEC 6 with the following attached:

1. A copy of the Law authorising the issue of the bond by the State Government, etc. or a Resolution of either the House of Assembly (or the Senate if it is by the Federal Government) or the State (Federal) Executive Council in lieu of a formal Law.
2. Copies of the draft trust deed, where applicable
3. An irrevocable Letter of authority issued by the Accountant-General of the State to the Accountant General of the Federation to deduct at source from the statutory allocation to it (the issuer) into the sinking fund(note-waiver)
4. Evidence of technical agreement (if any) reached between the issuer and technical partner(s), advisers/consultants;

5. A feasibility report on the project to be financed
6. Copies of the draft underwriting agreement and sub-underwriting agreement
7. A copy of a rating report by a rating agency
8. The latest audited accounts shall not be more than twelve months old for states, local governments and Federal Government agencies and supranational bodies.
9. Publication of annual financial statements in 2 daily newspapers
10. Details of sinking fund
11. Evidence of payment of registration and filing fees-

See ***Rule 565(1) SEC Rules; Section 224(3) ISA*****.**

F. Registration of Government Owned Company and Agency Bond

If it is an Agency of the Government or a company wholly owned by the Government, the procedure for registration will be as follows: Fill and file application Form SEC 6 attached with the following:

1. Copy of the Law or instrument establishing the Agency or company
2. Copy of the Law/Resolution authorising the Agency or company to issue the bond
3. A rating Report
4. An irrevocable letter of Guarantee of repayment issued by the Federal/State Government that owns the Agency or company etc.

GLOBAL DEPOSITORY RECEIPT (GDR)

I. Concept

GDR is the acknowledgment of purchase of shares on the floor of the stock exchange authorising the bond. It is the re-issuing of shares of a foreign company already issued in that country, in Nigeria.

II. Features

1. The country issues receipts to investors who are interested in owing shares in the foreign company.
2. A GDR is denominated in the foreign currency and is listed on the stock exchange of that foreign country.
3. No share certificate is given
4. Only listed companies can enjoy the issuance of GDR.

COLLECTIVE INVESTMENTS SCHEMES (CIS)

I. Concept

This is a pooled investment by a group of persons with no membership nor participatory rights. It is under a third party management and control - ***Section 152-154; 315 of ISA; Rule 450 SEC Rules***. It is any form of arrangement which may involve the following: where investors share the risk and benefit of investment in proportion to their participatory interest; or where investors share the risk and benefit of investment as determined in the deed. Therefore, it is a scheme in whatever form, in pursuance of which members of the public are invited to invest money or other assets in a portfolio – ***Section 153 ISA 2007*** e.g. cooperative societies.

II. Features of a Collective Investment Scheme

1. The participants pool funds together for the purpose of sharing profit and the participants do not have day to day control over the management of the property underlying the arrangement
2. The pooled funds is usually managed by a designated professional fund manager

3. The participants in a CIS merely has a participatory interest in the scheme and they are not members of any company in which their funds are invested
4. They do not enjoy membership rights of a company
5. Participants in a CIS are designated as unit holders

III. Types of Collective Investment Schemes

1. Unit Trust Scheme
2. Open-Ended Investment Scheme
3. Real Estate Investment Scheme
4. Investment Trust Scheme
5. Co-Operative/Community Savings Scheme
6. Ethical Mutual Investment/Investment Trust Fund
7. And other type designated as collective investment scheme in the Gazette

See ***Section 154 of ISA; Rule 41 SEC Rules 2011*****.**

A. Unit Trust Scheme

1. Concept

This is an arrangement made for the purpose of providing facilities for participation of the public as beneficiaries under a trust, in profits or income arising from acquisition, management or disposal of securities or any other property – ***Sections 152 & 315 ISA*****.**

It is usually administered as a Limited Liability Company (private or public) approved by SEC with the main object to pool resources of small savers in order to build a portfolio of securities to earn income and capital gains for the investors (unit holders) and managed by Fund/Portfolio Managers. A Trustee is also appointed whose responsibility is to register and hold investments in trust for the unit holders and to ensure that the terms of the trust as contained in the Trust Deed executed with the Fund Managers are strictly observed. Example of a Unit Trust Scheme is The UBA Money Market Fund by the UBA Asset Management Fund.

2. Essential Elements of a Unit Trust Scheme

(a) The Fund: The fund is pooled by all the investors

(b) Units: The pooled funds are divided into units of the participatory interest.

(c) Unit Holder: The unit holders are the participants in the scheme who are entitled to a pro rata share of interests or other income of the securities comprised in the units.

(d) Fund Manager: The scheme is managed by Fund Manager who uses the proceeds of the sale of trust units to invest in other securities in accordance with the policies and objectives of the trust scheme.

(e) Trustee: A Trustee registers and hold investments in trust for the unit holders and to ensure that the terms of the trust are strictly observed by the Fund managers. It also makes funds available to the fund manager.

(f) Trust Deed: A trust deed is executed between the trustees and the Fund manager for regulating the operation of the scheme. By virtue of ***Section 162 (1) ISA***, the manager, Trustee or custodian has no unilateral power to alter the trust deed any time without prior approval of the SEC.

(g) Limited Liability Company: A unit trust scheme is usually administered as a limited liability company (private or public) which is approved and registered by SEC.

Note: Familiarise yourself with the procedure for the Registration of Unit Trust Scheme (UTS).

3. Conditions for the Authorisation/Licencing of a Unit Trust Scheme (Use for Other Schemes)

(a) No Unit Trust Scheme (UTS) can be issued or made available unless it is registered and authorised by SEC - ***Section 160 ISA; Rules 459 & 466 SEC Rules*****.**
(b) The fund manager must be an incorporated company with a profile of dealing with business.
(c) Independence of the fund manager must be evident on the face of the scheme
(d) The share capital of the manager must be in line with the authorised capital as prescribed by SEC.
(e) The Trustee must be an incorporated company with the authorised share capital.
(f) The designation or name of the UTS must not be absurd and must be acceptable to SEC.
(g) There must be evidence of non – interference between the managers and trustees.

B. Investment Trust Fund/Ethical Mutual Investment

This is a socially responsive fund which complies with ethical or moral principles of investment.

It is usually packaged as a specialised unit trust scheme whereby the Unit Holders define in advance what type of securities their money would be invested in.

Example: IBTC Ethical Fund which clearly excluded Alcoholic and Cigarette producing companies from the investments of the trust scheme.

C. Real Estate Investment Trust (REIT)

1. Concept

This is established for the sole purpose of acquiring intermediate or long term interest in real estate or property development and may raise funds from the capital market through the issuance of securities in favour of the pooled investors that contributed to the scheme - ***Section 193 ISA; Rule 508-502 SEC Rules*****.** The scheme does not envisage the allotting of lands to the unit holders. It is merely an interest in real estate.

In real estate investment scheme, resources are pooled together for the purpose of investing in real property. In this like, the fund manager has no discretion whatsoever on the kind of investments to make. He must invest in real property. In REIS, the investor acquires units in the trust through which they shall be entitled to receive periodic distributions of income and participate in any capital appreciation of the property concerned.

2. Purpose of Establishing a Real Estate Scheme

REIS is established for the sole purpose of acquiring intermediate or long term interest in real estate or property development to raise funds from the capital market through the issuance of securities in favour of the pooled investors that contributed to the scheme.

3. Features

(a) Unit
(b) Unit holders
(c) Trustees
(d) Fund managers
(e) Trust deed.
(f) Contribution of money and
(g) Profit

4. Difference with Unit Trust Scheme

Unlike the UTS, here the investors are entitled to retain control over their investment by investing directly in a particular property rather than in a portfolio of investments.

D. Community Savings Scheme

It involves the pooling of small funds from certain members of a group within a community. It needs approval and registration from SEC for statistical purposes.

This scheme is regulated like unit trust but it is however specialized. This is because the investors have already determined, in advance, the kind of securities that they would like to invest their money in. a checklist is provided and the investment in which the funds would be invested is identified. The fund manager cannot invest in anything outside those specified.

A perfect example is the IBTC Ethical Fund, which clearly specifies the kind of sectors, goods and services that can be invested in, excluding alcoholic and cigarette producing companies from the investments of the scheme

E. Open-Ended Investment Scheme

Investment in this like is flexible as it is dependent on what the fund manager or investors want.

IV. Procedure for the Registration of Collective Investment Scheme

By virtue of ***Rule 41(1) of SEC Rules 2010,*** an application in Form SEC 6A is made attached with the following:

1. Copies of draft prospectus
2. Copies of draft Trust Deed
3. The proposed portfolio mix and experts
4. Notarised letters of consent of the prospective parties to the schemes
5. Copies of the CTC of the Memorandum and Articles of the Fund
6. Manager company
7. Copies of the CTC of the Memorandum and Articles of the Trustee company
8. A sworn undertaking to file evidence of maintenance of a separate fund account in a reputable Bank
9. Copies of the CTC of the particulars of Directors (Form CAC 7) of the managers and trustees of the company
10. Evidence that the minimum paid-up capital of the managers and trustees of the CIS complies with the requirements of SEC as follows:
    (a) Fund Manager – N150 million(20 million)
    (b) Trustee company- N300 million (40 million)

V. Differences between a Company and CIS (Exams)

1. Members of a company are called shareholders while the participants in CIS are called unit holders.
2. Shareholders have and exercise membership rights while unit holders do not take decisions in the running of the company.
3. The Board of Directors manage a company while the CIS is managed by the Fund managers, trustees.
4. Shareholders have a definite numbers of shares as against funds invested whereas funds contributed by unit holders' individualism and is not a representative of individual contributions made.
5. Shareholders are entitled to dividends whereas unit holders are entitled to profit pro rata.

VI. Open-Ended Investment Company

This is a company with an authorised share capital whose Articles of Association authorise the acquisition of its own shares structured in such a manner that it provides for the reissuing of different classes of shares to investors, each class of shares representing a separate portfolio

with a distinct investment policy – ***Sections 152 and 315 of ISA*****.** An investor will generally purchase shares in the fund directly from the fund itself rather than from the existing shareholders. This type continually issues and redeems units (shares) after IPO. The price is based on the net asset value, which is the sum of the fund less all liabilities as at the date of acquisition or redemption.

VII. Closed-Ended Scheme

This type does not re-issue nor redeem additional issue of new units (shares). Most times, it is listed and traded on the Stock Exchange and its price is determined by market forces. It issues all the shares it will issue at the outset, with such shares usually being tradable between investors thereafter. A closed-end fund is a publicly traded investment company that raises a fixed amount of capital through an initial public offering (IPO). The fund is then structured, listed and traded like a stock on a stock exchange.

It raises a prescribed amount of capital only once through an IPO by issuing a fixed number of shares, which are purchased by investors in the closed-end fund as stock. Unlike regular stocks, closed-end fund stock represents an interest in a specialised portfolio of securities that is actively managed by an investment advisor and which typically concentrates on a specific industry, geographic market, or sector. The stock prices of a closed-end fund fluctuate according to market forces (supply and demand) as well as the changing values of the securities in the fund's holdings.

VIII. Venture Capital Fund

This is profit seeking scheme by entrepreneurs. Their primary objective is to provide fund to new and growing businesses with the sole aim of long term profit. It is usually an initial stage of financing new and developing companies seeking to develop quickly. Institutional investors, affluent individuals etc. are sources of the fund. The risk of return under the scheme is high.

IX. Specialised Fund

This is a mutual fund that invest in securities of a particular sector, industry or geographical location. This kind is notable for high risks and returns when compared to other funds due to lack of diversification of the portfolio of investment.

ROLE OF SOLICITOR IN PUBLIC OFFER OF SECURITIES

1. Ensuring the company is a public company. If it is a private company, the solicitor must ensure the proper procedures is followed for conversion from private to public company.
2. Ensure that the shares to be issued are within the nominal share capital of the company.
3. Ensure that all requirements of the Regulatory bodies are duly complied with.
4. Make sure the shares to be issued are registered with the SEC.
5. Prepare the appropriate prospectus.
6. Ensure that the Prospectus makes all the required disclosures.
7. Getting all written consents, including his own and that of other experts that may be mentioned in the Prospectus.
8. Ensuring that the Prospectus carry the signature of all directors named in the Prospectus as directors.
9. Register the prospectus.
10. Make sure there are no untrue or misleading statements in the prospectus.
11. Advising on the opening of subscription lists before any allotment.
12. Seeking the initial and final approval of SEC and the Stock Exchange to the issue.
13. Ensuring that the issue conforms to all necessary laws and regulations.

See ***Rule 180 SEC Rules 2013***

(Week 17)

CORPORATE RESTRUCTURING I: INTERNAL RESTRUCTURING (EXAMS)

INTRODUCTION

I. Concept

There are times when the liabilities of a company are in excess of their assets, thus the need to restructure or re-organize. This is known as corporate restructuring. Corporate restructuring options can either be internal or external or a combination of both. The option to adopt is usually a product of business decisions and legal exigencies. Before any company can undergo external restructuring, such company must have done some internal restructuring for instance, Oceanic Bank before merging with Ecobank had first reduce its share capital which is a means of internal re-organization. Also, Intercontinental Bank had first converted from public company to a private company before merging with Access Bank. Thus in practice, there is no wall dividing them especially when it will end in external re-organization.

II. Regulatory Framework of Re-Organization/Restructuring

The regulatory laws are:

1. Companies and Allied Matters Act
2. Federal High Court Act
3. Investment and Securities Act
4. Constitution of the Federal Republic of Nigeria 1999 as amended
5. Securities and Exchange Commission Rules

The regulatory bodies are:

1. Corporate Affairs Commission
2. Securities and Exchange Commission
3. Federal High Court
4. Nigerian Stock Exchange

III. Corporate Restructuring Options

A. Internal Corporate Restructuring

Internal corporate restructuring includes:

1. Arrangement and compromise
2. Arrangement on sale
3. Management buy-out
4. Reduction in share-capital
5. Share reconstruction/consolidation which could include:
   (a) Consolidation and subdivision of shares into larger amounts
   (b) Subdivision of shares into smaller amounts
   (c) Conversion of stocks into shares
   (d) Conversion of shares into stocks
   (e) Cancellation of unissued shares
   (f) Conversion of debt into equity

B. External Corporate Restructuring

External corporate restructuring includes

1. Merger and acquisition
2. Take over
3. Purchase and assumption (agreement)
4. Management Buy In
5. Cherry picking
6. Restructuring of a group of companies

IV. Rationale for Internal Restructuring

1. To survive economic hardship/financial trauma without losing corporate identity
2. To eliminate superfluous shares/securities no longer represented by a company's assets through negotiation with company's creditors to accept money's worth.
3. To reduce likelihood of fraud

Note: When is internal restructuring used - When a company has a large debt profile and the company desires that it should not be wound up.

V. Markers for Determining Best Internal Restructuring Options to Adopt

1. Determining indebtedness of creditors and preference shareholders and the company does not want to be wound up - arrangement and compromise.
2. Solvent company selling whole or part of assets (voluntary winding up)-arrangement on sale.
3. Bloated shares - reduction of share capital (issued shares).
4. Directors/employees intervention - buyout of controlling shares.
5. Increase of share capital (raising money at capital market to settle debts)
6. Share reconstruction – Section 100 - this will enable them raise value of shares and raise more capital if it wants to target plenty participants.
7. If shares are unissued-cancellation of Section 100(1)(d)

ARRANGEMENT AND COMPROMISE

I. Concept

Arrangement is defined as any change in rights or liabilities of members, debentures holders or creditor of a company or any class of them. See ***Section 537 CAMA***. Compromise is essentially an arrangement by a company with its creditors and/or members or a class of them, to accept less than they are actually entitled to in full and final satisfaction of the obligations which the company owes to them. That is, it involves a business negotiation whereby the company seeks a variation or relinquishment of its obligations to the creditors/debenture holders or shareholders.

Arrangement and compromise must always be with the sanction of the court (FHC). See ***Sneath v. Valley Gold Ltd***. The scheme of arrangement and compromise must be fair and reasonable. In ***Re NTU Development Trust Ltd***, the members of a limited liability company were to give up their rights and get nothing in return. The court refused to sanction arrangement and compromise because it was not beneficial to both parties.

When the scheme of arrangement and compromise is sanctioned by the court as being fair, reasonable and equitable, it becomes binding. It must be noted that there must be a compromise in every arrangement.

II. Examples of Arrangements and Compromise

Examples of arrangements and compromise are:

1. **Where the arrangement is with members**, it could be:
   (a) Compelling the shareholders to contribute further capital
   (b) Agreement with preference shareholders to convert their preference shares into ordinary shares
   (c) Agreement with preference shareholders to cancel or reduce their dividend or right to dividend in exchange for an agreement with the ordinary shareholders to surrender part of their shares to the preference shareholders, who have agreed to accept ordinary shares in lieu of dividend which is cumulative in arrears.
2. **Where the arrangement is with debenture holders (creditors)**, it could be:
   (a) Proposing conversion of convertible debentures to shares under section 172 or taking part shares and part cash in satisfaction of their debts. Some sort of debt-equity conversion or swap. Debt Equity Swap is a mode whereby the company

negotiates with its creditors to propose a relinquishment of their security, or to undertake to pay them off prior to the reconstruction or convince them to take shares or part shares or part cash in satisfaction of their debts. This can be otherwise called convertible debenture in form of debt equity swap.

(b) Asking debenture holders or creditors to relinquish their security or to permit the creation of a prior or pari passu charge, or undertake to pay them off prior to the reconstruction.

3. **Conversion from public company to private company**.
4. **Reduction of share capital**: Note the three ways by which shares can be reduced – ***Section 106(2) (a)-(c) CAMA***. Note generally the following basic requirements for reduction in share capital:
   (a) The reduction must be authorized by its articles
   (b) A special resolution ¾ must be passed
   (c) Confirmation from the Federal High Court must be obtained – ***Section 106(1) & 107 CAMA***.

   A relevant mode of reducing share capital could be the cancellation of any paid up share capital which is lost or unrepresented by available assets. For instance, a company may have issued N1,000, 000 shares (fully paid up) but its net assets now represents a value of only N750, 000, the company could then reduce its capital to N750,000 to reflect the true value of its assets.

III. Procedure for Arrangement and Compromise (Section 539 & 540 CAMA)

1. **Preparation of Scheme of Arrangement & Compromise:** The Company prepares the scheme of arrangement and/or compromise either between company and members or company and creditor. If the company is in liquidation, then the scheme is prepared by the liquidator.
2. **Application to the FHC for a Court Ordered Meeting:** Application is made to the FHC, in a summary way, by the company, members or creditor or liquidator if the company is being wound up for a court ordered meeting of the creditors, members or a class of the foregoing – ***Section 539(1) CAMA***.
3. **Issuance & Service of Notice of the Court Ordered Meeting:** A notice of the court ordered meeting is issued and served. In accordance with ***Section 540(1)(a) CAMA***, the notice shall be accompanied by a statement explaining the general effect of the arrangement and compromise and the material interests of the directors and debenture holders
4. **Approval of Scheme of Arrangement & Compromise:** At the meeting for which notice was given, the scheme of arrangement and compromise must be approved by a vote of the majority representing not less than three-quarter (¾) in value of the shares of members or interests of creditors or classes thereof being present and voting in person or by proxy.
5. **Sending Approved Report to the FHC:** Where it is so approved, report of the approval shall be sent back to court (FHC). See ***Section 539(2) CAMA***. Where it is not so approved, the court will not sanction it. See ***Re Savoy Hotel Ltd.***
6. **Referral of the Scheme by the FHC to the SEC for Investigation:** The court will refer the scheme to SEC. SEC is to appoint one or more inspectors to investigate the fairness of the said scheme of compromise or arrangement and to make a report back to the court.
7. **Sanction of Scheme by the Court upon Satisfaction as to its Fairness:** If court is satisfied as to the fairness of the scheme, it shall sanction same. Upon the sanctioning of the scheme as fair by the court, it shall become binding on the members, creditors or classes thereof so concerned or liquidator or contributory. See ***Section 539(3) CAMA; Re Lipton (Nig) Ltd.*** The conditions for sanctioning by the court are:

(a) All statutory requirements have been met
(b) Arrangement is reasonable and can be easily approved by any man of business

8. **Delivery of CTC of the Court Order for Registration:** A CTC of the court order sanctioning the scheme shall be delivered to CAC for registration. The order shall not become effective unless and until a CTC of it is delivered to CAC for registration. See ***Section 539(4) CAMA***.
9. **Annexing Copy of Court Order to the Company Memo:** A copy of the court order must be annexed to every copy of the Memo of the company issued after the order has been made. See ***Section 539(4) CAMA***.

IV. Documents Required for Arrangement and Compromise

Documents required are:

1. Proposed scheme of arrangement and compromise
2. Originating summons and affidavit
3. Order of court convening general meeting
4. Notice of court ordered meeting
5. Special resolution approving the scheme
6. Report of inspectors appointed by SEC
7. Explanatory note to explain the scheme of arrangement and compromise and the rationale behind it - ***Section 540 CAMA***
8. Order of court sanctioning the scheme

ARRANGEMENT ON/UNDER SALE
(Section 538 CAMA)

I. Concept

This involves the members of the company resolving by special resolution (¾) that the company be subjected to members voluntary winding up or be wound up and a liquidator be appointed and authorized to sell the whole or part of the company's undertaking or assets to another corporate body known as the transferee company, in consideration for cash, fully paid shares or debentures in the transferee company which would then be distributed in species amongst the members of the company in accordance with their rights in liquidation. See ***Section 538(1) CAMA***.

Note that the transferee company need not be incorporated under CAMA. See ***Section 538(1) CAMA; Re Irrigation Company of Finance, ex parte FOX***. Note also that if the company is a private company without alien participation, the price at which it or its shares would be sold would be mutually agreed on by the members. If the company is a public company or a private company with alien participation, then it would be referred to SEC and SEC would determine the price. See ***Section 538(4) CAMA***.

II. Conditions for Special Resolution to Voluntarily Wind up the Company to become Binding on the Company & Its Members

By ***Section 538(2) CAMA***, the special resolution to voluntarily wind up the company is binding on the company and all its members. Provided that:

1. If within one year of passing the special resolution, a member obtains an order from the FHC under ***Sections 310 – 312 CAMA***, dealing with or granting relief on the ground that the affairs of the company have been conducted in an unfairly prejudicial or oppressive manner; or an order for the winding up of the company under a creditor's voluntary winding up, then before the arrangement on/under sale can be valid, it must be sanctioned by the FHC. See ***Section 538(2) (a) CAMA***.
2. If any member, within 30 days of passing the special resolution, deposits a dissent in writing, and addressed to the liquidator, at the registered or head office of the company, the liquidator must either abstain from carrying the resolution into effect or purchase the

shares of the dissenting member at a price to be determined in accordance with ***Section 538(4) CAMA***.

From the foregoing, it is clear that an arrangement on/under the sale can be frustrated in two instances identified above. This is because the special resolution is ordinarily binding. However, it would not be binding in the first instance above unless it is sanctioned by the court; and in the second instance, unless the shares of the dissenting member is purchased by the liquidator.

III. Difference & Similarities between the Arrangement on/under Sale (Section 538 CAMA) & Arrangement and Compromise (Section 539 CAMA)

A. Differences

1. Under an arrangement on sale, there is no court ordered meeting; while in arrangement and compromise there must be a court ordered meeting.
2. Under arrangement and compromise, the court would refer the arrangement to SEC and SEC would appoint inspectors; but no such requirements for arrangement on sale.
3. Under arrangement on sale, the company is to be wound up and liquidator appointed; but there is no such requirement for arrangement and compromise.
4. Under arrangement on sale, there is a transferee company; while there is no such requirement under arrangement and compromise.
5. Under arrangement on sale, there is no requirement of the sanction of the court unless where an order is obtained under section 310-312 or for creditor's voluntary winding up under section 538(2) (a) CAMA. However, under arrangement and compromise, sanction of the court is a mandatory requirement as the scheme of arrangement and compromise is ineffective until it is sanctioned by the court.

B. Similarities

However, under both arrangement on sale and arrangement and compromise, there is provision for minority protection as under section 538, a dissenting member can obtain an order under section 310-312 CAMA. While under section 539, the court will only sanction the scheme where the court is satisfied of its fairness.

IV. Difference between Dissolution in Arrangement on Sale and Dissolution in Winding up

It must be noted that the main difference between the liquidation process in arrangement on sale as a method of corporate restructuring and the liquidation process in the winding up and dissolution of the company lies in the fact that the winding up and liquidation embarked on for restructuring usually results in the resurrection of the company in another form, either as a brand new company, or providing funds for another restructuring scheme. In fact the members of the arranged company acquire shares or debentures in the transferee company and continue to participate in business as such shareholders; while the liquidation process at winding up or dissolution of the company brings the company to a permanent end since its assets are distributed to those entitled according to the rules of distribution of assets of a dissolved company.

V. Procedure for Arrangement on Sale

1. **Board Resolution Proposing the Scheme:** Board resolution proposing the scheme of arrangement on sale, and directing the company secretary to convene a general meeting.
2. **Notice of General Meeting:** Company secretary sends out a 21 days' notice of general meeting, usually EGM.
3. **Special Resolution authorizing Winding up and Appointment of Liquidator:** At the meeting for which notice was given, a special resolution is passed authorizing the following:
   (a) The voluntary winding up of the company; and

(b) The appointment of a liquidator with power to sell the company or any of its undertakings or assets and reinvest the proceeds in the new entity pursuant to ***Section 457(b) & 538 CAMA***.

4. **Directors Declaration of Solvency as Basis of Voluntary Winding up:** The directors will make a declaration of solvency as the basis of the members' voluntary winding up. This declaration must be made within the five (5) weeks immediately preceding the date of the passing of the special resolution for voluntary winding up and must be delivered to CAC for registration before the date of the special resolution. The declaration must embody a statement of the assets and liabilities of the company as at the latest practicable date before the making of the declaration. The declaration must also state that the directors are of the opinion that the company will be able to pay up its debts in Full within 12months from the commencement of the winding up. See ***Section 462 CAMA***.
5. **Meeting of the Shareholders & Creditors to Consider & Approve the Proposed Scheme:** The liquidator will convene a meeting of the shareholders and/or of the creditors for the purpose of considering and approving the proposed scheme of arrangement on sale.
6. **Purchase of the Shares or Interest of a Dissenting Member:** A dissenting member or creditor may have his shares or interest purchased at a price to be determined in accordance with ***Section 538(4) CAMA***.
7. **Final Dissolution Meeting to Consider Account of the Winding up:** The liquidator will convene a final dissolution meeting where the accounts of the entire winding up exercise and his report thereon would be considered by the members. See ***Section 478 CAMA***.

MANAGEMENT BUY-OUT
(Rule 449 SEC Consolidated Rules, 2013)
I. Concept

MBO is the acquisition, by the management team of a company, of controlling shares of that company or its subsidiaries with or without third party financing. See ***Rule 449(a) SEC Rules, 2013***. The management team might consist of the directors and the officers of the company.

II. Application for the Approval of MBO

By ***Rule 449(b) SEC Rules 2013***, the application for the approval of a MBO shall filed by the Management team making the acquisition, accompanied by the following documents:

1. A copy of the special resolution of the shareholders of the company approving the MBO
2. A copy of the resolution of the management team to undertake the MBO
3. A copy of the Certificate of Incorporation of the company
4. A copy of the MEMART of the company
5. Two copies of the Prospectus of the company
6. A copy of a the Sale Agreement between the company and the Management team
7. Trust deed, where applicable
8. Any other document required by SEC from time to time

See ***Rule 449(b) SEC Consolidated Rules, 2013***.

INCREASE AND REDUCTION OF SHARE CAPITAL
I. Concept

A company facing financial difficulty may opt to increase its share capital and then place it on the capital market for purchase - ***Section 102 CAMA; Rule 29 Companies Regulations 2012***. On the other hand, a company which is financially buoyant may opt to reduce its share capital realised for other investment - ***Section 106 CAMA; Regulation 30 Companies Regulations 2012***.

II. Reduction in Share Capital

A. Concept

Share capital reduction (***Section 106 CAMA***): A company may need to reduce its share capital if the assets of the company is no longer represented by a portion of its shares. The shares become superfluous i.e. not proportional to the assets of the company. Thus reduce the share capital as to what is fully represented.

B. Procedure

1. Special resolution at a general meeting of a company but for private companies, if all members entitled to attend and vote unanimously by written resolution.
2. Approval of reduction by the Court.
3. Copy of resolution, order of court and memo and article as altered will be filed with CAC.
4. Every memo will now bear indications that the share capital has been reduced.

C. Documents

1. Board Resolution;
2. Proposed Scheme of Reduction;
3. Notice of General Meeting;
4. Special Resolution
5. Court Order;
6. Extracts of Minutes Approving Scheme;
7. CAC 2.4;
8. Certificate of Registration of Court Order

III. Increase in Share Capital

A. Concept

Increase of share capital (***Section 102 CAMA***): discrepancy between Company Regulations 2012 (guidelines released by CAC seems to suggest that the resolution should be special) but in CAMA, it states ordinary resolution. Law is superior to Internal Guidelines released by CAC. Thus, the resolution is by ordinary resolution. Injection of more funds to the capital base of the company so the company can do more business and make more profit.

B. Procedure

1. Convening a meeting of the company by the company secretary.
2. Ordinary resolution is passed at the meeting.
3. File Form CAC 2.4 for alteration of share capital (could be increase or reduction).

C. Documents

1. Board & Ordinary Resolution;
2. Notice of General Meeting;
3. Altered Memo & Articles;
4. CAC 2A;
5. CAC 2.4;
6. Certificate of Increase.

SHARE RECONSTRUCTION AND RE-CONSOLIDATION
(Section 100 CAMA)

I. Concept

Shares can be reconstructed or consolidated, added together and subdivided into several numbers than they originally were or cancelled entirely. Issued but unpaid shares can be cancelled. To dissolve the shares into one whole lump and subdivide the shares into stocks or shares of larger numbers that it was or subdivide into fewer numbers of shares provided that in either case, the amount paid by the shareholders is not tampered with (e.g. 1million shares at N5 into 5million at N1). Thus the total amount represented by all the shares must be unchanged.

II. Documents

1. Form CAC 2A;
2. Scheme of Reconstruction (authorised share capital and ratio for reconstruction).
3. Notice to CAC within 1 month

(Week 18)

CORPORATE RESTRUCTURING II: EXTERNAL RESTRUCTURING OPTIONS (EXAMS)

INTRODUCTION

I. Options in External Corporate Restructuring

1. Mergers
2. Acquisition
3. Take over
4. Management Buy-In
5. Purchase and Assumption
6. Cherry picking
7. External restructuring of a group of companies and related party transactions.

II. Scope of the Regulations on External Restructuring

A. Applicability

The provisions of the regulation are only applicable to:

1. Public or private companies;
2. Every merger, acquisition or combination between or among companies, involving acquisitions of shares or assets of another company.
3. Partnerships;
4. Any Merger, Takeover, Acquisition or external restructuring undertaken by any Federal Government owned Agency pursuant to statutory powers vested in it - ***Rule 422 SEC Rules; Section 118 Investment & Securities Act.***

B. Exempted Bodies

The provisions of the regulation shall not apply to:

1. Holding companies acquiring shares solely for the purpose of investment
2. In a small merger, the merging entities shall not be required to notify the Commission of that merger but shall be required to inform the Commission at the conclusion of the merger.
3. An acquisition in a private/ unquoted public companies with assets or turnover below N1 billion (small merger)

III. Regulatory Bodies

The following regulatory bodies are involved in merger and acquisitions

1. Securities and Exchange Commission (SEC)
2. Central Bank of Nigeria (CBN)
3. Federal High Court of Nigeria (FHC)
4. Nigeria Stock Exchange (NSE)
5. Corporate Affairs Commission (CAC)
6. Nigeria Deposit Insurance Corporation (NDIC)
7. Asset Management Corporation of Nigeria (AMCON)

IV. Legal Framework for Mergers

The laws and Rules guiding merger are:

1. Investment and Securities Act 2007
2. CBN Act
3. Banks and Other Financial Institutions Act 1991 (as amended)
4. Federal High Court Act
5. Federal High Court Rules
6. NDIC Act – for banks
7. AMCON Act
8. SEC (Consolidated) Rules 2013

ROLES OF INSTITUTIONAL AND REGULATORY AGENCIES IN MERGERS AND ACQUISITIONS

I. Securities Exchange Commission

1. Apex regulator of the capital market
2. Reviews and approves every merger scheme
3. Grants pre-merger approval in principle
4. Grants authority to proceed in a takeover bid
5. Investigate every intermediate or large merger
6. Revoke an approved merger.
7. Order the break-up of a company
8. Safeguards market competition

II. Corporate Affairs Commission

1. Filing and certification of Corporate resolutions and documents to be filed with SEC such as certification of MEMART and certificate of incorporation
2. Filing of sanctions
3. De-registration of the dissolved merging companies on the completion of the merger
4. Registration of the emerging company (if the emerging company will use a new name, conduct name search etc.)
5. Registers the merger notice and approval documents pursuant to Regulations 53 of Companies Regulations.

III. Federal High Court

1. Makes order for a court-ordered meeting of the merging companies to be convened
2. Sanctions the merger, upon which it becomes binding
3. Deals with objections of dissenting members

See ***Re Dorman Long & Co., Re South Durham Steel & Iron Ltd; Re John Holt Investment Ltd Scheme of Arrangement***; and ***Re Lipton Nigeria Ltd***.

IV. Nigerian Stock Exchange

Its role is limited to re-organization involving quoted public companies. When public quoted companies are re-organizing, it would need to comply with relevant requirements of NSE. Specifically:

1. Self-regulatory organization
2. Regulates listed or quoted public companies
3. Regulates secondary market operations
4. Receives notification of merger from listed or quoted public companies
5. Admits "new shares" to Daily Official List and de-lists "scheme shares" of dissolved companies.

V. Central Bank of Nigeria and NDIC

These bodies only get involved in mergers and acquisitions when the merger or acquisition or other business combination involves banks. Any merger scheme involving a bank in Nigeria must get the prior approval of the CBN before SEC can grant its formal approval - ***Section 7 BOFIA***.

MERGERS

I. Meaning

By ***Section 119(1) ISA***, a merger means any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies or corporate bodies. That is, a merger involves the fusion of two or more corporate entities into one, usually on equal terms. See also the definition of merger in ***Rule 421 Sec Rules***. The emerging entity could assume an entirely new name or retain the identity of one of the merging companies.

NOTE: Check the ***Federal Competition & Consumer Protection Act 2018*** on the new regulations made on mergers. Most importantly is that the only regulatory body on merger is now the Federal Competition & Consumer Protection Commission. Where there is conflict between FCCPA and any other regulatory law on merger, the FCCPA shall prevail.

II. Forms of Mergers

Mergers are classified into three forms namely horizontal, vertical and conglomerate mergers.

1. **Horizontal Mergers**: ***Rule 421(1) SEC Rules*** defines a horizontal merger as a merger involving direct competitors. Thus, a horizontal merger is a combination or fusion of companies in the same line of business. That is, it is merger of competitors. This type of merger may give rise to monopoly by the emerging company as it lessens or eliminates competition. Thus, a merger of two or more banks is a horizontal merger. Merger between MTN, GLO, AIRTEL and ETISALAT.
2. **Vertical Mergers**: ***Rule 421(1) SEC Rules*** defines a vertical merger as a merger between companies in a non-competitive relationship. That is, a vertical merger is a combination or fusion of two or more companies which are engaged in complimentary business activities. For example, a merger between a company that supplies raw materials and a company that manufactures the finished goods.
3. **Conglomerate mergers**: A conglomerate merger is a combination or fusion of two or more companies that engage in completely unrelated aspects of business. See ***Rule 421(1) SEC Rules***. For instance, a merger between a food processing company and an insurance brokerage firm. The main objective of this kind of merger is to diversify risk and maximize returns.

III. Reasons for Merger

The basic reasons for merger are usually related to risks and returns and they include:

1. Risk diversification to guard against possible failure or to maximize returns
2. Economies of scale to enhance and expand productive capacity
3. Stock exchange quotation. That is, to acquire a status which would qualify it to be listed and quoted on the stock exchange
4. Corporate leverage to increase its debt-equity ratio
5. Technological drive. That is, to gain technological advantages
6. Management expertise
7. Desire for growth and increased market share
8. To survive regulatory requirements for consolidation as was the case in the CBN 25billion bank consolidation in 2005.

IV. Packaging a Merger

The effective packaging of a merger transaction would involve certain preliminary documentation involving the execution of certain agreements such as MOU (usually subject to contract), exclusivity agreement, confidentiality agreement, and conducting due diligence before finally preparing and executing the merger agreement. All these are done as protective and precautionary measures to ensure the smooth exercise of the complex nature of a merger.

A. Exclusivity Agreements

Where this agreement is executed, the merging companies agree not to sell their assets to anyone else during a period of time set by the parties. It is mostly relevant in the purchase of public companies.

B. Memorandum of Understanding

When a merger is contemplated and the parties reach an agreement in principle, then a MOU becomes necessary. The MOU usually provides for the terms of the proposed transaction and the conducting of due diligence before the parties execute the legally binding merger agreement. Thus, the MOU is usually not binding and is marked “subject to contract”. A MOU

may not be necessary where the merging companies where previously known to each other by reason of existing relationship such as a holding company and its subsidiary.

C. Confidentiality Agreement

The parties may also execute a confidentiality agreement to prevent either of the merging companies from disclosing confidential information about the others, except in circumstances permitted by law. The merging companies may also execute representation and warranties in order to provide for the indemnification of any party against untrue or false statements upon which that other party has acted, and as a result of which he has suffered loss or damage. Parties can seek further assurances by way of executing contracts of indemnity, guarantees or performance bonds.

D. Merger Agreement

This is usually executed after due diligence has been conducted. It is final and legally binding. It may provide mechanism for the adjustment of the exchange ratio in the event that at the post-merger stage, any of the representations made by any of the merging companies is untrue and affects the agreed valuation and exchange ratio. The principal provision/contents of a Merger Agreement includes:

1. Introduction
2. Parties and the date
3. Recitals
4. Basic terms of the transaction
5. Representations and warranties
6. Corporate authority
7. Consents and authorization
8. Financial statements
9. Title to properties
10. Litigations
11. Employee matters
12. Licenses
13. Compensation plans for employees
14. Full and complete disclosure
15. Covenants and undertakings
16. Notification of default or any adverse developments
17. Indemnification and insurance
18. Conduct of sellers business prior to closing
19. Conduct of purchaser's business prior to closing
20. Conditions to closing
21. Amendments
22. Termination and effect of termination
23. Extension
24. Miscellaneous
25. Definitions.

E. Due Diligence

1. **Concept:** This is an investigation of the target company and its business by the acquiring company before the consummation of the merger. Thus, before any binding merger agreement or transfer or final purchase agreement is made, there is a need to investigate and be satisfied with the accuracy of the information supplied by the target company to the acquiring company so that the acquisition is not made on faulty assumptions or wrong information. Business prudence also requires that the target company conducts due diligence on the acquiring company to see if it has the ability to acquire it; and also conduct

an internal due diligence on itself before making representations and warranties in order to avoid making misstatements which may render it liable in future.

2. **Types of Due Diligence:** Several professionals are involved in due diligence. They could include lawyers, accountants, estate valuers, tax consultants, insurance brokers etc. There are two major types of due diligence. They are legal due diligence and financial due diligence.
   (a) Legal Due Diligence: this covers a myriad of issues which can be subsumed under the following heads: ownership of the business, business profile, employees, intellectual property and technology issues, litigation analysis, and corporate searches.
      i. Ownership of the Business: it is necessary to confirm that the target company was duly incorporated and that it continues to exist. This will involve the verification of the authenticity of the certificate of incorporation and any other applicable regulatory permits and licenses as well as changes to any of these. The MEMART, board resolutions and resolutions of the general meetings must also be scrutinized. Attention must be paid to the authorized share capital and the classes of shares; issued and paid up share capital, including their classes; the shareholders of the company and the classes of shares they hold; directors and secretary of the company; statutory books, shareholders agreements and other similar agreements which would require consent before a merger or acquisition; details of other corporate bodies in which the company owns shares or other securities; validation of title to property and the perfection of same; and whether or not they are free from encumbrances and charges; the solvency of the company etc.
      ii. Business Profile: legal due diligence on business profile should reveal the customers of the company and the contractual terms entered into by the company; any disputes arising from contracts or other transactions; Description of the nature of operations carried on by the company etc.
      iii. Employees: the legal due diligence should consider the employees of the merging companies, their contracts of employment; collective agreements; employee share option schemes; pension and retirement schemes which may all affect the finances of the company.
      iv. Intellectual Property and Technology Issues: The legal due diligence should cover technological issues and regulatory regimes relating to technology transfer; intellectual property assets and trade secrets.
      v. Litigation Analysis: the validity of and estimated liability arising from existing and anticipated lawsuits and claims must be considered. Also, insurance policies, applicable company law and tort rules relating to successor liability for contractual and tortious liability of the target company must be evaluated.
      vi. Corporate Searches: as part of the legal due diligence, it would be necessary to conduct searches at the lands registry, CAC, SEC, NSE, SON, FBIR, NAFDAC and other applicable regulatory agencies to confirm the company's compliance with relevant laws and regulatory requirements.
   (b) Financial Due Diligence: the financial due diligence should cover the following issues:
      i. Accounting and financial control systems of the company
      ii. A comparison of the company's historic trading results and its current trading position
      iii. Tax liabilities of the company and the tax implication of the proposed merger
      iv. Value of the assets and liabilities to be acquired
      v. Product development and competitors

vi. Capital investments, profitability, margin/price earnings ratio, review of forecast of trading results
vii. Credit worthiness

The best way to conduct a financial due diligence is to conduct a detailed credit check and audit of the company.

V. Categories (Threshold) of Mergers

A. Concept

Mergers are categorized into small, intermediate and large. The categorization of mergers is done by SEC and is based on the threshold of combined assets or annual turnover or a combination of both assets and turnover in Nigeria. See ***Section 120(1) (a) ISA*** which provides that SEC shall prescribe a lower and an upper threshold of combined annual turnover or assets, or a lower and an upper threshold of combinations of turnover and assets in Nigeria, in general or in relation to specific industries, for purposes of determining categories of mergers. See also ***Rule 427(2) SEC Rules***. By ***Section 120(1) (b) ISA***, SEC is also to prescribe a method for the calculation of annual turnover or assets to be applied in relation to each of the prescribed thresholds.

B. Categories

1. **Small Merger:** By ***Section 120(2) ISA***, a small merger is a merger or proposed merger in which the combined assets or annual turnovers in Nigeria of the merging companies is at a value below below the lower threshold, which is currently below N1, 000, 000, 000 (One billion). See ***Section 120(4) ISA*** and ***Rule 427(1) SEC Rules***.
2. **Intermediate Merger:** By Section 120(2) ISA, an intermediate merger is a merger or proposed merger in which the combined assets or annual turnovers in Nigeria of the merging companies is at a value between the lower threshold and the upper threshold, which is currently between N1, 000, 000, 000 (One billion) and N5, 000, 000, 000 (Five billion). See ***Section 120(4) ISA*** and ***Rule 427(1) SEC Rules***.
3. **Large Merger:** By ***Section 120(2) ISA***, a large merger is a merger or proposed merger which the combined assets or annual turnovers in Nigeria of the merging companies is at a value above the upper threshold, which is currently above N5, 000, 000, 000 (Five billion). See ***Section 120(4) ISA*** and ***Rule 427(1) SEC Rules***.

Note: the FCCPA 2018 has collapsed the categories of mergers to Small and Large mergers with the threshold to be determined time to time by the Commission.

VI. Procedure for obtaining approvals for Mergers

A. Basic Procedure for Obtaining Approval

The basic procedures for obtaining approval for mergers is contained under ***Rule 425 SEC Rules*** which provides that companies proposing a merger, acquisition or other forms of external restructuring shall:

1. File with the Commission, a merger notification
2. File an application in the Federal High Court seeking an order to convene a court ordered meeting;
3. Following the resolution of the shareholders at the court ordered meeting, the applicants shall file with the Commission a formal application for approval of the merger.
4. Comply with post-approval requirements.

B. Pre-Merger Notification (Pre-Merger Notice)

1. **Concept:** It must be noted that by ***Section 118 ISA*** and ***Rule 423 SEC Rules***, every merger, acquisition and external restructuring between or among companies shall be subject to the prior review and approval of SEC. It is for this reason that intermediate and large mergers must receive formal approval from SEC and pre-merger notice must be given to SEC. After pre-merger notice is given, SEC grants approval in principle, or may refuse it on grounds of competition law. Note that although small mergers do not require

pre-merger notification, if SEC demands notification or where the merging companies voluntary notify SEC, they will file the same documents indicated above. Pre-merger notification is a mandatory requirement for intermediate and large mergers.

2. **Procedure for Filing Pre-Merger Notice with SEC:** The procedure of filing the pre-merger notice with SEC is provided by ***Rule 426(1) SEC Rules*** to the effect that the pre-merger notification shall be filed by submitting to SEC, a Report which contains the following documents:
   (a) Completed merger notification form
   (b) A joint letter of intent signed by the merging companies
   (c) Extract of board resolutions of the merging companies authorizing the merger, duly certified by a director and the company secretary.
   (d) A detailed information memorandum of the proposed merger, including all the background studies relating to the merger and justification for it.
   (e) A copy of letter appointing financial adviser(s)
   (f) Certificates of incorporation of the merging companies certified by the company secretaries and MEMART of the merging companies certified by CAC
   (g) Particulars of the directors and allotment of shares of the merging companies certified by CAC
   (h) A letter of no objection from the companies' regulator where applicable, for instance if banks are merging, a letter from CBN
   (i) Audited accounts of the merging companies for the preceding five (5) years or the number of years any of the companies has been in existence if less than five (5) years.
   (j) Evidence of payment of filing fee of N50, 000 per merging company. (This fee is only required for intermediate and large mergers).

C. Requirements for Formal Approval

1. **Filing of Formal Application with SEC:** ***Rule 428(2) SEC Rules*** provides that upon receipt of a favourable response to the pre-merger notification from SEC, a formal application for the formal approval of the proposed merger or any other form of business combination shall be filed with SEC accompanied by certain documents. They are:
   (a) Formal application for approval of the proposed merger
   (b) Two hard copies and a soft copy of the scheme document containing:
      i. Copies of separate letters from the chairmen of the merging companies addressed to their respective shareholders.
      ii. Explanatory statement to the shareholders by the joint financial advisers addressing issues like the proposals, reasons for the proposals, plans for employees, capital gains tax, the synergies/benefits, approved status, meetings and voting rights etc.

   The following ones are provided by ***Rule 429 SEC Rules****:*
   (c) Extract of the minutes of the court ordered meeting of the merging entities in support of the merger duly certified by a director and the company secretary. The extract shall capture the consideration as approved by majority shareholders, representing not less than three –quarters (3/4) in value of the shares of members being present and voting either in person or by proxy;
   (d) Two (2) copies of the scheme document duly signed by the parties to the merger;
   (e) Evidence of the executed resolutions passed at the separate court – ordered meetings;
   (f) Scrutineers report showing the result of voting and total number of votes casts;
   (g) Stamped Power of Attorney of directors who were absent at the separate court – ordered meetings (where applicable);
   (h) Evidence of clearance letter from the Federal Inland Revenue Services regarding any tax liability (where applicable)

(i) Amended copy of the Memorandum and Articles of Association of the resultant company (where applicable).
(j) CAC form 7 showing particulars of directors;
(k) CAC form showing allotments (for private companies) only;
(l) Evidence of payment of processing fee;
(m) Relevant SEC Form
See ***Rules 428(2) & 429 SEC Rules***.

2. **Information to the FHC by SEC:** By ***Rule 428(5) SEC Rules***, where all the requirements have been fulfilled, SEC shall inform the FHC, by a statement in writing whether the merger is approved, subject to conditions or prohibited.

D. Procedure for Small Merger

The procedure for a small merger are in ***Section 122 ISA*** and it is as follows:

1. **Step One: Pre-Merger Notification (Not compulsory for small mergers)**
   (a) Preparation and approval of the merger scheme/merger proposal by the Boards of Directors of each of the merging companies
   (b) Parties to a small merger are not required to notify SEC, but may voluntarily notify SEC. That is, pre-merger notification is not compulsory except if within 6 months of the implementation of the merger, SEC requires the merging companies to notify it and obtain approval. See ***Section122 (3) ISA***. However, because of provisions of ***Section 118(1) & Section 121(4) ISA***, ***Rule 423 SEC Rules*** and right of SEC to demand notification, it is advisable for parties to give pre-merger notification to SEC. Where notification to SEC is required, parties shall take no further step to implement the merger until the merger is conditionally approved - ***Section 122(4) CAMA***.
   (c) SEC may give an approval in principle and direct the merging companies to apply to court for separate meetings of the merging companies to be ordered (court-ordered meetings). See ***Section 121(4) ISA***
2. **Step Two: Formal Approval**
   (a) At the court ordered meeting ¾ majority of shareholders of each company must vote in favour of the merger. That is, a special resolution must be passed approving the merger scheme. See ***Section 121(5) ISA***
   (b) Upon obtaining special resolution approving the merger, the parties are to notify SEC for formal approval of the merger. SEC is to consider the application for formal approval within 20 working days but SEC may extend the period by a single period not exceeding 40 working days. Where it is so extended, an Extension Certificate to that effect must be issued to the party who notified it of the merger - ***Section 122(5) ISA***.
   (c) Upon consideration, the decision of SEC can be any of the following.
      i. Approval of the merger
      ii. Approval of the merger subject to any conditions
      iii. Prohibition of the merger if it has not been implemented
      iv. If already implemented, a declaration that, that merger is prohibited - ***Section 122(5) ISA***
   (d) If upon the expiration of the 20 working days period for formal approval or any extension granted, SEC has not notified the parties of its decision, the merger shall be deemed to have been approved, subject to revocation by SEC. (this is called deemed approval of small merger). See ***Section 122(11) ISA***.
   (e) SEC shall publish a notice of its decision in the Gazette and issue written reasons for the decision if it prohibits or conditionally approves the merger; or if it is requested to do so by a party to the merger ***Section 122(12) ISA***.

(f) If SEC approves the merger or if it is deemed approved, the parties are to apply to the FHC for the merger to be sanctioned. Upon the order of court sanctioning the merger, the merger becomes binding on the parties. See ***Section 122(6) ISA***.

3. **Step 3: Post-Approval Notifications and Compliances**

(a) After the court order, the merging companies are to satisfy the following post approval requirements provided under ***Section 122(9) ISA*** and ***Rule 430 SEC Rules***:

i. File an office-copy of the court-order sanctioning the scheme with SEC within seven (7) days of the order, for registration. (note that section 122(9) ISA says that each of the merging companies are to file an office copy of the order)

ii. Publish a notice of the court order in the Gazette and in at least one national newspaper as required by Section 122(9) ISA and then file a copy of the newspaper publication of the court order with SEC as required by Rule 430 SEC Rules. Failure to comply attracts fine of N20, 000

iii. File a statement of the actual cost of the scheme

iv. File a notification of the completion or otherwise of the merger within three (3) months of the court's order

v. File summary reports of the merger scheme in respect of the following:

a. Arrangements relating to employees of the acquired company
b. Settlement of shareholders
c. Utilization of monies injected into the company, if any
d. Treatment of dissenting shareholders
e. Submission of gazetted copy of the court's sanction
f. Evidence of allotment of shares
g. Evidence of settlement of severance benefits of employees where applicable
h. Statement of the actual cost of the scheme

(b) Post-merger inspection by SEC within three (3) months after approval to ascertain the level of compliance with the scheme documents. See Rule 431 SEC Rules. The documents to be inspected during the post-merger inspection include:

i. Minutes book of the meetings of board of directors
ii. Original certificate of incorporation of the resultant company, where applicable
iii. Copy of amended MEMART, where applicable
iv. Severance benefits of employees of dissolved companies
v. Final settlement of shareholders
vi. Dispatch of share certificates
vii. Settlement of debts
viii. Report of shareholders' representatives on the merger
ix. Any other document that SEC may require from time to time. See ***Rule 431 SEC Rules***

4. **Step 4: Notification to CAC**

Registration of the notice of merger with CAC in accordance with Regulation 53(1) Companies Regulations. The requirements for registration of notice of merger includes:

(a) Special resolution of each company in the merger scheme
(b) Scheme of merger arrangement duly approved by the SEC
(c) Court order sanctioning the merger
(d) Evidence of publication of court order in Gazette and at least one (1) newspaper
(e) Original certificate of incorporation of each dissolved company for cancellation
(f) Updated annual returns
(g) Updated section 553 filing where applicable
(h) Payment of fees

See ***Regulation 53(1) Companies Regulations, 2012***

It must be noted that by ***Regulation 53(2) Companies Regulations, 2012***, the special resolution approving the merger shall be filed with CAC within fifteen (15) days of its passing. By ***Regulation 53(3) Companies Regulations, 2012*** the notice of the court order sanctioning the scheme shall be filed with the CAC within fifteen (15) days of its making.

E. Intermediate Merger

By ***Section 120(2) ISA***, an Intermediate Merger is a merger or proposed merger with a value between the lower threshold and the upper threshold, which by ***Rule 427(1) SEC Rules*** is currently between N1, 000, 000, 000 (One billion) and N5, 000, 000, 000 (Five billion). See ***Section 120(4) ISA*** and ***Rule 427(1) SEC Rules***. Therefore, an intermediate merger is a merger or proposed merger in which the combined assets or annual turnovers in Nigeria of the merging companies is at a value between N1, 000, 000, 000 (One billion) and N5, 000, 000, 000 (Five billion) or any value which SEC may prescribe from time to time.

The procedures for intermediate mergers are in ***Sections 123, 124, 125 ISA*** and ***Rules 428-430 SEC Rules***. It is as follows:

1. **Step One: Pre-Merger Notification to SEC**
   (a) Preparation and approval of the merger scheme/merger proposal by the Boards of Directors of each of the merging companies
   (b) In intermediate and large mergers, pre-merger notification to SEC is compulsory. Thus, there is pre-merger notice to SEC. See ***Section 123(1) ISA***. You must comply with all the requirements for pre-merger notification including payment of fees of N50, 000.
   (c) Each of the merging companies must give copies of the pre-merger notice to:
      i. Any registered trade union that represents a substantial numbers of its employees; or
      ii. The employees concerned or representatives of employees concerned if there are no such registered trade unions. See ***Section 123(2) ISA; Rule 426 SEC Rules***.
   (d) SEC may investigate the merger or appoint an inspector to investigate any merger and demand for any other document, affidavit in statement or relevant information in respect of the merger. See ***Section 124(1) ISA***
   (e) SEC may grant approval in principle to the proposed merger and direct the merging companies to apply to FHC for court ordered meetings of the merging companies. See ***Rule 425(b) SEC Rules*** which provides that the merging companies shall file an application in FHC seeking an order to convene a court ordered meeting. See also ***Section 121(4) ISA***. Before applying to court, you send the letters of consent by the merging companies duly notarized for SEC to review and do the clearance of the scheme documents in accordance with ***Rule 428(1) SEC Rules***.
2. **Step 2: Formal Approval**
   (a) At the court-ordered meetings of each of the merging companies, special resolutions (¾ majority) must be passed approving the proposed merger. See ***Section 121(5) ISA***
   (b) Upon obtaining special resolution approving the merger, the parties are to notify SEC for formal approval of the merger. SEC is to consider the application for formal approval within 20 working days but SEC may extend the period by a single period not exceeding 40 working days. Where it is so extended, an Extension Certificate to that effect must be issued to the party who notified it of the merger. ***Section 125(2) ISA***
   (c) Upon consideration, the decision of SEC can be any of the following:
      i. Approval of the merger
      ii. Approval of the merger subject to any conditions
      iii. Prohibition of the merger if it has not been implemented

See ***Section 125(1) ISA***

(d) It must be noted that if upon the expiration of the 20 working days period for formal approval or any extension granted, SEC has not notified the parties of its decision, the merger shall be deemed to have been approved, subject to revocation by SEC. (this is called deemed approval of intermediate or large merger). See ***Section 125(3) ISA***

(e) By ***Section 125(4) ISA***, SEC shall publish a notice of its decision in the Gazette and issue written reasons for the decision if it prohibits or conditionally approves the merger; or if it is requested to do so by a party to the merger.

(f) If SEC approves the merger or if it is deemed approved, the parties are to apply to the FHC for the merger to be sanctioned. Upon the order of court sanctioning the merger, the merger becomes binding on the parties

3. **Step 3: Post-Approval Notifications and Compliances**

After the court order, the merging companies are to satisfy the following post approval requirements provided under ***Rule 430 SEC Rules***:

(a) File an office-copy of the court-order sanctioning the scheme with SEC within seven (7) days of the order, for registration. (each of the merging companies will file it)

(b) File a copy of the newspaper publication of the court order with SEC.

(c) File a statement of the actual cost of the scheme

(d) File a notification of the completion or otherwise of the merger within three (3) months of the court's order

(e) File summary reports of the merger scheme in respect of the following:

i. Arrangements relating to employees of the acquired company
ii. Settlement of shareholders
iii. Utilization of monies injected into the company, if any
iv. Treatment of dissenting shareholders
v. Submission of gazetted copy of the court's sanction
vi. Evidence of allotment of shares
vii. Evidence of settlement of severance benefits of employees where applicable
viii. Statement of the actual cost of the scheme

4. **Step 4: Post-Merger Inspection**

This is done by SEC within three (3) months after approval to ascertain the level of compliance with the scheme documents. See ***Rule 431 SEC Rules***. The documents to be inspected during the post-merger inspection include:

(a) Minutes book of the meetings of board of directors

(b) Original certificate of incorporation of the resultant company, where applicable

(c) Copy of amended MEMART, where applicable

(d) Severance benefits of employees of dissolved companies

(e) Final settlement of shareholders

(f) Dispatch of share certificates

(g) Settlement of debts

(h) Report of shareholders' representatives on the merger

(i) Any other document that SEC may require from time to time.

See ***Rule 431 SEC Rules***

5. **Step 5: Notification to CAC**

Registration of the notice of merger with CAC in accordance with ***Regulation 53(1) Companies Regulations***. The requirements for registration of notice of merger includes:

(a) Special resolution of each company in the merger scheme. By ***Regulation 53(2) Companies Regulations, 2012*** the special resolution approving the merger shall be filed with CAC within fifteen (15) days of its passing.

(b) Scheme of merger arrangement duly approved by the SEC

(c) Court order sanctioning the merger. By ***Regulation 53(3) Companies Regulations, 2012*** the notice of the court order sanctioning the scheme shall be filed with the CAC within fifteen (15) days of its making.
(d) Evidence of publication of court order in Gazette and at least one (1) newspaper
(e) Original certificate of incorporation of each dissolved company for cancellation
(f) Updated annual returns
(g) Updated section 553 filing where applicable
(h) Payment of fees

See ***Regulation 53(1) Companies Regulations, 2012***

F. Large Merger

By ***Section 120(2) ISA***, a large merger is a merger or proposed merger with a value above the upper threshold, which by ***Rule 427(1) SEC Rules*** is currently above N5, 000, 000, 000 (Five billion). Therefore, a large merger is a merger or proposed merger in which the combined assets or annual turnovers in Nigeria of the merging companies is at a value above N5, 000, 000, 000 (Five billion) or any value which SEC may prescribe from time to time.

The procedures for intermediate mergers are in ***Sections 123, 124, 126 ISA and Rules 428-430 SEC Rules***:

A. Step One: Pre-Merger Notification to SEC

(a) Preparation and approval of the merger scheme/merger proposal by the Boards of Directors of each of the merging companies
(b) In large mergers, pre-merger notification to SEC is compulsory. Thus, there is pre-merger notice to SEC. See ***Section 123(1) ISA***. You must comply with all the requirements for pre-merger notification including payment of fees of N50, 000
(c) Each of the merging companies must give copies of the pre-merger notice to:
  i. Any registered trade union that represents a substantial numbers of its employees; or
  ii. The employees concerned or representatives of employees concerned if there are no such registered trade unions. See ***Section 123(2) ISA; Rule 426 SEC Rules***.
(d) SEC may investigate the merger or appoint an inspector to investigate any merger and demand for any other document, affidavit in statement or relevant information in respect of the merger. See ***Section 124(1) ISA***
(e) SEC may grant approval in principle to the proposed merger and direct the merging companies to apply to FHC for court ordered meetings of the merging companies. See ***Rule 425(b) SEC Rules*** which provides that the merging companies shall file an application in FHC seeking an order to convene a court ordered meeting. See also ***Section 121(4) ISA.*** Before applying to court, you send the letters of consent by the merging companies duly notarized for SEC to review and do the clearance of the scheme documents in accordance with ***Rule 428(1) SEC Rules***.

B. Step 2: Formal Approval

(a) At the court-ordered meetings of each of the merging companies, special resolutions (¾ majority) must be passed approving the proposed merger. See ***Section 121(5) ISA***
(b) Upon obtaining special resolution approving the merger, the parties are to notify SEC for formal approval of the merger.
(c) By ***Section 126 ISA*** when SEC receives the notice of the large merger, it will refer the notice to the court and within forty (40) working days after all the parties to a large merger have fulfilled all the prescribed notification requirements, SEC will forward a statement to the FHC stating whether or not the implementation of the merger is approved, or approved subject to any condition, or prohibited. See also ***Rule 428(5) SEC Rules***.

(d) If SEC approves the merger, the parties are to apply to the FHC for the merger to be sanctioned. Upon the order of court sanctioning the merger, the merger becomes binding on the parties

C. Step 3: Post-Approval Notifications and Compliances

After the court order, the merging companies are to satisfy the following post approval requirements provided under ***Rule 430 SEC Rules*:**

(a) File an office-copy of the court-order sanctioning the scheme with SEC within seven (7) days of the order, for registration. (each of the merging companies will file it)
(b) File a copy of the newspaper publication of the court order with SEC.
(c) File a statement of the actual cost of the scheme
(d) File a notification of the completion or otherwise of the merger within three (3) months of the court's order
(e) File summary reports of the merger scheme in respect of the following:
    i. Arrangements relating to employees of the acquired company
    ii. Settlement of shareholders
    iii. Utilization of monies injected into the company, if any
    iv. Treatment of dissenting shareholders
    v. Submission of gazetted copy of the court's sanction
    vi. Evidence of allotment of shares
    vii. Evidence of settlement of severance benefits of employees where applicable
    viii. Statement of the actual cost of the scheme

D. Post-Merger Inspection

This is done by SEC within three (3) months after approval to ascertain the level of compliance with the scheme documents. See ***Rule 431 SEC Rules***. The documents to be inspected during the post-merger inspection include:

(a) Minutes book of the meetings of board of directors
(b) Original certificate of incorporation of the resultant company, where applicable
(c) Copy of amended MEMART, where applicable
(d) Severance benefits of employees of dissolved companies
(e) Final settlement of shareholders
(f) Dispatch of share certificates
(g) Settlement of debts
(h) Report of shareholders' representatives on the merger
(i) Any other document that SEC may require from time to time.

See ***Rule 431 SEC Rules***

E. Step 5: Notification to CAC

Registration of the notice of merger with CAC in accordance with ***Regulation 53(1) Companies Regulations***. The requirements for registration of notice of merger includes:

(a) Special resolution of each company in the merger scheme. By ***Regulation 53(2) Companies Regulations, 2012*** the special resolution approving the merger shall be filed with CAC within fifteen (15) days of its passing
(b) Scheme of merger arrangement duly approved by the SEC
(c) Court order sanctioning the merger. By ***Regulation 53(3) Companies Regulations***, 2012 the notice of the court order sanctioning the scheme shall be filed with the CAC within fifteen (15) days of its making.
(d) Evidence of publication of court order in Gazette and at least one (1) newspaper
(e) Original certificate of incorporation of each dissolved company for cancellation
(f) Updated annual returns
(g) Updated section 553 filing where applicable
(h) Payment of fees

See ***Regulation 53(1) Companies Regulations, 2012***

VII. Summary of Procedure for All Mergers

A. Step One: Pre-Merger Notification to SEC

1. Preparation and approval of the merger scheme/merger proposal by the Boards of Directors of each of the merging companies
2. In small mergers, pre-merger notification is not compulsory except if SEC requires it. However, in intermediate and large mergers, pre-merger notification to SEC is compulsory. Thus there is pre-merger notice to SEC. See ***Section 123(1) ISA***. You must comply with all the requirements for pre-merger notification including payment of fees of N50, 000 (small mergers do not pay this fee)
3. For intermediate and large mergers pre-merger notice also to be sent to registered trade unions of employees
4. For intermediate and large mergers, SEC may investigate the merger or appoint an inspector to investigate any merger and demand for any other document, affidavit in statement or relevant information in respect of the merger. See ***Section 124(1) ISA***
5. SEC may grant approval in principle to the proposed merger and direct the merging companies to apply to FHC for court ordered meetings of the merging companies. See ***Section 121(4) ISA***. Before applying to court, you send the letters of consent by the merging companies duly notarized for SEC to review and do the clearance of the scheme documents in accordance with ***Rule 428(1) SEC Rules***.

B. Step 2: Formal Approval

1. At the court-ordered meetings of each of the merging companies, special resolutions (¾ majority) must be passed approving the proposed merger. See ***Section 121(5) ISA***
2. Upon obtaining special resolution approving the merger, the parties are to notify SEC for formal approval of the merger. SEC has 20 working days or single extension of 40 working days to approve either conditionally or unconditionally or prohibit the implementation of the merger. Note deemed approvals for small and intermediate mergers.
3. If SEC approves the merger, the parties are to apply to the FHC for the merger to be sanctioned. Upon the order of court sanctioning the merger, the merger becomes binding on the parties

C. Step 3: Post-Approval Notifications and Compliances

After the court order, the merging companies are to satisfy the post approval requirements provided under ***Rule 430 SEC Rules***

1. File an office-copy of the court-order sanctioning the scheme with SEC within seven (7) days of the order, for registration. (each of the merging companies will file it)
2. File a copy of the newspaper publication of the court order with SEC.
3. File a statement of the actual cost of the scheme
4. File a notification of the completion or otherwise of the merger within three (3) months of the court's order
5. File summary reports of the merger scheme

D. Post-Merger Inspection

This is done by SEC within three (3) months after approval to ascertain the level of compliance with the scheme documents. See ***Rule 431 SEC Rules***.

E. Step 4: Notification to CAC

Registration of the notice of merger with CAC in accordance with Regulation 53(1) Companies Regulations.

VIII. Revocation of Merger

SEC has the power to revoke any merger under certain circumstances. This power and the grounds upon which it can be exercised are contained under ***Section 127(1) ISA*** which provides

that SEC may revoke its own decision to approve or conditionally approve a small, intermediate or large merger if:

1. The decision approving the merger was based on incorrect information for which a party to the merger is responsible
2. The approval was obtained by deceit
3. A company concerned in the merger has breached an obligation attached to the decision.

See ***Section 127(1) ISA***.

It must be noted that by ***Section 127(2) ISA***, SEC's power to revoke a merger is not barred by any time limit prescribed by ISA. It can be exercised at any time.

IX. Power of SEC to Order the Break-Up of a Company

A. Concept

This is a post-merger power given to SEC. This power is an anti-trust provision which is a major regulatory strategy to avoid and checkmate monopoly and dominant companies that create monopolies and engage in anti-competition conducts. By ***Section 128(1) ISA*** and ***Rule 432(1) SEC Rules***, where SEC determines that the business practice of any company substantially prevents or lessens competition or creates a monopoly in particular industry, SEC shall order the break-up of the company into separate entities in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market.

B. Procedure

1. Where SEC forms the opinion that the activities of the company lessens or eliminates competition, it shall communicate the basis of its observation to the company in writing. See ***Section 128(2) ISA*** and ***Rule 432(1)(a) SEC Rules***
2. The company shall forward its response to SEC within thirty (30) days from the day it received SEC's letter. See ***Section 128(2) ISA*** and ***Rule 432(1) (a) SEC Rules***
3. SEC will review the company's response and where it is found that competition is restrained, senior officers of the company shall be invited to further defend their position. See ***Section 128(2) ISA*** and ***Rule 432(1)(b) SEC Rules***
4. After hearing them, SEC will communicate its final decision to the company. See ***Rule 432(1)(c) SEC Rules***
5. SEC will forward its decision to FHC for sanctioning. Upon the sanction, the break-up becomes effective and the affected company shall be broken-up into smaller entities. See ***Section 128(3) ISA*** and ***Rule 432(2) SEC Rules***

See generally ***Section 128 ISA*** and ***Rule 432 SEC Rules***

C. Business Practices Capable of Restraining Competition

By ***Rule 432(3) SEC Rules***, the following shall be considered as business practices capable of restraining competition and creating monopoly:

1. The entry into agreements with other companies or business undertakings which have as their object or effect the prevention, restriction or distortion of competition in any part of the Nigerian market, and in particular those which:
   (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) Limit or control production, markets, technical development, or investment;
   (c) Share markets or sources of supply;
   (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. The abuse by companies or business enterprises of dominant positions achieved by them in any part of the Nigerian Market irrespective of how such positions of dominance were achieved. Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) Limiting production, markets or technical development to the prejudice of consumers;
(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Power to acquire shares of dissenting shareholders – Section 129 ISA
Right of dissenting shareholder to compel the acquisition of his shares – Section 130 ISA

X. Regulation of Mergers and Acquisitions

A. Concept

Certain mergers, especially horizontal mergers, may produce socially undesirable consequences such as monopolies. It is therefore for public interest that mergers be regulated, especially horizontal mergers.

ISA has extended the definition of companies, for the purpose of mergers and other forms of external restructuring, to include partnerships and other associations of persons. See ***Section 118 ISA*** and ***Rule 422 SEC Rules***, which also included government agencies. The regulatory ambit of ISA and SEC Rules covers all of them.

As part of the regulation, ***Section 118 ISA*** and ***Rule 423 SEC Rules*** provides that every merger, acquisition or business combination between or among companies or partnerships shall be subject to the prior review and approval of the Commission.

As part of the competition law considerations, SEC will only grant approval where it is satisfied that the business combination is not likely to eliminate or substantially lessen competition or create a monopoly.

B. Conditions for the Approval of Merger by SEC in Respect to Competition

Accordingly, by ***Rule 423(2) SEC Rules***, SEC will grant approval for the merger, acquisition or external restructuring only if SEC is satisfied that:

1. Such acquisition, whether directly or indirectly, of the whole or any part of the equity or other share capital or of the assets of another company, is not likely to cause substantial restraint of competition or does not tend to create monopoly in any line of business enterprise;
2. The use of such shares by voting or granting proxies or otherwise shall not cause substantial restraint of competition or will not tend to create monopoly in any line of business enterprise.
3. Though the contemplated merger is likely to restrain competition, one of the parties to the merger has proved that it is failing.

See ***Rule 423(2) SEC Rules***.

C. Exemptions

However, notwithstanding the foregoing, there are certain exemptions provided under ***Rule 424 SEC Rules***. They are:

1. Holding companies acquiring shares solely for the purpose of investment and not for the purpose of using the shares by voting or otherwise to cause or attempt to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise;
2. In small mergers, the merging entities shall not be required to notify SEC of the merger but shall be required to inform SEC at the conclusion of the merger.
3. Also, acquisitions in private companies or unquoted public companies with assets or turnover below N500,000,000 (five hundred million) shall not be subject to the prior review and approval of SEC

D. Considerations with Respect to Competition Law

By ***Section 121(1) ISA***, whenever it is considering a merger, SEC will do the following three things:

1. Initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors the following factors which are set out in ***Section 121 (2) ISA*** as follows:
   (a) the actual and potential level of import competition in the market;
   (b) the ease of entry into the market, including tariff and regulatory barriers;
   (c) the level and trends of concentration, and history of collusion, in the market;
   (d) the degree of countervailing power in the market;
   (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
   (f) the nature and extent of vertical integration in the market;
   (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
   (h) Whether the merger will result in the removal of an effective competitor.
   (i) SEC will also consider the strength of competition in the relevant market and the probability that the emerging company will behave competitively or cooperatively.
2. If after this first consideration, it appears that the merger is likely to substantially prevent or lessen competition, then SEC will determine:
   (a) whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented, and
   (b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the following factors which are set out in section 121(3) ISA as follows:
      i. the effect the merger will have on a particular industrial sector or region
      ii. the effect the merger will have on employment
      iii. the effect the merger will have on the ability of small businesses to become competitive
      iv. the effect the merger will have on the ability of national industries to compete in international markets.
3. Then SEC will determine whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.

After making the foregoing determinations, if SEC is satisfied, it will grant the approval in principle.

XI. Roles of Professionals in Mergers

A. Legal Practitioners (Solicitors)

The following are the roles of solicitor involved in mortgage transaction

1. Conducts legal due diligence
2. Participating in the negotiation process
3. Drafting the memorandum of understanding, transaction implementation agreement, merger agreement and other agreements that may be drafted such as exclusivity agreements.
4. Review legal documentation and provide a legal opinion on actual and/or threatened litigation
5. Securing all necessary approvals
6. Ensure the passing of all necessary resolutions required to effect the merger
7. Obtain court hearing date for the proposed merger and obtain court order for court-ordered meeting

8. Obtain court sanction for the merger scheme
9. Ensure that proper procedure is followed and that the process is implemented in full compliance with all relevant legal requirement
10. Conduct the order of proceedings at the court-ordered meetings
11. Assist with obtaining shareholders' support for the passing of the necessary resolutions at the court ordered meetings.

B. Company Secretary/Legal Adviser

He is the chief legal and compliance officer of the company.

1. Ensures that all relevant resolutions are passed, drafted and duly signed
2. Ensures that all legal and other regulatory requirement are satisfied by filing resolutions within time
3. Organize board meetings for requisite proposals
4. Co-ordinate meetings with various classes of shareholders and third parties
5. Ensure that proper quorums are formed at the various meetings.
6. He can also perform all the roles of the legal practitioners mentioned above.

See Ogbuanya pages 633-635 for the roles of investment banks/financial advisers/issuing houses, auditors, reporting accountants, registrars, stockbrokers etc.

ACQUISITION

I. Concept

SEC Rules 2013 treats acquisition as a separate transaction different from mergers or takeovers. Under the Rules, acquisition now has its own definition and separate procedure. Rule 433 SEC Rules defines acquisition as business combination where a person or group of persons buys most, if not all, of a company's ownership stake in order to assume control of the target company. See ***Rule 433 SEC Rules***.

By ***Rule 434(a) SEC Rules***, SEC is empowered to regulate acquisitions in both private companies and unquoted public companies through the filling and approval of the requirements for acquisitions by any corporate body or individual.

II. Requirements for Acquisition

The requirements for an acquisition are prescribed under ***Rule 434(b) SEC Rules*** which provides that the acquirer (acquiring company) shall file a Letter of Intent. The filling shall be done by a Registered CMO, registered to function as an issuing house. The Letter of Intent will be accompanied by the following documents:

1. Two (2) draft copies of Information Memorandum
2. Extracts of board resolutions of the acquirer and the Acquiree (target company) agreeing to the acquisition signed by their respective company secretaries and directors, where applicable;
3. MEMARTs of both the Acquirer and the Acquiree recently certified by CAC, where applicable
4. Certificates of Incorporation of both the Acquirer and the Acquiree, where applicable, certified by their respective company secretaries
5. Extracts of shareholders resolution of both the Acquirer and the Acquiree to be signed by a director and company secretary, where applicable
6. Summary of the claims and litigations of the Acquiree
7. A copy of "No Objection" letter from the relevant regulatory body, where applicable;
8. Copies of letters appointing the financial advertiser(s);
9. Particulars of Directors and Allotment of Shares of both the Acquirer and Acquiree certified by CAC, where applicable
10. Notarized consent of directors of both the Acquirer and the Acquiree, where applicable

11. Financial Services Agreement between the Acquirer and the Acquiree and their respective Financial Advisers, where applicable
12. Share Purchase Agreement (SPA) and any other relevant agreement executed between the Acquirer and the Acquiree, where applicable
13. Payment of N50,000 being application fee;
14. Payment of processing fee based on the value to be acquired on the graduation fee.
15. Annual report and accounts of both companies for the preceding period of five (5) years or a shorter period of three (3) years for private companies and those that have been operating for less than five (5) years;
16. Source of fund to finance the acquisition must be clearly disclosed and backed by documentary evidence;
17. Report of valuation shares/assets, where applicable
18. Publication of the acquisition in at least two national dailies after consummation of the acquisition.

III. Post-Acquisition Processes and Inspection

1. After the acquisition process, by ***Rule 437 SEC Rules***, the following documents shall be forwarded to SEC:
   (a) Executed Share Purchase Agreement (SPA) or Asset Purchase Agreement
   (b) Evidence of settlement of purchase consideration
   (c) Evidence of settlement of severance benefits of employees who may lose their jobs as a result of the acquisition, where applicable.
2. By ***Rule 438 SEC Rules***, dissenting shareholders shall treated in accordance with the procedure in Section 146 & 147 of ISA
3. By ***Rule 439 SEC Rules***, SEC shall conduct a post-acquisition inspection three (3) months after the approval of the application.

TAKE OVER

I. Concept

By ***Section 131(1) ISA***, take-over is an external restructuring process that involves the acquisition of at least 30% **(**30% to 50%**)** of the shares or voting rights (or any lower or higher threshold as SEC may prescribe from time to time) of the target company, either by an individual (called a core investor**)** or a company (called the acquiring company), with the intention of taking over the target company. See ***Section 131(1) ISA***. Acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company. Where the acquiring company acquires the target company, both companies would form a single group in which the acquirer is the Holding Company and the target company becomes the subsidiary. Here, both companies exist.

It is not mandatory that all the shares be acquired at once by the core investor or acquiring company, but it can be acquired in a series of transactions over a period of time and the core investor or acquiring company need not be acting alone as he use share acquired by persons acting in concert with him. See ***Section 131(1) ISA***.

By ***Section 134(1) ISA***, before a company can be taken over, the acquiring company or core investor must obtain the authority to proceed with the take-over bid from SEC. See also ***Rule 447(1) (a) SEC Rules***. The procedure for applying for authority is prescribed under ***Rule 447(1) (b) & (c) SEC Rules*** and will be considered subsequently.

It would seem that under ISA and SEC Rules, a take-over bid can only be made in respect of a quoted public company. See ***Rule 445(1) (a) SEC Rules***. See also ***Section 133(4) ISA*** and ***Rule 445(3) (b) SEC Rules*** which provide that a take-over bid cannot be made for shares in private company.

II. Take-Over Bid

Rule 445(1) (a) SEC Rules provides that where a person or group of persons acquires or wishes to acquire a minimum of 30% shares in a **public quoted company** (target company) with the intention of taking over control of that company, a take-over bid shall be made by such person or group of persons or through their Agent to the shareholders of the target company. It must be noted that by ***Rule 445(1) (b) SEC Rules***, the agent must be a registered CMO.

III. Conditions for the Validity of a Takeover Bid

For the take-over bid to be valid, the following conditions must be satisfied:

1. The agent who dispatches the bid must be a registered CMO. See ***Rule 445(1)(b) SEC Rules***
2. The take-over bid must be made or dispatched to at least twenty (20) shareholders representing sixty (60%) percent of the members of the target company or such other number as SEC may provide from time to time. See ***Rule 445(3) (a) SEC Rules***. See also ***Section 133(3) (a) ISA***, but note the difference in the two provisions and raise query.
3. The bid must not be in respect of shares of private company - ***Rule 445(3) (b) SEC Rules, Section 133(4) ISA.***
4. If the bid is by a corporate body, it must be accompanied by a resolution of the company, signed by a director and the company secretary approving the bid. See ***Rule 445(2) SEC Rules.***
5. The bid must be advertised in at least two (2) national dailies. See ***Rule 445(4) SEC Rules***
6. The bid must dispatched within three (3) months from the date the authority to proceed with the bid was granted, or if a renewal is granted, then within the renewed period.
7. The bid must contain the requisite contents of a take-over bid set out in ***Rule 446 SEC Rules*** and ***Section 136(1) ISA***.
8. The bid must be registered with SEC in accordance with ***Rule 448 SEC Rules*** and ***Section 135 ISA***

IV. Contents of a Take-Over Bid

The contents of a take-over bid are provided under ***Rule 446 SEC Rules*** and ***Section 136(1) ISA***. The provisions make a distinction between a take-over bid which is an "invitation" and a take-over bid which is an "offer". In either case, the take-over bid must contain the following:

1. It must state the full names and addresses of the offeror (acquiring company/acquirer or core investor). The address should be a street address and post office box (if any). Where the offeror is a corporate body, the name and current head office address and a statement of the date on which the approval of the directors of the company was given;
2. It must specify the maximum number and offer particulars of the shares the company proposed to be acquired during the period specified in the invitation to bid;
3. It must specify the price and other terms on which those shares are proposed to be acquired;
4. It must specify the number and offer particulars of the shares in the offeree company to which the offeror(s) is or are entitled immediately before the date of the take-over bid;
5. If applicable, then where the take-over bid is for all the shares of a class in an offeree company, the offeror, if he so intends, shall state in the bid that he intends to invoke the right under the Act, to acquire the shares of shareholders of the offeree company who do not accept the bid and that the shareholder is entitled to dissent and to demand the fair value of the shares; or
6. The bid must state if the offeror intends to purchase shares in the offeree company in the market during the period of time within which shares may be deposited pursuant to the bid;

Where the bid is an offer, then in addition to the above, it must contain the following:

7. It must specify the number and other particulars of the shares in the offeree company proposed to be acquired during the period specified in the offer;

8. It must specify the price and offer terms of the offer in respect of those shares;
9. It must set out how and by what date the obligations of the offeror are to be satisfied;
10. It must set out such other matters as may be prescribed by regulation from time to time.

V. Authority to Proceed with a Take-Over Bid Rules

By ***Section 134(1) ISA***, before a company can be taken over, the acquiring company or core investor must obtain the authority to proceed with the take-over bid from SEC. See also ***Rule 447(1) (a) SEC Rules***. The procedure for applying for authority is prescribed under ***Rule 447(1) (b) & (c) SEC Rules*** as follows:

An application for authority to proceed with a take-over bid shall be made to SEC by or on behalf of the person proposing the bid before the proposed bid is made. The application shall state the following:

1. The name and other particulars of the person making the bid
2. The particulars of the proposed bid with supporting documents in compliance with ISA and SEC Rules
3. Any other information or document that SEC may require from time to time

By ***Rule 447(3) SEC Rules***, in addition to the take-over bid, the following documents shall be filed with SEC:

1. A letter of application;
2. Two copies of the Information Memorandum (where applicable);
3. A letter of "No objection" from relevant regulatory body (where applicable)
4. A copy of shareholders and board resolutions of the offeror certified by the company secretary approving the takeover (where applicable);
5. A copy of the certificate of incorporation certified by the company secretary;
6. Copies of the MEMART of the offeror certified by the CAC;
7. Copies of letters from the offeror appointing their financial adviser to the transaction.

By ***Section 134(7) ISA***, where SEC grants the authority, the authority shall be in writing, signed by or on behalf of SEC, dated, and give sufficient particulars of the proposed take-over bid to enable it to be identified.

By ***Section 134(8) ISA*** and ***Rule 447(2) SEC Rules***, the authority to proceed with a take-over bid shall be and remain in force for a period of three (3) months, subject to renewal on application by the person making the bid. The application for renewal must be made within fourteen (14) days prior to the expiration of the authority and such renewal shall be for a period of not more than three (3) months.

VI. Registration of a Take-Over Bid

1. A copy of the proposed take-over bid shall first be lodged with SEC for registration before it is dispatched to the shareholders of the target company. The aim is to ascertain whether the Bid satisfies the requirements of ISA and SEC Rules. See ***Section 135(2) ISA*** and ***Rule 448(1) SEC Rules***.
2. By ***Section 135(2) (a) ISA*** and ***Rule 448(2) SEC Rules***, SEC shall register the bid if it is satisfied that it has complied with the provisions of ISA and SEC and notify the applicant.
3. By ***Section 135(2) (b) ISA*** and ***Rule 448(3) SEC Rules***, if SEC is not satisfied, it will refuse to register the bid and notify the applicant accordingly, stating reasons for its refusal.
4. By ***Section 135(3) ISA*** and ***Rule 448(4) SEC Rules***, within thirty (30) days after the service of the Notice of Refusal, the applicant may by notice in writing require SEC to refer the fact of its refusal to register the proposed bid to the IST for a review of SEC's decision.
5. By ***Section 135(4) ISA***, IST may order SEC to register the proposed take-over bid or may uphold SEC's decision not to register the bid, in which case, it will not be registered.

6. By ***Rule 448(5) SEC Rules***, once the authority to proceed with the takeover bid is granted by SEC, the following documents must be filed with SEC:
   (a) Two (2)draft copies of the takeover bid;
   (b) Consent letters of directors and other parties to the transaction;
   (c) Form CAC 7 containing the particulars of directors of the offeror;
   (d) A copy of draft Financial Services Agreement between the financial adviser and the offeror, and any other agreement(s) entered into in the course of the transaction;
   (e) Annual report and accounts of the offeror for the preceding period of five (5)years or the number of years the company has been in existence, if less than five years;
   (f) Payment of N50,000 application fee and relevant SEC fee based on the value of shares to be taken over;
   (g) A draft newspaper publication of the proposed takeover;
   (h) Evidence of source of funds;
   (i) Any other documents the Commission may require from time to time.
   See ***Rule 448(5) SEC Rules***.

VII. Summary of the Full Procedure for Take-Over

1. Preparation of the take-over bid
2. Application to SEC for authority to proceed with the take-over bid
3. When SEC grants the authority to proceed with the take-over bid, file a copy of the proposed bid with SEC for registration. It must be noted that the authority lasts for three (3) months and renewable for another three (3) months if application for renewal is made within fourteen (14) days before its expiration
4. After the grant of the authority to proceed, file the following documents are to be filed with SEC for the registration of the take-over bid:
   (a) Two (2)draft copies of the takeover bid;
   (b) Consent letters of directors and other parties to the transaction;
   (c) Form CAC 7 containing the particulars of directors of the offeror;
   (d) A copy of draft Financial Services Agreement between the financial adviser and the offeror, and any other agreement(s) entered into in the course of the transaction;
   (e) Annual report and accounts of the offeror for the preceding period of five (5)years or the number of years the company has been in existence, if less than five years;
   (f) Payment of N50,000 application fee and relevant SEC fee based on the value of shares to be taken over;
   (g) A draft newspaper publication of the proposed takeover;
   (h) Evidence of source of funds;
   (i) Any other documents the Commission may require from time to time.
   See ***Rule 448(5) SEC Rules***.
5. If satisfied, SEC will register the take-over bid. However, if SEC is not satisfied, it will not register the bid and where it so refuses, the applicant can within thirty (30) days of receipt of the notice of refusal, send a notice in writing to SEC requesting it to refer the fact of the refusal to IST for review.
6. Upon registration of the take-over bid, the offeror shall proceed to make the formal take-over bid to not less than twenty (20) members representing not less than 60% of the members of the target company (offeree). The offeror should have acquired or wish to acquire at least 30% of the shares of the target company, with express intention to take control of the target company.
7. By Rule 448(6) SEC Rules, upon the completion and conclusion of the take-over bid, the offeror shall, within seven (7) days of the conclusion of the offer, file with SEC the following documents:

(a) Schedule of the shareholders of the target company who accepted the offer containing the volume and value of the respective shares
(b) Evidence of settlement of the consideration. See ***Rule 448(6) SEC Rules***

8. By Rule 448(7) SEC Rules, a Post-takeover inspection is conducted by SEC not less than three (3) months after the registration of the take-over bid. See ***Rule 448(7) SEC Rules***

See generally ***Rules 445 - 448 SEC Rules*** for the procedure.

VIII. Settlement of Dissenting Shareholders

A. Concept

Some shareholders in the target company may refuse to accept the offer to surrender their shares for purchase by the acquiring company and thus, refuse to corporate with the take-over. Whether such refusal can affect the success of the take-over depends on the number of shareholders/quantity of shares that the dissenting shareholders possess vis-à-vis the quantity of shares required for the acquiring company to cross the margin and achieve a successful bid. Where the acquiring company crosses such margin and acquires sufficient shares for other shareholders of the target company, the dissenting shareholders can no longer prevent the take-over of the company. ISA has provided guidelines for the settlement of such dissenting shareholders in order to ease them out of the target company. Thus Sections 146 and 147 ISA provides for the procedure for the acquisition of the shares of dissenting shareholders.

B. Meaning of Dissenting Shareholder & Outstanding Shares

Section 146(1) (c) ISA defines a dissenting shareholder or dissenting offeree as a person who is registered, or is entitled to be registered as a holder of outstanding shares. ***Section 146(1)(b) ISA*** now defines outstanding shares to mean shares subject to acquisition in respect of which a take-over bid was made, but has not been accepted. The definition of dissenting shareholders captures those who refused the offer, those who neither accepted nor rejected the offer; and those shareholders who having accepted the offer still fail or refuse to transfer their shares to the offeror.

C. Procedure for the Settlement of the Dissenting Shareholders & Acquiring Their Shares

The procedure/guide for the settlement of the dissenting shareholders and acquiring their shares are as follows:

1. The offer by the acquiring company must be accepted by shareholders holding not less than ninety (90%) percent of the total number of shares subject to acquisition.
2. The offeror/acquiring company may, within one (1) month after the acceptance of the offer amounting to at least 90% is made, give notice to a dissenting shareholder offeree stating that:
   (a) That the offer/bid has been accepted up to 90%
   (b) That the offeror/acquiring company is bound to take up and pay for, or has taken up and paid for, the shares of the offerees who accepted the take-over bid
   (c) That the dissenting shareholder has the right to elect whether he would be paid for his shares in the same way and on the same terms the others were paid for; or whether he would require his shares to be valued and a fair value paid to him.
3. Within twenty (20) days of receiving the notice from the offeror, the dissenting shareholder may by notice sent to the offeror, make his election as indicated above. If he fails to make the election, then by section 146(4) ISA, he will be deemed to have elected to be paid for his shares in the same way and on the same terms the others were paid for. In such a case, the dissenting shareholder is bound to surrender his shares certificate to the acquiring company within twenty (20) days of receiving the said notice of the acquisition of the target shares. See ***Section 146(5) ISA***.
4. Within twenty (20) days of the expiration of the notice to the dissenting shareholders, the offeror/acquiring company must pay to the target company, the amount or consideration it would have paid to a dissenting shareholder had he accepted the bid earlier; and the target

company should hold such money in trust for the dissenting shareholder, who shall pay the amount into a bank account established for that purpose, or place the consideration in the custody of a bank. See ***Section 146(6) ISA***.

5. By ***Section 146(7) ISA***, the offeror shall send a copy of every notice sent to the dissenting shareholder to the target company and must also notify it of the election made by the dissenting shareholder.
6. By ***Section 146(8) ISA***, the offeror shall also send a copy of every notice sent to the dissenting shareholder to SEC within one (1) month after the date on which it was so sent.
7. Where the dissenting shareholder elects to be paid a fair value for his shares, the offeror shall apply to the FHC within twenty (20) days of such election to determine the fair value of the shares. See ***Section 147(2) ISA***. If the offeror fails to make the application within the period specified, the dissenting shareholder can make the application within a further period of twenty (20) days. See ***Section 147(3) ISA***. It must be noted that the dissenting shareholder shall not be required to pay security for costs. See ***Section 147(4) ISA***
8. All the dissenting shareholders who made elections for the payment of a fair value of their shares can be joined as parties and the decisions made are binding on all of them. See ***Section 147(5)(a) ISA***
9. On hearing the application, the court may appoint one or more independent valuer(s) to assist the court in fixing a fair value for the shares of the dissenting offeree. See ***Section 147(7) ISA.***
10. The final order of the court shall be made against the offeror in favour of each dissenting offeree who made the election and for the amount of his shares as fixed by the court. See ***Section 147(8) ISA***. The court may also make an order allowing the prevailing bank interest rate to be paid from the date the dissenting shareholder sent his share certificate to the offeror. ***Section 147(9) ISA***
11. The order of the court shall operate to divest the offeree company of the money or other consideration held in trust for the dissenting shareholder and vest same in the dissenting shareholder or in any person in trust for him. See ***Section 147(10) ISA***.

EXTERNAL RESTRUCTURING OF A GROUP OF COMPANIES AND RELATED PARTY TRANSACTIONS

I. Concept

Rule 440 SEC Rules defines external restructuring to include the external restructuring of a group of companies and other related party transactions.

II. Procedure

The procedure for it and for obtaining SEC's approval involves the following steps which are provided for under ***Rules 441 and 444 of SEC Rules***. They are:

1. By Rule 441, the companies proposing the external restructuring shall file an application for external restructuring with SEC. The requirements for external restructuring are provided for under Rule 442, which provides that that the application for external approval shall be filed by submitting the following documents:
   (a) Resolution of the shareholders of the companies approving the external restructuring
   (b) A copy of the certificates of incorporation of the companies, certified by their respective company secretaries
   (c) Particulars of directors and statement of allotment of shares of the companies, certified by CAC
   (d) NO OBJECTION letter from relevant regulatory authorities, where applicable
   (e) Scheme of external restructuring
   (f) Any other information required by SEC from time to time
   (g) Additional requirements which include:

i. Consents of the directors and other parties to the transaction
ii. Board resolutions
iii. Two (2) years financial statements of the companies
iv. Evidence of payment of processing fees.

2. By Rule 441, upon clearance of the application, the companies shall file an application at the FHC seeking and order to convene a court ordered meeting
3. By Rule 441, at the court ordered meetings, a special resolution of the shareholders is passed approving the scheme of external restructuring
4. By Rule 441, an application is made to FHC for the court to sanction the transaction
5. By Rule 441, after the court sanctions it, the applicants shall file, with SEC, a formal application for the formal approval of the scheme of external restructuring. The requirement/documents to be submitted to SEC for formal approval are provided under Rule 443 as follows:
   (a) Two copies of the Scheme of external restructuring duly executed by the parties to the transaction;
   (b) Copies of duly executed shareholders resolution passed at the separate court ordered meetings approving the scheme;
   (c) Scrutineer's report showing the result of the voting;
   (d) Power of attorneys of Directors who were absent at the separate court ordered meetings;
   (e) Any other document which SEC may require
6. By Rule 444 SEC Rules, after SEC grants the final approval and the court order sanctioning the scheme, the applicant must do the following:
   (a) Obtain the court order sanctioning the scheme;
   (b) File a copy of court order sanctioning the scheme within seven (7) days of the court sanction;
   (c) File a copy of newspaper publication of court order;
   (d) File a statement of the actual cost of the scheme;
   (e) Report on the settlement of shareholders;
   (f) File a notification of completion or otherwise of the exercise within there (3) month.

See ***Rule 444 SEC Rules***.

PURCHASE AND ASSUMPTION

This involves another company purchasing the liability of a failing company and assuming ownership of its asset usually at an auction price. It is usually effected through a duly executed Deed of Purchase and Assumption executed by the parties and the resolutions approving the transaction or government white papers in the case of government corporation purchased and assumed by a regulatory agency such as CBN, NDIC or AMCON. Application must be made to the FHC for the P&A to be sanctioned. The deed and other documents for the perfection are filed along with the processes at the FHC. The use of the deed makes it easy to transfer assets which are legal interests in land.

P&A is an external restructuring option which aims at rescuing investments in a moribund or failing company. It reduces the loss of investment by allowing another company or investors to purchase the liabilities of the failing company and assume ownership of its assets, usually at an auction price.

The assumed company does not go through the formal winding up process, but is dissolved through a judicial sale of its assets and liabilities to the purchasing company.

It must be noted that here all the liabilities of the failing company are taken. This is a major difference between P&A and Cherry picking.

CHERRY PICKING

This is an external restructuring option for a moribund or failing company, also aimed at reducing the loss of investment. Unlike P&A, the company/investor is not taking up all the liabilities of the failing/failed company, but is allowed to inspect the books, assets, business operations/activities of the failing company with a view to choosing or picking out those aspects it could save by integrating them into its own business activities.

This is almost the opposite of purchase and assumption because under P&A all the liabilities of the failing company are taken; but under cherry picking, not all is taken.

(Week 19)

COMPANY PROCEEDINGS AND INVESTMENT DISPUTES

MEANING & NATURE OF COMPANY PROCEEDINGS

I. Introduction

These are the proceedings of a company. The Federal High Court has exclusive jurisdiction on company proceedings and administration of the Companies and Allied Matters Act - ***Section 251(1) (e) CFRN 1999***. All offences under the act may be tried by a Court (Federal High Court) of competent jurisdiction in the place where the offence is alleged to have been committed – ***Section 554(1) of CAMA*****.**

In ***Abiola v FRN*** and ***Ibori v FRN*** – the courts held that the FHC is one court with judicial division in states of the federation. The judicial division of FHC that has jurisdiction in any matter is where the registered office of the company is situated, subject to the overriding interest of forum convenience.

Investment disputes can be resolved through:

1. Litigation
2. Alternative Dispute Resolution
3. Investment & Securities Tribunal

II. Laws/Rules Governing Company Proceedings in Nigeria

1. Companies Proceeding Rules 1992 (as amended);
2. The Companies Winding-Up Rules 2001;
3. Federal High Court (Civil Procedure) Rules, 2009;
4. Federal High Court Act;
5. Investment and Securities Act (ISA), 2007;
6. Companies and Allied Matters Act (CAMA)2004;
7. Securities and Exchange Commission (Consolidated) Rules, 2013; and
8. Investment and Securities Tribunal Procedure Rules, 2003.

III. Courts/Tribunals in Company Proceedings

1. Federal High Court
2. Investment and Securities Tribunal
3. IST-ADR centre
4. Administrative Proceedings Committee annexed to IST

IV. Companies Proceedings Rules 1992

The Companies Proceedings Rules 1992 apply to all proceedings taken out or arising from any provision of any section of Part A of the Companies and Allied Matters Act – ***Rule 21(1) of the Companies Proceedings Rules*****.** Where no provision is made by the Rules, the Federal High Court (Civil Procedure) Rules shall apply - ***Rule 19 CPR***.

MODES OF COMMENCEMENT OF CORPORATE LITIGATION

1. Originating Summons
2. Originating motion
3. Petition
4. Writ of Summons
5. Originating Application – exclusively at IST

NB: various modes of commencing action and the actions that fall under each mode (minimum 5 per action).

I. Originating Summons

A. Concept: The default mode of commencement of action in corporate litigation is by originating summons - ***Unipetrol (Nig.) Plc. v. Agip (Nig.) Plc; Rule 2(2) CPR*****.** Summons is "commanding" in nature. It involves interpretation, clarification or declaration of

legal/documentary prescriptions. Actions commenced by originating summons dispense with exchange of pleadings and calling of witnesses and thus saves time. Application to be supported by affidavit and all annexures attached together with a written address. An originating summons under the Rule shall be in FORM 1 as specified in the schedule to the Rules – ***Rule 2(2) of the Rules***. It can be on Notice or Ex-parte. Also, an application under Section 317 CAMA may be made by ex-parte originating summons – ***Rule 2(3) of the Rules***.

B. Circumstances of using Originating Summons: An application is to be made by originating summons except where:

1. It is to be made by originating motions – ***Rule 3 of the Rules***; it is praying. Contains mixture of law and fact. Generally used when need to remedy an error or omission from a set rules.
2. It is to be made by petition – ***Rule 4 of the Rules***; and it is to be made in respect to winding-up of companies and used where no provision is made in Company Proceeding Rules. Petition is used when described by law. Petition is petitioning (begging someone to intervene). A prayer to a higher authority.

II. Originating Motion(s)

A. Concept: This is "praying" in nature. It contains mixture of both law and disputed facts. In corporate litigation, originating motion is mostly used where there is need to remedy an error or omission or benefit from set rules. Its aim is to bring an original application in the circumstances specified by statute.

B. Circumstances of using Originating Motions: Under ***Rule 3(a-g) of the Rules***, the following applications under the Act (Companies and Allied Matters Act) shall be made by originating motion:

1. Relief from consequences of default in complying with the conditions for LTD - ***Section 23 (2) CAMA***
2. Extension of time to file documents at CAC - ***Sections 46(8), 129 (2) 312 (5) CAMA***
3. Rectification of Company's Register of Members - ***Section 90(1) CAMA***
4. Appointment of Inspector to investigation a company - ***Section 315 CAMA***
5. Inquiry into refusal to produce document or respond to summons - ***Section 319 (3) &(4) CAMA***
6. Ceasure of imposition of restrictions on shares - ***Section 329 CAMA***
7. Order for a declaration of dissolution of company which has not been wound up to have been void - ***Section 524 (1) CAMA***.

C. Notice of Originating Application: In Form 2 of the Rules, the notice of an originating motion must be given, and it must include a concise statement of the nature of the claim made or the relief or remedy required.

III. Petition

A. Concept: The nature of petition is "complaining/requesting". This is brought in the cases which are specifically provided for in the Rules.

B. Circumstances of using Petition: Under ***Rule 4 Companies Proceedings Rules***, the following applications under the Act (Companies and Allied Matters Act) shall be made by originating petition –

1. An order for cancellation of a company's amended objects - ***Section 46(1) & (2) CAMA***.
2. Cancellation of alteration of memo - ***Section 47 (1) CAMA***
3. Cancellation of a special resolution to re-register PLC as LTD – ***Section 53(3) CAMA***
4. To confirm a reduction of the share premium account of a company – ***Section 120 CAMA***
5. Application to confirm issue of shares at a discount - ***Section 121 (2) CAMA***.

6. To confirm a reduction of the capital redemption reserve fund of a company – ***Section 158 CAMA***.
7. Confirmation of reduction of share capital - ***Section 107(1) CAMA***
8. Cancellation of variation of right attached to class of shares - ***Section 142 (1) CAMA***
9. Relief on ground that affairs of the company are being conducted in an illegal and oppressive conduct – ***Section 311(1) CAMA***
10. Under ***Section 525(6)*** for an order restoring the name of a company to the register, when the application is made in conjunction with an application for the winding-up of the company;
11. To sanction a scheme of merger between 2 or more companies – ***Section 591(3) CAMA***
12. Under section 641 for relief from liability of an officer of a company or a person employed by a company as auditor.

C. Procedure for Petition (FORM 3)

Summons for Direction in Regards to Petition –

1. Under Rule 4 of the Rules, there shall be a presentation of the petition.
2. After the presentation, the petitioner must, under Rule 5 of the Rules, apply for direction as in Form 5 EXCEPT where the application is made under section 121(2) of the Act or section 100(3) of the Investments and Securities Act (ISA) to sanction a compromise or arrangement except as provided in rule 52(6), or under section 525(6) of the Act for an order restoring the name of the company to the register
3. On the hearing of the summons, the court may give such direction, as to the proceedings to be taken before the hearing of the petition, as it thinks fit – Rule 5(3) of the Rules.
4. When the application made by the petition is to confirm a reduction of share capital (section 107 of CAMA), or of the share premium account (section 120 of CAMA) of the capital redemption reserve fund (section 158 of CAMA) of a company, the court may give additional directions for inquiry as to debts of and claims against the company, and also as to the proceedings to be taken for settling the list of creditors entitled to object to the reduction and fixing the date of the list – Rule 5(4) of the Rules**.**

Inquiry as to Debts –

1. Where an inquiry is order as to the debts, the company must, within fourteen (14) days, file in the court, an affidavit made by a competent officer of the company verifying a list of creditors as in rules 6 and 7.
2. The company must give notice of the list of creditors – Rule 8 of the Rules, and advertise a notice of the list in the newspaper as required by rule 9.
3. With regard to claims by creditors, the company must also file an affidavit made by the company's solicitor and a competent officer of the company in the form required in rule 10.
4. Where there is dispute as to the entitlement of creditors to be entered in the list, the dispute is to be adjudicated upon and settled by the court as provided by rules 11, 12 and 13.
5. The list of creditors entitled to object to the reduction must be certified and the certificate filed by the court registrar – rule 12 of the rules.

D. Hearing the Petition: Where a petition is for the confirmation of a reduction under Rule 5(4) and the court had directed an inquiry as above, the petition shall not be heard before the expiration of at least eight (8) clear days after the filing of the certificate – ***Rule 14 of the Rules***. Before the hearing, a notice of the day appointed for the hearing must be published in the newspaper as the court directs – ***Rule 14(2) of the Rules***.

IV. Writ of Summons

This is used for proceedings concerning the operations of the CAMA where no provision is made by these Rules; hence the Federal High Court (Civil Procedure) Rules would apply most with Writ of Summons - ***Rule 19 CPR 1992; Order 3 Rule 1 FHC (Civil Procedure) Rules 2009***.

V. Originating Application

Rule 5/6(1) IST (Procedure) Rules 2003 prescribes Originating Application as the originating process for use at the IST.

OTHER CONSIDERATIONS ON COMPANY PROCEEDINGS

1. **Effect of Commencement of an Action by Wrong Mode:** It will not invalidate proceedings except it will lead to substantial injustice - ***Agip v. Agip; Yalaju Amaju v. Arec***.
2. **Criminal Proceedings:** By ***Section 554 CAMA***, criminal offence resulting from corporate transactions is to be tried by court of competent jurisdiction in the place of the offence - ***Momodu v. State***.
3. **Titling/Heading of Corporate Suit:** Every originating summons, originating motion and petition by which company proceedings are begun and all affidavits, notice and other documents in those proceedings shall be entitled.

   IN THE MATTER OF COMPANY XYZ
   AND
   IN THE MATTER OF THE COMPANIES AND ALLIED MATTERS ACT CAP C20 LFN 2004
   Rule 1 (1) Companies Proceedings Rule 1992
   The originating process is supported by a verifying Affidavit as well as other relevant documents.

SERVICE OF COURT PROCESSES AND DOCUMENTS ON A COMPANY

I. Service of Court Process on a Company

Service of court process on companies is very important to know as this goes to the jurisdiction. The legal consequence of non-service or invalid service renders the entire proceedings null and void. Non-compliance with the rules of issuance of the process renders proceedings ineffectual - ***Integrated Builders v. Domzaq Ventures (Nig) Ltd***.

Section 78 CAMA provides that court process is to be served on a company in accordance with the provisions of the applicable Rule of CAMA.

Court processes is to be served on the principal officers of the company: Managing Director, Directors heading various departments, Company Secretary or by leaving it at the registered office of the company.

By virtue of ***Order 7 Rule 9 & 10 HCCPR Lagos 2012***, originating court process is served on a company by:

1. Serving a Director, Secretary or other principal officer of the company.
2. Leaving it at the Registered Office of the company.

In ***MTN (Nig.) Communications Ltd v. Bolingo Hotels & Towers Ltd***, service on the security guard of the appellant was held as improper service – ***Multi-Chem. Industries v. Musa***.

II. Service of Other Documents on a Company

All other documents other than court processes are to be served by posting it to the company, leaving it at the registered office of the company or leaving it with a principal member of the company - ***Order 6 Rule 8 FHC (Civil Procedure) Rules 2009***.

EVIDENTIAL ISSUES IN COMPANIES' PROCEEDINGS

I. Company Contracts

A. Forms of Company Contracts

By virtue of ***Section 71(1) CAMA***, contracts on behalf of a company may be made, varied or discharged as follows:

1. **Contracts in Writing under Seal:** any contract which if made between individuals would be by law required to be in writing under seal, or which would be varied, or discharged only by writing under seal, may be made, varied or discharged, as the case may be, in writing under the common seal of the company.
2. **Contracts in Writing:** any contract which if made between individuals would be by law required to be in writing, signed by the parties to be charged therewith, or which could be varied or discharged only by writing or written evidence signed by the parties to be charged, may be made, varied or discharged, as the case may be, in writing signed in the name or on behalf of the company.
3. **Oral or Parol Contracts:** any contract which if made between individuals would be valid although made by parol only and not reduced into writing or which could be varied or discharged by parol, may be made, varied or discharged, as the case may be, by parol on behalf of the company.

B. Effect of the Contracts

By virtue of ***Section 71(2) CAMA***, a contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, executors, or administrators, as the case may be; and may be varied or discharged in the same manner in which it is authorised by this section to be made.

C. Pre-incorporation Contracts

Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto – ***Section 72(1) CAMA***.

Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof – ***Section 72(2) CAMA***.

II. Common & Official Seal

1. **Common Seal:** Upon incorporation every company must have a common seal - ***Section 37; 74 CAMA***. The use of common seal shall be regulated by the articles of association - ***Section 74 CAMA*****.** Failure to use the common seal where necessary renders the transaction ineffective – ***African Development Corporation v. LEDB***.
2. **Official Seal:** It is used in place of common seal for the company outside Nigeria. It is a facsimile of the common seal with the addition on the face of it, of the name of every Country where it is to be used. The company's object must provide for the company to transact business in foreign countries.

II. Execution of Company Document by Attorney

By virtue of ***Section 76 (1) CAMA***, a company may by writing under its common seal appoint a person as its attorney, either generally or for a specified matter, to execute deeds on its behalf in any place in Nigeria or outside Nigeria. A deed signed by such an attorney binds the company and have the same effect as if it had been executed under the common seal of the company.

III. Authentication of Documents

A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company and need not be under its common seal unless otherwise so required – ***Section 77 CAMA; SPDC v. Allaputa*.**

ADR AS AN ALTERNATIVE IN RESOLUTION OF DISPUTES INVOLVING COMPANIES

I. Concept

Alternative Dispute Resolution (ADR) is a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a way that is less formal and often more consensual than is done in the courts. The various ADR options that can be resorted to are negotiation, mediation, conciliation, arbitration, etc.

II. Advantages of ADR in Company Disputes

1. Alternative Dispute Resolution (ADR) is generally faster and less expensive.
2. It is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the state.
3. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached.
4. Most Alternative Dispute Resolution (ADR) processes are based on an integrative approach.
5. They are more cooperative and less competitive than adversarial court-based methods like litigation. For this reason, Alternative Dispute Resolution (ADR) tends to generate less escalation and ill-will between parties.

III. Drafting of Arbitration Clause

In drafting arbitration, the following are important:

1. Language to be adopted in arbitration proceeding
2. The applicable law
3. The procedure to be adopted
4. The rules to be adopted
5. The place where the arbitral proceeding will be held.

Below is a model arbitration clause

Any dispute, controversy or claim arising out of or relating to the contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the rules for arbitration as follows:

1. *The appointing authority shall be……*
2. *The number of arbitrators shall be……..*
3. *The language to be used in the arbitral proceeding shall be…….*
4. *The law applicable to this contract shall be that of……*
5. *The venue of the arbitration shall be……..*

Or

All disputes between the partners in relation to any matter whatsoever touching the joint venture affairs or the construction of this agreement and whether before or after the determining of the joint venture shall be referred to a single arbitrator in accordance with the provisions of the Arbitration and Conciliation Act. Cap. A8 LFN 2004.

JURISDICTION, POWERS AND FUNCTIONS OF COURTS AND TRIBUNALS IN RESOLUTION OF INVESTMENT DISPUTES

I. Federal High Court

The Federal High Court shall have limited jurisdiction in investment disputes except for enforcement of IST awards and application for an order for the revocation of registration of a capital market operator - ***Section 51 & 293(3) of ISA*****.**

II. Administrative Proceedings Committee (APC) of the SEC

The Administrative Proceedings Committee of SEC is a body established pursuant to the Investments and Securities Act for the purpose of resolving disputes between parties to a capital market dispute.

Any party who is not satisfied with the decision of the Committee as confirmed by the Commission may within 30 days of the receipt of the decision appeal to the Investments and Securities Tribunal (IST) – ***Rule 18 of APC Rules of Procedure.***

III. Investments and Securities Tribunal (IST)

A. Establishment

The Investments and Securities Tribunal (IST) was established under ***Section 224 of Investments and Securities Act (ISA) 1999*** now ***Section 274 ISA 2007*****.** The IST is a tribunal established by an Act of National Assembly to give expeditious hearing of capital market issues. The IST is deemed to be a civil court. It have both appellate and original jurisdiction. It has appellate from the administrative proceedings committee annexed to IST. It has jurisdiction on capital market disputes

B. Aims and Objectives of the IST

1. Expedient and affordable dispute resolution mechanism
2. Protect the integrity of the capital market and stable economy
3. Avoids delays and technicalities.
4. Efficient resolution of investments and capital market disputes with fairness, flexibility and transparency". Flexible in adherence to the rules of evidence.

C. Proceedings of the IST

Proceeding is judicial and shall be deemed to be a civil court – ***Section 290(3) ISA***. The IST is flexible in adherence to the rules of evidence, and other technicalities in proceedings. Note that a party may appear before the Tribunal either in person or by a counsel – ***Section 291 ISA*****.**

Onus of proof is on the appellant or applicant – ***Section 292 ISA***. The judgment or orders of the tribunal shall be in writing – ***Section 293 ISA*****.** Proceedings may be open to the public or in camera – ***Section 290(4) ISA*****.**

To appeal a decision of SEC to IST, There must be 14 days pre-action notice/intention to appeal given to SEC – ***Proviso to Section 289(1) ISA***.

D. Other Considerations

1. **Mode of Commencement of Action:** The mode of commencing action in IST is by an Originating Application.
2. **Powers of IST – *Section 290(2)A-H ISA*:**
   (a) Power to summon/compel attendance of any person
   (b) Power to require discovery and production of documents.
   (c) Power to decide matters ex-parte.
   (d) Power to dismiss applications in default.
   (e) Power to call for the examination of witnesses or documents
   (f) Power to review its decisions
3. **Composition of IST:** Minimum of 3 members of the tribunal. Where it is deemed necessary for the purpose of exercising jurisdiction vested in the tribunal by ISA 2007 or any other act, the chairman must be a lawyer – ***Section 276 ISA*****.** The members of the Tribunal are appointed by the Minister of Finance.

4. **Tenure:** ***Section 277 ISA*** provides 5 years for chairman and 4 years for members renewable once for the respective periods.
5. **Time Frame for Concluding Actions:** It is required to conclude any proceedings before it within 90 days of commencement of the action.
6. **Time Limit For Filing Appeals:** 30 days from the date of making of the order - ***Section 289(2); 304 ISA***.

E. Jurisdiction of the IST

1. **Concept:** The jurisdiction of the Investment and Securities Tribunal is enumerated in ***Section 284/294 of the Investments and Securities Act***. It has exclusive original jurisdiction over disputes arising from the administration, management and operation of collective investment schemes. The IST is also empowered to adjudicate on pensions disputes in Nigeria - ***Section 93 Pension Reform Act 2004***. It has appellate jurisdiction over APC disputes.
2. **Scope of the IST Jurisdiction –** By ***Section 284 CAMA*****,** it may also adjudicate in the following matters:
   (a) Interpretation of any law or regulations to which the Act applies;
   (b) Disputes between SEC and a Securities Exchange or capital Trade Point
   (c) Disputes between capital market operators and the securities exchange or capital trade point;
   (d) Disputes between capital market operators;
   (e) Disputes between capital market operators and their clients; and
   (f) Disputes between quoted companies and the regulators of the securities exchange.

F. Appeal of IST Decisions

Any appeal against its judgment lies directly to the Court of Appeal on points of law only. Any issue of fact is not appealable as deemed to have been resolved by the best experts in the field. It can equally go further to the Supreme Court – ***Section 295 & 297 ISA*** respectively. From the Court of Appeal, appeal lies further to the Supreme Court. A Pre-Action Notice will have to be issued to the Tribunal whenever there will be an appeal against its decision.

G. Enforcement of Decisions of the IST

The decision of the Tribunal is enforced as a judgment of the Federal High Court by registering it with the Federal High Court – ***Section 293(2) ISA***.

H. IST – ADR Centre

This is the Alternative Dispute Resolution Centre of the IST. It is designed to provide sessions for various ADR options such as negotiation, mediation, arbitration and other hybrid processes. Pursuant to ***Rule 34(1), 3(2) and 4 of IST (Procedure) Rules 2003*** the IST issues directives for the effective management and resolution of dispute brought before it (i.e. IST issues the rules for the ADR proceedings).

I. Limitations of the Dispute Resolution Mechanism of IST

However, the Rule and laws do not make any express procedural provision as to resolving investment and securities dispute alternatively rather than resorting to litigation.

The laws should give effect to the rule of ***Scott v. Harvey*** clause, which posits that where parties agree as to ADR, it should be considered before resorting to litigation. Where ADR fails, the litigation can be regarded as a means of settling disputes between capital market operators.

ADR should be made compulsory rather than voluntary. Where parties fail in ADR, then the matter would be taken into litigation at the Investment and Securities Tribunal.

Under ***Rule 4 IST (Procedure) Rules 2003***, the IST is empowered to promote reconciliation among parties to an action and encourage and facilitate the amicable settlement of disputes.

J. Jurisdictional Conflict

A. Federal High Court and the Investment and Securities Tribunal (IST)

1. Conflicting Provisions

(a) The combined provisions of ***Section 251(1)(e) CFRN 1999*** which gives the FHC exclusive jurisdiction over matters arising from the operation of CAMA coupled with ***Section 251(1)(r) CFRN*** which gives FHC exclusive jurisdiction on matters involving challenge of decisions of Federal Government Agency, clearly raises jurisdictional conflict between FHC and IST.

(b) This is in view of the matters covered by ***Section 284 ISA*** and the exclusive jurisdiction granted the IST by ***Section 294 ISA***.

(c) The conflicting jurisdiction was raised in ***FIS Securities Ltd v. SEC*** and the IST held that it has competence to deal with matters contained in CAMA.

2. Schools of Thought

There are two schools of thought to this conflict viz:

(a) 1st School of Thought: This proponents of this school hinge their arguments on the fact that the Constitution is supreme. That IST is not a superior court as listed in Section 6(6) CFRN. In ***National Union of Electricity Employees v. Bureau for Public Enterprises (BPE)***, consistency Test was laid in relation to ***Section 1(3) CFRN***. IST is not a superior court and as therefore cannot purport to take away jurisdiction in matters vested in the Federal High Court. Also, judgment of IST is not enforceable unless it is registered in the Registry of the Federal High Court.

(b) 2nd School of Thought: In determining the jurisdiction of the Federal High Court, the Court must look at both the object and the subject matter - ***NEPA v. Edegbenro***. The proponents of this school hold the view that IST has exclusive jurisdiction over capital market and investment disputes. In ***Ajayi v. SEC*****,** the Court of Appeal upheld the decision of the Federal High Court in declining jurisdiction in a matter bordering on capital market dispute. IST is established by Act of National Assembly and gives exclusive jurisdiction on capital market disputes. Thus, it is not an inferior court.

3. Comment

Origin of the conflict stems from 1973 as IST was supposed to be an arm of FHC. The argument has no yes/no approach. The court will consider it on a case-by-case basis. There are pending SC decisions on the point - ***FIS Securities Limited v SEC and IST***.

In resolving this dispute, having gone through the 4 cases above, the conclusion seem to be that the FHC has jurisdiction for matters emanating from CAMA whereas as was held in ***Ajayi v SEC***, matters bordering on capital market disputes only shall go to IST.

Assuming someone suing Nigerian Law School (Council of Legal Education) and a capital market operator, ***NEPA v Edegbenro*** states that it is the FHC because NLS is an agency of the government. But note should look at the object and subject matter so I think it should be the IST.

B. Jurisdictional Conflict with the National Industrial Court

Section 254C of CFRN vests exclusive jurisdiction on NIC over employment and labour matters including pensions. This conflicts with ***Section 93(4) Pension Reform Act***.

IV. Dispute Resolution Mechanism of the NIPC Act

A. Scope

Although ***Section 26(2) NIPCA*** provides for different laws that will apply for foreign and local investors, ***Section 26(3) NIPCA*** does not specify whether the investor would be local or foreign. It therefore affords both foreign and local investors level opportunities for settling investment disputes.

B. Procedure

1. Where a dispute arises between an investor and any government of the federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.
2. If amicable settlement through mutual discussion is not possible, the dispute may be submitted at the option of the agreed party to arbitration as follows:
   (a) In case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act cap A18 LFN 2004*;*
   (b) In the case of a foreign investor, within the framework of any bilateral or multilateral agreement or investment protection to which the Federal Government and the country of which the investor is a national are parties; or
   (c) In accordance with any national or international machinery for the settlement of disputes agreed on by the parties - ***Section 26(1) (2) NIPC Act.***
3. Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Dispute Rules shall apply - ***Section 26(3) NIPC Act***.

C. Tax Appeal Tribunal

By virtue of ***Section 59 FIRS (Establishment Act) 2007,*** the Tribunal has jurisdiction over:

1. Companies Income Tax Act
2. Personal Income Tax Act
3. Petroleum Profit Tax Act
4. Value Added Tax Act
5. Capital Gains Tax Act
6. Other Tax Laws

V. National Industrial Court

The Court shall have and exercise exclusive jurisdiction in civil causes and matters relating to labour, including trade unions and industrial relations, environment and conditions of work, health, safety and welfare of labour – ***Section 254C CFRN 1999***.

Also, it has exclusive jurisdiction in civil causes and matters relating to the grant of any order to restrain any person or body from taking part in any strike, lock-out or any industrial action, or any conduct in contemplation or in furtherance of strike, lock-out or any industrial action.

Other Jurisdiction include civil causes and matters relating to the determination of any question as to the interpretation of any collective agreement, any award made by an arbitral tribunal in respect of a labour dispute or an organisational dispute, the terms of settlement of any labour dispute, organisational dispute as may be recorded in any memorandum of settlement, any trade union constitution and any award or judgment of the Court.

ETHICAL ISSUES

1. Advice client on ADR options - ***Rule 15(3) (d) RPC***
2. Not to deal improperly with client's money - ***Rule 23(2) RPC***
3. Conversant with the company rules - ***Rule 16 RPC***
4. Understand the issue of jurisdiction as can be raised for the first time at Supreme court and can be raised on the court suo motu - ***Rule 14 & 16 RPC***
5. Ensure proper service of court services

SAMPLE DRAFTS

Originating Motion

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

SUIT NO:_____

IN THE MATTER OF TIMBERWOODS FURNITURE LTD
AND
IN THE MATTER OF THE COMPANIES AND ALLIED MATTERS ACT CAP C20 LFN 2004
BETWEEN:

1. MOJI MODUPE
2. OYIN MODUPE
(Administrators/Personal representative of the Estate of Bola Modupe-Deceased) } APPLICANTS

AND

1. TIMBERWOODS FURNITURE LTD
2. JAMES JOHN (DIRECTOR) } RESPONDENTS

ORIGINATING MOTION

BROUGHT PURSUANT TO SECTION 90 OF THE COMPANIES AND ALLIED-MATTERS ACT, ORDER 3 OF THE COMPANIES PROCEEDINGS RULES 1992 (AS AMENDED) AND UNDER THE INHERENT JURISDICTION OF THIS HONOURABLE COURT

TAKE NOTICE that this Honourable Court will be moved on the 4th day of April 2019 at the hour of 9 O'clock in the forenoon or so soon thereafter as Counsel for the Defendant/Appellant will be heard praying this Honourable Court for:

1. AN ORDER mandating the Respondent to rectify the Register of members to include both the names of the Applicants as owners of the shares owned by Mrs Bola Modupe now deceased.
2. AND for such orders as the Honourable Court may deem fit to make in the circumstances.

Dated This 22 Day of March, 2019

…….
Killi Nancwat, Esq.
Counsel to the Applicants
No 10 Base Street
Ikoyi
Lagos State

For Service On:
The Respondents
No. 40 Keffi Street Ikoyi Lagos

Affidavit in Support of Originating Motion

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

SUIT NO:_____

IN THE MATTER OF TIMBERWOODS FURNITURE LTD
AND
IN THE MATTER OF THE COMPANIES AND ALLIED MATTERS ACT CAP C20 LFN 2004
BETWEEN:

1. MOJI MODUPE
2. OYIN MODUPE
(Administrators/Personal representative of the Estate of Bola Modupe-Deceased) } APPLICANTS

AND

1. TIMBERWOODS FURNITURE LTD
2. JAMES JOHN (DIRECTOR) } RESPONDENTS

AFFIDAVIT IN SUPPORT OF ORIGINATING MOTION

Moji Modupe Adult, Female, Public Servant, Nigerian citizen of No. 15 Broad Street Ikeja Lagos, do hereby make oath and state as follows:

1. That I am one of the Applicants and by virtue of which I am conversant with the facts of this case.
2. The applicants in this case are the personal representatives/Administrators of the Estate of Mrs. Bola Modupe (now deceased), a copy of the letters of Administration is attached and marked as Exhibit A.
3. I know as a fact that in 2010 the deceased Mrs. Bola Modupe bought 2, 000 ordinary shares of N1.00 each in the 1st Respondent's company, a copy of the Shares Certificate issued to her is attached and marked Exhibit B.
4. That on the 10 day of January 2018, Mrs. Bola Mudupe died survived by the Applicants; a copy of the death certificate is attached and marked Exhibit C.
5. That the Applicants after been granted Letters of Administration in respect of the Estate of Mrs Bola Modupe (deceased), wrote to the Respondents indicating their intention to be members of the 1st Respondent. A copy of the letter of intention to be members of the Respondent Company is attached and marked Exhibit D.
6. The Respondents has since ignored their request to be registered and so a reminder Letter was sent to the Respondents dated the 15th day of December 2018, a copy of the letter is attached and marked Exhibit E.
7. That up till the time of this action, the Respondents never replied nor did they register the Applicants as members of the 1st Respondent.
8. That the Applicants pray that the Respondents be ordered to rectify its Register of members to include the Applicants in the interest of justice.
9. That I make this statement in good faith believing its content to be true and correct and in accordance with the Oaths Law of Lagos State.

……
Deponent

Sworn to at the Federal High Court Registry, Lagos
This 22nd day of March 2019

BEFORE ME

COMMISSIONER FOR OATHS

Originating Summons

IN THE FEDERAL HIGH COURT OF FEDERAL REPUBLIC OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDING AT ABUJA

SUIT NO: FHC/99/15

IN THE MATTER OF KENNYBABE & SONS PLC
AND
IN THE MATTER OF COMPANIES AND ALLIED MATTERS ACT

BETWEEN:
KENNYBABE & SONS PLC----------APPLICANT
AND
GOLD PALM NIGERIA PLC----------RESPONDENTS

ORIGINATING SUMMONS

BROUGHT PURSUANT TO RULE 2(2) COMPANIES PROCEEDING RULES 1992 AND THE INHERENT JURISDICTION OF THE COURT

Let Gold Palm Nigeria Plc whose registered address is at No 8 Palm Street, Abuja within jurisdiction to within 7 days on or after service of this summons on it inclusive of the day of such service cause an appearance to be entered for it to this summons, which is Kennybabe & Sons Plc (Plaintiff) whose registered address is situate at Plot B4 Highway Garki, Abuja for the following RELIEFS:

1. AN ORDER DECLARING ITS TAKE-OVER BY THE DEFENDANT AS FRAUDULENT, ILLEGAL AND VOID
2. AND FOR SUCH FURTHER ORDER OR ORDERS as the court may deem fit in the circumstances.

Dated the 19th day of February 2015.

Killi Nancwat
NE Killi & Co. (Peoples Chamber)
SOLICITOR FOR THE PLAINTIFF,
No 2B Akinsway, Maitama,
Abuja.

FOR SERVICE ON:
DEFENDANT'S COUNSEL
Kunleowo Iyaloja Esq
Plot G1 Plaza Motel, Wuse,
Abuja.

Affidavit in Support of Summons

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

SUIT NO: FHC/10/15

IN THE MATTER OF KENNYBABE & SONS PLC
AND
IN THE MATTER OF COMPANIES AND ALLIED MATTERS ACT

BETWEEN
KENNYBABE & SONS PLC PLAINTIFF
AND
GOLD PALM NIGERIA PLC DEFENDANT

AFFIDAVIT IN SUPPORT OF SUMMONS

I, Tennyson Sunday, Female, Christian, Director of KENNYBABE and Sons Plc, of No 2B KENNYBABE Way, Garki, Abuja and a Nigerian Citizen do hereby depose to this affidavit and state as follows:

1. I am a Director of the Plaintiff, a company incorporated under the Allied & Matters Act 2004 whose registered address is situated No 2B KENNYBABE Way, Garki, Abuja.
2. I am conversant with the facts of this case and other related facts
3. I am aware that there was a take-over transaction by the respondent in the Plaintiff's company.
4. The take-over was fraudulent because Chief Nze Nchinyere who was a major shareholder in the Plaintiff company without disclosing influenced the take-over to his personal favour.
5. The take-over was carried out contrary to the procedure laid down by the law which requires it to notify the employees of the respondent company.
6. That the take-over had resulted in the loss of job of over 100 workers of the Plaintiff's company.
7. The grant of this application would be in the interest of justice and benefit of the economy of society considering the nature of the business of the company and its contribution so far.
8. I swear to this affidavit in good faith believing same to be true and correct to the best of my knowledge and in accordance with the Oath Act.

Deponent

Sworn to at the Federal High Court of Federal Republic of Nigeria Registry, Abuja
This 19th day of February 2015

BEFORE ME:

COMMISSIONER FOR OATHS

(Week 20)

WINDING UP AND DISSOLUTION OF BUSINESS & NON-BUSNIESS ORGANISATIONS

INTRODUCTION

I. Concept of Winding-Up and Dissolution of a Company

Winding up involves the process where a company's assets are liquidated and dissolved and distributed in accordance with rules of priority. Winding up is usually the last option open to a company suffering from financial problems that is after certain re-structuring options did not work. Importantly is the fact that winding up includes both the liquidation of a company and the dissolution of such company. A company in liquidation still has its legal personality only that legally, it is sick while a dissolved company no longer exists. That is why ***Section 20(3) CAMA*** provides that a company in liquidation should not join in the formation of a company. Even when the order of winding up of the company has been given, that does not mean the company is no longer in existence. It is only when the company has been dissolved that it ceases to exist - ***CS (Nig) Plc v. Mbakwe***. Winding up is not the only process of bringing the life of a company to an end. There is the striking out of a company's name from the register of companies by the CAC under ***Section 525 CAMA***.

Importantly, winding up only applies to companies incorporated in Part A; while business names and incorporated trustees are to be dissolved. Also, a statutory company (that has not converted to a limited liability company) can only be dissolved by a statute as they are creation of statute. The decision of the court in ***Kwara Investments Co Ltd v. Garuba***.

II. Modes of Winding up Companies

Principally, there are three modes of winding up a company, namely

1. Winding up by the court
2. Voluntary winding up by members or creditors
3. Winding up subject to the supervision of the court – ***Section 401(1)(a)-(c) CAMA***

III. Court with Jurisdiction

The court having jurisdiction to wind up a company shall be the Federal High Court within whose area of jurisdiction the registered or head office of the company is situate or where it has maintained registered office for the past 6 months preceding the presentation of the petition - ***Section 407 CAMA***.

IV. Applicable Laws

1. Companies & Allied Matters Act (CAMA)
2. Company Winding up Rules 2001
3. Investment and Securities Act 2007
4. SEC Consolidated Rules 2013
5. National Deposit Insurance Commission Act
6. Banks & Other Financial Institution Act
7. National Insurance Commission Act
8. Federal High Court Act
9. Federal High Court (Civil Procedure) Rules 2009

V. Regulatory Agencies

1. Corporate Affairs Commission – It can present petition for winding up. It is a custodian of company records-A company must file returns during winding up.
2. Federal High Court - court with jurisdiction to entertain winding up petition.
3. Securities & Exchange Commission
4. Nigeria Stock Exchange
5. National Insurance Commission

COMMENCEMENT OF WINDING UP PROCEEDINGS

I. Concept

It depends on the type of winding up as follows: ***Section 415 CAMA***

1. If a members' Resolution to wind up was passed, it is commenced at the time of passing the Resolution: i.e. for voluntary members' winding up.
2. If it is a Petition to wind up that is filed, at the time of presentation of the Petition: in any other case - ***Mercantile Bank of Nigeria Plc v. Nwabude*****.**

In case of the company itself, it is when a special resolution has been passed for a voluntary winding up unless there is proof of fraud. In any other cases, where the petition for winding up of the company has been presented.

II. Effect of Commencement of Winding-Up Proceedings

1. Any disposition of the property of the company including things in action shall be void unless the court orders otherwise.
2. Any transfer of shares shall be void unless the court orders otherwise.
3. Any alteration in the status of members of the company shall be void unless the court orders otherwise - ***Section 413 CAMA***.
4. Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after commencement shall be void – ***Section 414 CAMA***. Do not forget this that the foregoing is only applicable where winding up is effected by the court.

WINDING UP BY THE COURT (COMPULSORY WINDING UP)

I. Concept

This mode of winding up is also known as compulsory winding up. The court with jurisdiction in this regard is the FHC – the judicial division within whose area of jurisdiction the registered office or head office of the company is situated – ***Section 407(1) CAMA***.

II. Circumstances in which a Company may be Wound Up by the Court

The circumstances under which a company may be wound up by the court are provided as follows – ***Section 408(a)-(e) CAMA***.

1. The company has by special resolution resolved that the company be wound up by the court
2. Where there is default in delivering the statutory report to the commission or in holding the statutory meeting. Note that this is applicable to a public company – ***Section 211-212 CAMA***.
3. The number of members is reduced below two
4. The company is unable to pay its debts
5. The court is of the opinion that it is just and equitable that the company should be wound up.

A. Members Special Resolution for Compulsory Winding-Up

This begins with the Board of Directors passing resolution (Resolution of the Board) that the company be wound up. The members in general meeting will then pass a special resolution for the winding up of the company.

B. Default in Delivering Statutory Report to the Commission or in holding the Statutory Meeting

This can only be brought by a shareholder and it must be before the expiration of fourteen (14) days after the last day on which the meeting should have been held under ***Section 410(2) (b) of CAMA***. The court may, instead of making a winding-up order, direct that a meeting be held or the report be delivered, and make orders as to costs as it thinks fit – ***Section 411(3) of CAMA***. This ground is only applicable to public companies – ***Section 211(1) & 212 CAMA***

C. Reduction of Members below Two

A company cannot be incorporated with less than two persons which is the legal requirement – ***Section 18 of CAMA***. A company which is in default of this would be wound-up by the court in addition to other sanctions as to liability – ***Section 93 of CAMA***. This is one of the cases where a contributory is expressly authorised to bring a petition for winding-up – ***Section 410(1)(d) of CAMA***.

D. Inability to Pay Debts

1. **General Rule:** Under ***Section 408(a)-(c) CAMA***, the term is well defined:
   - **(a) Failure to Pay Debt after 3 Weeks of Service of Statutory Letter of Demand by the Creditor:** First is where a creditor either by assignment or otherwise, to whom the company is indebted in a sum exceeding N2, 000 which is duly served on the company by leaving it at its registered office or head office a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.
     The statutory letter of demand must be written personally by the creditor - if the creditor is an individual, by himself; if creditor is a company, by its officers – director or secretary. A solicitor cannot write on behalf of the creditor. In ***Nigerian Com Ind Ent. Ltd .v. Omogbajo Ltd***,[34] a solicitor had written on behalf of creditor, the court found that such was not in compliance with provision of the law (Companies Act 1968) having same provision with CAMA.
     The demand should be formally titled as "STATUTORY LETTER OF DEMAND FOR PAYMENT PURSUANT TO SECTION 409 OF COMPANIES AND ALLIED MATTERS ACT". It should set out the debts owed, a request to pay within three weeks and a notice that upon expiration, the creditor would take steps to wind up the company. "LEARN TO DRAFT IT".
   - **(b) Returning Order of Court in Favour of Creditor Unsatisfied:** a company is deemed to be unable to pay its debts if execution or other process issued on a judgment, Act or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part.
   - **(c) Contingent or Prospective Liability of the Company:** If the court after taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debts.
2. **Exceptions:** A company will not be deemed to be unable to pay its debt if:
   - (a) The debt to a creditor is not due
   - (b) No evidence of due demand for payment was made
   - (c) If there is a bona fide dispute of the debt - ***Onochie v. Alan Dick & Co. Ltd;***[35] ***Tate Industries Plc v. Devcom Ltd.***[36] ***Re London & Paris Banking Corp***.
   - (d) There is no evidence that the company is insolvent.

   See ***Section 409 of CAMA***

NB - the State High Court has jurisdiction when the debt claimed is unascertainable or in dispute. However, the denial of debt in bad faith cannot stop petition if amount admitted is more than N2, 000.

[34] (1979) NCLR
[35] (2003)
[36] (2004)

E. Winding Up On Just & Equitable Grounds under Section 408 (e) CAMA

1. **Grounds upon which the Court May Order Winding-Up under Just and Equitable Grounds:**
   (a) The substratum of the company has disappeared, such as the inability of the company to achieve its object clause or the company is deeply indebted - ***Re Yenidije Tobacco Ltd.***
   (b) The company is formed for fraudulent purpose.
   (c) The company is a "bubble" as it has no business or asset or never intended to carry on business in a proper manner.
   (d) Unfairly prejudicial or discriminatory act against the minority or other members, culminating in lack of confidence in the management of the company's affairs by those in control of the company - ***Ibrahimi v. Westbourne Galleries Ltd.***
   (e) If the company is small, grounds that would justify dissolution of partnership on just and equitable ground is enough, such as deadlock - ***The Matter of the Stevedoring (Nig.) Co. Ltd.***
2. **Factors Guiding Courts Discretion in Winding-Up under Section 408(e)**
   (a) Whether it is just and equitable to wind-up a company depends on the facts which are available to the court at the time of hearing of the application as set out in the petition – ***Re Wondoflex Textiles Property Ltd*.**[37]
   (b) However, a petition on just and equitable ground should not be dismissed basically because the petitioner has some other remedies since the motive of the petitioner is irrelevant – ***Obasi v. Pureway Corporation (Nig.) Ltd***.[38]
3. **Circumstance where Winding-Up under Just & Equitable Ground will not be Granted:** The petitioner is not entitled to a winding-up order on the just and equitable ground if his object is not a company purpose but the pursuit of a selfish advantage in a question between himself and other shareholders – ***Anglo American Brush Corporation Ltd. v. Scottish Brush Co. Ltd*.**

III. Categories of Persons who can bring Petition in the FHC

Under the winding up by the court, certain persons are given the power to bring petition to the FHC in ***Section 410(1)-(4) CAMA***. There are general categories of persons in sub-section (1) namely:

1. The company
2. A creditor including a contingent or prospective creditor of the company
3. The official receiver
4. A contributory – a contributory is every person liable to contribute to the liability of the company on the event of its being wound up. It include both present and past members as provided in Section 92 and a member who has paid up all his issued shares is a contributory – ***Section 403-406 CAMA***.
5. A trustee in bankruptcy to, or a personal representative of a creditor or contributory
6. The commission - CAC under ***Section 323 CAMA.***
7. A receiver if authorized by the instrument under which he was appointed
8. By all or any of those parties, together or separately.

IV. Restrictions of the Powers of the Persons who can bring Petition

The powers of the above persons are curtailed or restricted by the following provisions:

1. **Contributory:** A contributory can only bring petition if the number of members is reduced below two. The shares in respect of which he is a contributory, some of them were originally allotted to him or have been held by him and registered in his name for at least

[37] (1951) VLR 458.
[38] (1878) 4 FRCR 214

6 months within 18 months of presenting the petition or have devolved on him through the death of a former holder – ***Section 410(2)(a) CAMA***.

2. **Shareholder:** For the ground of failure of a public company to hold statutory general meeting or delivery of statutory report, only a shareholder can bring petition within 14 days after the day the meeting should have held – ***Section 410(2) (b) CAMA***.
3. **Contingent or Prospective Creditor:** The court can only hear a winding up petition presented by a contingent or prospective creditor when sufficient security for costs has been established to its satisfaction – ***Section 410(2) (c) CAMA***.
4. **Corporate Affairs Commission:** Where CAC is petitioning on the court opinion that it is just and equitable that the company should be wound up or on report of inspector under Section 320 – 321 CAMA, the commission is to obtain the approval of the Attorney-General of the Federation for the presentation of the petition – ***Section 410(2)(d) CAMA***.
5. **Official Receiver:** Petition for winding up can only be presented by the official receiver attached to the court or any other person so authorized if the company is being voluntarily wound up or subject to supervision of the court – ***Section 410(3) CAMA***.

V. Stages of Compulsory Winding up Proceedings

There is the ***Companies Winding Up Rules*** and ***Companies Proceeding Rules 1992***. The procedure for winding up a company is essentially contained in the Companies Winding-Up Rules 2001.

1. **Presentation or Filing of Petition:** this is to be presented at the court – FHC's registry and the time and place appointed for the hearing of the petition shall be written on the petition – ***Rule 15 CWR 2001***.
2. **Filing of Verifying Affidavit:** this is to be depose to by the petitioner, or one of the petitioners if more than one. If petition is by the company, then by the secretary, director or other principal member of the company. The verifying affidavit should be filed within 4 days of presenting petition – ***Rule 18 CWR 2001***.
3. **Service of Petition on the Company:** unless the petition is by the company, it must be served on the company. Service is at registered office in absence of which principal place of business or last known principal place by leaving with the member, officer or servant of the company and in absence of which leaving a copy at the place – ***Rule 17(1) & (2) CWR 2001***. If it is voluntary winding up on the liquidator.
4. **Advertisement of the Petition:** the petition is advertised on the order of the judge which is to be advertised within 15 days before the hearing. The petition is to be advertised in the gazette, one national daily newspaper and one other newspaper in circulation in the company's registered office or principal or last known place of business. The advertisement is to contain the following:
   (a) The day the petition was presented
   (b) The name and address of the petitioner and of his solicitor
   (c) Contain a note at the foot stating that any person who intends to appear at the hearing of the petition either to oppose or support must send notice of his intention to the petitioner or to his solicitor not later than 48 working hours before the date the petition is for mention in court - ***Rule 19(1)-(4) CWR 2001***.
5. **Sending Copies of Petition to Creditor:** Sending of copies (petition) to creditor or contributory within two days of requiring same - ***Rule 20 CWR 2001***.
6. **Filing of Memorandum of Companies by the Petitioner:** After advertisement, the petitioner or his solicitor is to file memorandum of companies - ***Rule 22 CWR 2001***. This comes before issuance of notice of intention to appear.
7. **Filing of Notice of Intention to appear on the Hearing of the Petition:** Notice is to be given to the petitioner and signed by such person or his solicitor - ***Rule 23(1) & (2) CWR 2001***, this is by those who wants to oppose or support the petition for dissolution.

8. **Appointment of a Liquidator:** After the advertisement of a petition for the winding up of a company by the court, a liquidator - a provisional liquidator can be appointed. The provisional liquidator is appointed upon the application of a creditor or of a contributory or the company - ***Rule 21 CWR 2001***.
9. **Filing Affidavit in Opposition**: Affidavit in opposition to petition is filed by the respondent within 10 days of service of petition or by any other party within 15 days on date of advertisement - ***Rule 25(1) CWR 2001***. Notice of such affidavit in opposition is to be given to the petitioner or his solicitor on the day it was filed.
10. **Affidavit in Reply to Affidavit in Opposition**: Affidavit in reply to an affidavit filed in opposition to a petition shall be filed within 5 days of the date on which notice of such affidavit is received by the petition or his solicitor - ***Rule 25(2) CWR 2001***. Petitioner files affidavit in reply.
11. **Summons for Security for Costs**: This is by the petitioner.
12. **Filing List of Names and Address of Persons Who Appear on the Petition:** This is to be prepared by the petitioner or his solicitor containing the names and address of persons who have given notice of their intention to appear on the hearing of the petition - ***Rule 24 CWR 2001***.
13. **Hearing of the Petition by the Court:** the court is to hear the petition as presented by the petitioner and the respondent is equally allowed to oppose.
14. **Winding-Up Order Made By The Court**: if the court is satisfied of the grounds for petition, an order for winding up will be made. Where a winding up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose. Restriction is not on the company but on a third person who had commenced action against the company or is intending to - ***Section 417 CAMA***. An order for winding up a company shall operate in favour of all the creditors and all the contributors of the company as if made on the joint petition of a creditor and of a contributory - ***Section 418 CAMA***.
15. **Service of Winding-Up Order:** After the winding up order is made, the order is to be served. Thus, the service of winding up order. ***Section 416 CAMA*** provides for delivery by the company to the CAC and the commission shall make a minute thereof in its book relating to the company.
16. **Advertisement of Winding-Up Order** – the winding up order is advertised - ***Rule 30 CWR 2001***.
17. **Delivery of Statement of Affairs**: the statement of affairs is then delivered as the last step.

VI. Staying of Winding-UP

Section 438 (1) CAMA empowers the Federal High Court to stay winding up even after the order is made. It is not a form of Appeal, but a review of the entire proceedings leading to the order. This may be on the application of either a liquidator or official receiver, a creditor or contributory.

VOLUNTARY WINDING UP

I. Concept

Under voluntary winding up, there is member voluntary winding up and creditors' voluntary winding up. A company in this regard may be wound up voluntarily in two respects, namely

1. By an ordinary resolution when the period fixed for duration of the company by its articles expires or the duration was contingent upon the happening of an event and such event has happened.
2. By special resolution where the company resolves that it should be voluntarily wound up – ***Section 457(a)-(b) CAMA***.

A voluntary winding up commences at the time of passing of the resolution for voluntary winding up – ***Section 459 CAMA***. The above is based on the fact that upon commencement of the winding up, the company ceases to carry on its business except as required for the beneficial winding up – ***Section 460 CAMA***. However, the corporate state and corporate powers of the company shall continue until dissolved notwithstanding anything in its articles. Also, any transfer of shares not made to or with sanction of the liquidator and any alteration in the status of the members of the company shall be void – ***Section 461 CAMA***.

II. Member's Voluntary Winding-Up

A. Concept

Member's voluntary winding up is only possible when there is statutory declaration of solvency. The statutory declaration is to be made by the directors of the company. If just two directors, both of them and if more than two, majority of them. The statutory declaration in essence states that the directors have made a full inquiry into the affairs of the company and thus formed an opinion that within 12 months from the commencement of the winding up, the company will be able to pay its debts in full – ***Section 462(1) CAMA***.

B. Conditions for Statutory Declaration becoming Effective

The statutory declaration can only have effect upon fulfilling of the following conditions:

1. It was made within 5 weeks before the date of passing of the resolution for winding up the company and is delivered to the commission, CAC for registration before that date.
2. The statutory declaration embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration. See ***Section 462(2) (a)-(b) CAMA***.

Note that it is the making and delivery of statutory declaration that distinguishes a member's voluntary winding up and a creditor's voluntary winding up – ***Section 462(4) CAMA***.

C. Procedure for Member's Voluntary's Winding-Up

1. **Making of Statutory Declaration by Directors & Delivery of Same to CAC:** Directors in board of directors meeting make statutory declaration and delivers same to CAC within 5 weeks.
2. **Issuance of Notice of General Meeting by Directors:** Directors issue notice of general meeting of the company.
3. **Passing of Special Resolution for Voluntary Winding-Up at General Meeting:** A special resolution for voluntary winding up within 5 weeks of making statutory declaration is passed at the general meeting.
4. **Appointment of Liquidators:** The Company at the general meeting appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company and may fix the remuneration to be paid to him or them – ***Section 464(1) CAMA***. Upon appointing liquidator(s), powers (all) of the directors ceases except the company in general meeting or liquidator sanctions the continuance – ***Section 464(2) CAMA***.
5. **Giving of Notices of Special Resolution & Appointment of Liquidator to CAC:** Notices of special resolution and appointment of a liquidator(s) are given to CAC within 14 days of its being passed or appointment. Also advertisement in the gazette or two daily newspaper – ***Section 458(1) CAMA***.
6. **Summoning of Meeting of Creditors by the Liquidator(s):** Liquidator(s) calls or summon a meeting of creditors if the company in its opinion would not be able to pay its debts within 12 months and lay before the meeting a statement of the assets and liabilities of the company – ***Section 466(1) CAMA***.
7. **Summoning of General Meeting by the Liquidator(s) where Winding-Up will be more than One Year:** Where winding up will be more than one year, the liquidator summons a general meeting of the company at the end of the first year and lay before the meeting an account of his acts and dealings and of the conduct of winding up during the

preceding year – ***Section 461(1) CAMA***. A copy of the accounts is to be delivered to CAC within 28 days for registration.

8. **Preparing & Sending of Copy of Final Accounts by Liquidator to Members & Presentation of Same in General Meeting:** Where the affairs of the company is fully wound up, the liquidator shall prepare and send to every member of the company, final accounts and convene a meeting of the company for the purpose of laying before it such accounts. The meeting is to be convene by notice in the gazette and some newspaper circulating in the locality where the meeting will be held – ***Section 468(2) CAMA***. It should specify the time, place and object and be published at least one month before the meeting.
9. **Sending of Copy of Account to CAC after Meeting:** If quorum was present at the meeting, a copy of the account shall be sent to CAC within 7 days of the meeting. If no quorum, return to the effect that the meeting was duly summoned but no quorum would be delivered to CAC within 7 days – ***Section 468(3) CAMA***.
10. **Registration of Account & Return by CAC:** The CAC on receiving the account and appropriate return, register them and on the expiration of 3 months from the registration of the return, the company shall be deemed to be dissolved – ***Section 468(4) CAMA***.

D. Requirements for Member's Voluntary Winding-Up

Regulation 44 of Companies Regulation provides for requirements for member's voluntary winding up to include the following:

1. Statutory declaration of solvency duly signed by majority of the directors and embodying statement of the company's asset and liabilities - shall be filed with the commission within 5 weeks of its making.
2. Special resolution for voluntary winding up signed by a director and secretary or two directors - shall be passed within 5 weeks of the making of the statutory declaration of solvency and filed with the CAC within 14 days of its passing.
3. Publication of notice of resolution in the gazette or two daily newspaper
4. Resolution for appointment of liquidator
5. Publication of notice of appointment of liquidator in the gazette or two daily newspaper
6. Liquidator's notice of his appointment - shall be filed with the commission within 14 days of the appointment.
7. Publication of notice of final meeting in the gazette and at least two newspaper, one which must circulate in the locality where the meeting is being called
8. Return of final meeting and account of liquidation as laid before and approved by the meeting - shall be filed with the commission within 7 days after the date of the final meeting. The account shall be audited by the auditor of the company unless the liquidator is qualified for appointment as auditor of a public company or the company has resolved on or after appointment of the liquidator that the account should not be audited.
9. Original certificate of registration (or certified true copy where applicable) for cancellation
10. Updated annual return
11. Payment of fees

E. Circumstances where Members' Voluntary Winding-Up will be converted to Creditors Winding-Up

1. There is no Statutory Declaration of Solvency made and filed in support of the Resolution for winding-up.
2. The liquidator is of the opinion that the company will not be able to pay its debts within the 12 months stated in the declaration of solvency.

III. Creditors Voluntary Winding-Up

A. Concept

What determines the creditor's voluntary winding up is when the directors did not make any statutory declaration on solvency of the company's ability to pay its debt fully within a period of 12 months. Contrary to what creditors voluntary winding up may imply, it actually start with members or involves members.

B. Procedure

1. **Sending of Notice of General Meeting & Meeting of Creditors by Directors to Members & Creditors Respectively:** The directors send notice of the general meeting of the company and meeting of the creditors on the same day to the members and creditors.
2. **Publication of Notice of Meeting of the Creditors:** The notice of meeting of the creditors is to be published once in the gazette and once at least in two newspaper printed in Nigeria and circulating in the district where the registered office or principal place of business of the company is situate – ***Section 472(2) CAMA***.
3. **Passing of Resolution for Winding-Up in General Meeting:** In company's general meeting, the company passes the resolution proposing winding up of the company.
4. **Passing of Resolution for Voluntary Winding-Up in Creditors' Meeting:** The creditors meeting will be held on the day or following day of holding the company's meeting. The resolution proposing voluntary winding up will be passed – ***Section 477(1) CAMA***.
5. **Attendance of Meeting of Creditors by the Directors:** The directors are to attend the creditors meeting. One of the directors is to be the chairman and the directors shall cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of the creditors.
6. **Nomination of Liquidator:** At the meeting of the company and that of the creditors, a person is to be nominated as liquidator for the purpose of winding up the affairs and distributing the assets of the company.
   Where the company and creditors nominated different persons, the person nominated by the creditors shall be the liquidator. However, a member director or creditor of the company may apply to court within 7 days of the nomination for an order that:
   (a) The person nominated by the company be the liquidator
   (b) The persons nominated by both company and creditors be liquidators jointly
   (c) Another person be liquidator instead of the person appointed by the creditors
   On appointment of the liquidator, all the powers of the directors shall cease - ***Section 473(2) CAMA***.
7. **Appointment of Committee of Inspectors by the Creditors:** The creditors may at the meeting or subsequent meeting appoint a committee of inspectors consisting of not more than 5 persons - ***Section 474 CAMA***.
8. **Summoning of General Meeting by Liquidator where Winding-Up Continues for More than One Year):** Where winding up continues for more than one year, the liquidator shall
   (a) Summons general meeting of the company and a meeting of the creditors
      i. At the end of the first year from the commencement of the winding up and at each succeeding year.
      ii. At the first convenient date within three months from the end of the year or such longer period as the commission may allow.
   (b) Lay before the meeting account of his acts and dealings and the conduct of the winding up during the preceding year - ***Section 477 CAMA***.

9. **Summoning of Final Meeting of Company & Creditors by the Liquidator after Affairs of the Company has been Fully Wound-Up:** As soon as the affairs of the company are fully wound up, the liquidator is to summon the final meeting of company and creditors, and prepare an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of. The meetings are to be summoned by notice in the gazette and in some newspaper printed in Nigeria.
10. **Sending Copy of Account & Return of Holding of the Meeting to CAC:** Within 7 days of holding the meetings or if the meetings did not hold on the same date, after the date of the latter, send a copy of the account and make a return of the holding of the meeting to the CAC; if no quorum, then the return is to state so.
11. **Registering of Account & Return by CAC:** The CAC on receiving the account and return in respect of the meetings shall register them and after three months of registration, the company shall stand dissolved. However, the court can make an order stating the date on which the dissolution of the company shall take effect on the application of the liquidator or person interested. The order of the court is to be delivered to the CAC for registration - ***Section 478 CAMA***.

C. Requirements for Creditors Voluntary Winding-Up

Regulation 45 of Companies Regulation provides for the requirements for creditors voluntary winding up to include the following:

1. Publication of notice of creditors meeting in the gazette and two daily newspaper
2. Resolution for voluntary winding up passed by both members and creditors - filed with the commission within 14 days after its passing.
3. Appointment of liquidator
4. Publication of notice of appointment of liquidator in the gazette or two daily newspaper
5. Liquidator's notice of his appointment – filed with the commission within 14 days of the appointment.
6. Publication of notice of final meeting in the gazette and at least two newspaper circulating in the locality of where the meeting is being called.
7. Return of final meeting and account of liquidation as laid before and approved by the meeting - filed with the commission within 7 days after the date of the final meeting.
8. Original certificate of registration (certified true copy where applicable) for cancellation
9. Updated annual return
10. Updated section 553 filing where applicable
11. Payment of fees

IV. Consequences of a Voluntary Winding-Up

1. The company shall cease to carry on its business except so far as may be required for the beneficial winding-up thereof - ***Section 460 CAMA*****.**
2. The corporate status and powers of the company shall not withstanding anything to the contrary in its articles, continue until it is dissolved – ***Proviso to Section 460 CAMA*****.**
3. Any transfer of shares not made with the sanction or approval of the liquidator shall be void.
4. Any alteration in the status of members of the company made after the commencement of the voluntary winding-up shall also be void – ***Section 461 of CAMA***
5. On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the company in general meeting or the liquidator sanctions the continuance thereof – ***Section 464 (2) CAMA*****.**
6. In a creditor’s voluntary winding up, the powers of the directors shall also cease, except so far as the committee of inspection or if there is one, the creditors sanction the continuance - ***Section 473(2) CAMA*****.**

7. A voluntary winding up will operate as a discharge of employees of the company is wound up because it is insolvent just as it will in the case of a compulsory winding up.

WINDING-UP SUBJECT OF SUPERVISION OF THE COURT

I. Concept

This is the winding up by company that started by company passing resolution to voluntarily wind up. However, petition is brought to the court that the winding up should be subject to the supervision of the court - ***Section 486 CAMA***.

The Federal High Court is the court where the petition is to be brought - ***Section 413 & 415 CAMA*** are applicable - ***Section 488 CAMA***. The provisions are to the effect that any disposition of the property is void except the court orders otherwise and any attachment, sequestration, distress or execution put in force against the estate or effects of the company shall be void.

II. Persons who can bring Application for Voluntary Winding-Up Subject to Supervision of the Court

The court can order that the voluntary winding up should be subject to supervision of the court upon application by:

1. Creditors
2. Contributories
3. Others entitled under compulsory winding up

III. Appointment of Liquidators

The court upon making the order for a winding up subject to supervision, the court may by the same appoint additional liquidator and remove a liquidator appointed by it or continue under the supervision order and may fill any vacancy occasioned by the removal or by death, or resignation - ***Section 489 CAMA***.

IV. Procedure for a Winding-Up Subject to the Supervision of the Court

1. Pass a special Resolution for winding up of the company
2. File a Petition supported with a verifying affidavit requesting the Court to wind up the company subject to its supervision

V. Effect of Supervision Order

An order for winding-up subject to the supervision of the court has the following effects –

1. The liquidator so appointed is free to exercise all his powers without the sanction or intervention of the court – ***Section 490(1) of CAMA***.
2. The liquidator shall not exercise the powers specified in paragraphs (d), (e) and (f) of section 425(1) of CAMA, that is, the power to pay all classes of creditors in full; the power to make any compromise or arrangement with creditors or persons claiming to be creditors; and the power to compromise all calls, debts and liabilities capable of resulting in debts respectively, except with the sanction of the court – ***Proviso to Section 490(1) of CAMA*.**
3. A winding-up subject to the supervision of the court does not amount to winding-up by the court for the purpose of the provisions of CAMA as specified in Schedule 12 – ***Section 490(2) of CAMA***.

DISSOLUTION OF COMPANY

I. Procedure

Dissolution of company concerns compulsory winding up and winding up subject to the supervision of the court.

1. **Application by Liquidator to the Court for a Dissolution Order:** Where the affairs of a company have been fully wound up, the liquidator is to make an application to the court for the dissolution of the company.
2. **Order of Dissolution by the Court:** The court shall order the dissolution of the company and the company shall be dissolved accordingly from the date of the order.

3. **Delivery of a Copy of the Order of Dissolution to CAC:** A copy of the order shall within 14 days from the date when it was made, be delivered to CAC by the liquidator.
4. **Record of Minute of Dissolution in Books by CAC:** The CAC upon receipt shall make in its books a minute of the dissolution of the company - ***Section 454(1)-(3) CAMA***. Note striking off by CAC under section 525 CAMA.

II. Order Deferring the Date of Dissolution & Voiding Dissolution

1. **Order Deferring the Date of Dissolution:** The liquidator or any other interested person may apply to the court to make an order deferring the date of the dissolution.
2. **Voiding Dissolution by the Court:** By virtue of ***Section 524 CAMA*** even where the company is deemed to be dissolved, the court may on application by the liquidator or any other interested person, within 2 years of the dissolution void the dissolution. That person must deliver the order to CAC within 7 days after making the order.

III. Effect of Non Compliance

Failure to comply with the provision by the liquidator will attract a fine of N25 (Twenty five naira) daily of the breach – ***Section 454(3) of CAMA***.

IV. Difference between Liquidation and Dissolution of a Company

During liquidation, the company can still sue in its corporate name. However, it cannot be a member of a new company.

Conversely, during dissolution of a company, the company no longer exists in its corporate entity as it is now dead.

LEGAL EFFECT OF WINDING-UP & DISSOLUTION OF COMPANY

1. **Effect of Winding-Up Proceeding on the Legal Personality of a Company:** The winding up of a company or the appointment of liquidator does not by itself result in the death of the corporate body thereby removing its legal personality. A company under a winding up proceedings has not died it is still alive though sick. A company "dies" on its dissolution - ***CS (Nig.) Plc v. Mbakwe***.
2. **Effect of a Winding–Up Order**
   (a) Action/proceedings against the company must be with the leave of Court – ***Section 417 CAMA***. However, what the section prohibits is action against the company without leave of court and not the company proceeding against another person - ***Onwuchekwa v. NDIC***.
   (b) Employees are automatically laid off
   (c) Any disposition of the company's property and transfer of its shares after the commencement of a winding up is void
   (d) The directors' power to run the company ceases
3. **Effect of Dissolution Order**
   (a) Once a company is fully wound-up and dissolved, it loses its legal entity and ceases to exist (DIES) in law – ***CBCL (Nig.) Ltd. v. Okoli; Section 454(1) & (2) CAMA*****.**
   (b) The incorporated name cannot be used any longer.

MAJOR OFFICERS INVOLVED IN WINDING UP

1. Liquidator
2. Official Receiver
3. Committee of Inspection
4. Provisional Liquidator
5. Receiver
6. Receiver Manager
7. Special Manager

I. Liquidator

A. Meaning

Under the winding up by the court, a provisional liquidator after advertisement of the petition may be appointed. A provisional liquidator acts in relation to the company pending the winding up proceeding by the court - ***Section 422(2) CAMA***. After the making of the winding up order, a liquidator can also be appointed. If no liquidator (provisional) is appointed before making of a winding up order, the official receiver or any other person so authorized may be appointed - ***Section 422(3) CAMA***.

On meetings of creditors and contributory of the company, it can be subsequently determined that another person be appointed - ***Section 422(4) CAMA***. The meeting is to hold separately. Importantly, upon appointing a liquidator, whether provisionally or otherwise, the powers of the directors shall cease except the court may by order sanction the continuance - ***Section 422(9) CAMA***. A liquidator is basically in charge of the affairs of the company

B. Qualification of Liquidator/Disqualification

The following persons shall not be competent to be appointed or to act as liquidator of a company whether in a winding up by the court or under the supervision of the court or in a voluntary winding up namely:

1. An infant
2. Anyone found by the court to be of unsound mind
3. A body corporate
4. An undischarged bankrupt
5. Any director of the company under liquidation
6. Any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and in respect of whom there is a subsisting order under Section 254 of this Act.

Any appointment made in disregard of the foregoing is void, and any person acting in contravention will be guilty of an offence punishable with 6 months imprisonment or a fine of N2, 500 – ***Section 509(2) CAMA***.

C. Functions and Powers of Liquidators

1. Where the winding up is by the court, the liquidator is to take into his custody or under his control all the property and chooses-in-action to which the company is or appears to be entitled – ***Section 423 CAMA***.
2. The court can direct on application of liquidator under winding up order by the court that all property of the company be vested in the liquidator by his official name – ***Section 424 CAMA***.
3. The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection to – ***Section 425(1) CAMA***
   (a) Bring or defend any action or other legal proceeding in the name and on behalf of the company.
   (b) Carry on the business of the company so far as may be necessary for its beneficial winding up.
   (c) Appoint a legal practitioner or any other relevant professional to assist him in the performance of his duties.
   (d) Pay any classes of creditors in full.
   (e) Make any compromise or arrangement with creditors or persons claiming to be creditors. Note that committee of inspection is appointed by creditors to assist the liquidator in liquidation process consisting of at most 5 persons – ***Section 474 CAMA***.
4. Also, a liquidator in winding up by the court shall have the power to namely – ***Section 425(2) CAMA***

(a) Sell the property of the company by public auction or private contract and transfer the whole property
(b) Do all acts and to execute in the name and on behalf of the company all deeds, receipt and other documents and for that purpose to use, when necessary, the company's seal
(c) Raise on the security of the assets of the company any money requisite
(d) Appoint an agent to do any business which the liquidator is unable to do himself.
(e) Do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

The foregoing is not exhaustive of the powers and functions of liquidator

Liquidators are to be remunerated and the committee of inspection in its absence, the creditors may fix the remuneration to be paid to liquidator or liquidators – ***Section 475 CAMA***. More than one liquidator can be appointed. ***Regulation 43 of the Companies Regulation*** provides for the requirements for winding up by the court to include the following.

II. Official Receiver

An official receiver is the Deputy Chief Registrar to the Federal High Court or any other officer designated for that purpose by the Chief Judge of the Federal High Court. He is to receive the statement of Affairs of the company and to collate information about the company in winding up. Official Receiver is just a nomenclature given to the Deputy CR of FHC. He can be appointed as provisional liquidator after a compulsory winding up order and where there is vacancy – ***Section 419, 422(2) & (3) CAMA***.

III. Committee of Inspection

Appointed by creditors to assist the liquidator – ***Section 474 CAMA***.

IV. Provisional Liquidator

He is appointed by the Court before the making of a winding up Order and the formal appointment of a liquidator - ***Section 422(3) (a) of CAMA***. An official receiver may be a provisional liquidator when the winding up order is made in a compulsory winding up until the appointment of a liquidator. He continues to be so act wherever there is vacancy in the office of a liquidator - ***Section 422 (3) (b) CAMA*****.**

V. Receiver

A receiver is appointed by the secured creditors under the power contained in the debenture instrument, executed by the company and the creditors.

A receiver need not get involved in the management of the company. He only has an eye in the income and expenditure of the company in order to realise assets and pay off the debt due to the creditors – ***Section 389 CAMA***.

VI. Receiver Manager

A Receiver Manager is not only concerned to realise the assets of the company but takes over the management of the affairs of the company, to stabilise it to make profit and pay off the creditors and then handover the company to the members. He stands in a fiduciary relationship to the company and observe utmost good faith towards it in any transaction with it or on its behalf – ***Section 390 CAMA***.

The power a receiver manager are:

1. Power to carry on the business of the company
2. Power to use the company's seal
3. Power to appoint other professionals to assist him
4. Power to sell and dispose of the property
5. Power to establish subsidiaries of the company
6. Power to raise or borrow money and grant security due over the property of a company.

VII. Special Manager

He is an officer appointed by the Chief Judge of the Federal High Court to assist the Deputy Chief Registrar (i.e. Official Receiver) in the winding up of a company by the order of the court – ***Section 436 CAMA***.

ORDER/PRIORITY OF PAYMENTS OF LIABILITIES UPON WINDING-UP OF A COMPANY

1. All costs including the remuneration of the liquidator are paid out - ***Section 484, 494(5) of CAMA*****.**
2. Outstanding local rates and charges due from the company and payable within 12 months next before the date of the winding-up Order or its commencement are paid.
3. Pay all PAYEE (Pay As You Earn) tax deductions, assessed taxes, land taxes, properties or income taxes from the company not exceeding 1 year before the winding-up Order or its commencement
4. Pay salaries of junior staff or servants of the company for services rendered to the company and deductions under the National Provident Fund Act
5. Settle claims of creditors and members. Secured creditors with fixed/floating charges are paid first before the unsecured debentures
6. Settle preferential shareholders
7. Distribute the remaining assets to the ordinary shareholders - ***Section 494 of CAMA***

SAMPLE DRAFTS

Statutory Notice of Demand

KILLI BUILDING SUPPLIES LIMITED
NO 40 ADEOLA STREET
VICTORIA ISLAND LAGOS
RC NO. 10145

OUR REF:_____

DATE: 10th January, 2004

The Board of Directors
Stan Construction Limited
Ikoyi-Lagos State.
Dear Sir,

STATUTORY NOTICE OF DEMAND TO REPAY N50, 000.00 LOAN PURSUANT TO SECTION 409 OF THE COMPANIES AND ALLIED-MATTERS ACT

I, the Finance Director of the above named company write to notify your company of the repayment of a loan advanced to it to the sum of fifty thousand naira only (N50, 000.00) dated the 10th day of January, 2002.

Please be informed that no amount of the loan has been paid in partial discharge of the loan sum.

You are hereby demanded to repay the principal loan and interest within twenty-one (21) clear days of your receipt of this Notice otherwise Legal action will be taken against your company.

You can kindly make payment into account No 1276589308 at First Bank Nigeria Plc belonging to us or account No 4356008693 at Guaranty Trust Bank Ltd.

Yours faithfully,

Finance Director For: Killi Building Supplies Ltd.

Special Resolution to Wind-Up a Company

KILLI BUILDING SUPPLIES LIMITED
NO 40 ADEOLA STREET
VICTORIA ISLAND LAGOS
RC NO. 10145

OUR REF:_____

SPECIAL RESOLUTION TO WIND-UP THE COMPANY AND TO APPOINT A LIQUIDATOR/FIX HIS REMUNERATION PURSUANT TO SECTION 457 OF THE COMPANIES AND ALLIED-MATTERS ACT 2004

At an Extra-ordinary General meeting of the above named company held on the 10 day of May 2014 at the company's conference room, it was duly proposed and resolved as follows:

1. That the company be wound up voluntarily.
2. That Chief Joel Adamu, an accountant of No. 139 B Mission Street, Baguada, Kano State be and is hereby appointed liquidator to wind-up the company at a remuneration of N100,000.00 per annum.

DATED THE 11 DAY OF MAY 2019

_____ _____
Director Director

Declaration of Solvency to Enable Members' Voluntary Winding Up

KILLI BUILDING SUPPLIES LIMITED
NO 40 ADEOLA STREET
VICTORIA ISLAND LAGOS
RC NO. 10145

OUR REF:_____

We, Killi Nancwat of No 12 Babangida Crescent, Jos, Plateau State and Bamba Audu of No 24, Abiola Avenue, Ikoyi, Lagos State being all the Directors of the above company, solemnly declare that we have made a full enquiry into the affairs of this company and that having done so, we have formed the opinion that the company will be able to pay its debt in full within a period of twelve (12) months from the commencement of the winding up, and we append a statement of the company's assets and liabilities as at the 10 day of January 2019 being the latest practicable date before making this declaration.
(Show the assets and liabilities and the assets – liabilities to show that assets exceed liabilities)
And we make this solemn declaration, conscientiously believing the same to be true by virtue of the Oaths Act.

1. Killi Nancwat ……

2. Bamba Audu …….
Deponents

Sworn to at the Federal High Court Registry, Lagos
This 11th day of April 2019.
BEFORE ME

COMMISSIONER OF OATHS

Petition for Winding Up of Delta Oil Group Plc

IN THE FEDERAL HIGH COURT OF FEDERAL REPUBLIC OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

PETITION NO: FHC/78/15

IN THE MATTER OF DELTA OIL GROUP PLC
AND
IN THE MATTER OF COMPANIES AND ALLIED MATTERS ACT

BETWEEN
EMEKA ADE……PETITIONER
AND
DELTA OIL GROUP PLC…….RESPONDENT

PETITION FOR WINDING UP OF DELTA OIL GROUP PLC BROUGHT PURSUANT TO SECTION 408(d) OF CAMA AND UNDER THE INHERENT JURISDICTION OF THIS COURT

The humble petition for the winding up of DELTA OIL GROUP PLC, a company incorporated under the Companies and Allied Matters Act 1990, whose registered address is located at No 1 Delta Oil Close, Porthacourt, Rivers State by Emeka Ade, whose address is situated at No. 1 Abacha Street, Off Yakubu Gowon Way, Garki, Abuja states as follows:

1. The above-named company also called "the Company was incorporated as a public company limited by shares under the Companies and Allied Matters Act.
2. The registered office of the company is situated at No 1 Delta Oil Close, Porthacourt, Rivers State
3. The object for which the company was established was the mining of petroleum within and outside the state and as set out in paragraph 3 of the memorandum of association of the company.
4. The Share Capital of the company is N 10,000,000,000.00 (Ten billion Naira) divided into 10 billion ordinary shares of N1.00 each.
5. Your petitioner states that on 3rd day of January 2008, your petitioner negotiated the purchase of "Camp Five" oil rig in the Escravos on the instruction of the company from Elyon Producing (Nig) Limited for the sum of $100, 000, 000 (One Hundred Million) USD.
6. The company agreed in writing to pay your petitioner 5% of the purchase price, $2, 000, 000 (Two Million) USD as professional fees.
7. The company has refused to honour their agreement to pay the professional fee one year and six months after the transaction despite repeated demand.
8. Your Petitioner humbly pray the court for the following RELIEFS:

(a) The affairs of the company be wound up as provided under the Companies and Allied Matters Act;
(b) A liquidator be appointed by the court to effect the winding up and settlement of the mortgage sum owed the petitioner.
(c) AND for such orders as the Honourable Court may deem fit to make in the circumstances.

Dated This 30 Day of June, 2010

PETITIONER'S SOLICITOR
KILLI NANCWAT
NE KILLI & CO
NO 1 BABANGIDAWAY
MAITAMA,
ABUJA.

FOR SERVICE ON:
THE RESPONDENT'S COUNSEL
AJAY K & CO.,
GARKI AREA 3,
ABUJA.

Affidavit Verifying Petition of a Limited Company

IN THE FEDERAL HIGH COURT OF FEDERAL REPUBLIC OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

PETITION NO: FHC/78/15

IN THE MATTER OF DELTA OIL GROUP PLC
AND
IN THE MATTER OF COMPANIES AND ALLIED MATTERS ACT

BETWEEN
EMEKA ADE……PETITIONER
AND
DELTA OIL GROUP PLC…….RESPONDENT

AFFIDAVIT VERIFYING PETITION OF A LIMITED COMPANY

I, CHIEF AKINOSI, Male, Christian, Nigerian citizen, of Plot 170, Dawaki Ext. Abuja, make oath and say as follows:

1. I am a Secretary in the law firm of the petitioner in the above matter.
2. I have been concerned in this matter in such capacity and am duly authorized by the said petitioner to make this affidavit on its behalf.
3. Such of the statements in the petition now produced and shown to me marked with the letter "A" as it relates to the acts and deeds of the said petitioner are true, and such of the statements as it relates to the acts and deeds of any other person(s), I believe to be true.
4. The document now shown to me and marked exhibit A is a true photocopy of the written agreement referred to, in paragraph 5 of the petition.

5. I make this statement in good faith and conscientiously in accordance with the Oath Act.

_____
DEPONENT

Sworn to at the Federal High Court Registry, Abuja
This 30th day of June 2010.

BEFORE ME

_____
COMMISSIONER FOR OATHS

(Week 21)

DISSOLUTION OF BUSINESS AND NON–BUSINESS ORGANIZATION II: (BUSINESS NAME, PARTNERSHIP, INCORPORATED TRUSTEE)

DISSOLUTION OF BUSINESS NAME UNDER PART B OF CAMA

I. Dissolution of Sole Proprietorship

A. Concept

Death of the sole proprietor will lead to dissolution of sole proprietorship except there is provision in his will for Personal Representatives to carry on the business for a certain period of time.

B. Procedure

Procedure for dissolution of a sole proprietorship upon death of sole proprietor:

1. Evidence of the death of the sole proprietor
2. Within a period of 3 months of the death, the PR shall submit to Registrar General, the evidence of death together with the original certificate of the business name and particulars of registration for cancellation (also attach letter of probate/administration)
3. Upon the payment of requisite fees, filing fees for cancellation,
4. Evidence of payment of annual returns up to date or payment of the annual returns, if necessary.

II. Dissolution of Partnership Business

The procedure for the dissolution of a partnership is as follows**:** ***Section 578 of CAMA***

1. **Mode of Dissolution:** The business will cease to be in existence by either a Resolution by the partners or by a Court order or death of a sole proprietor.
2. **Filing Notice to CAC by Partners:** The partners shall file a Notice to CAC within 3 months of the cessation of the business, stating that the firm/individual has ceased to do business under a business name with evidence and documents attached viz:
   (a) A copy of the court order or evidence of consent of the partners must be annexed to the notice.
   (b) The original particulars of the business registration should be surrendered for cancellation (certificate of registration and other particulars)
   (c) Pay the prescribed fees for filing the Notice.
3. **Removal of the Firm from the Register by the Registrar:** Upon delivery of the notice to the Registrar of Business Name, the Registrar may remove the firm, company or individual from the register.
4. **Notice of Enquiry to the Firm by the Registrar:** If the Registrar has reasonable cause to believe that the firm, company or individual is not carrying on business, the Registrar may send a notice to the firm, company or individual enquiring whether or not the business is being carried on.
5. **Failure to Respond & Removal of Firm from the Register:** Where there is no response within two (2) months, or the answer to this is that there is no business being carried on, the Registrar may remove the business name from the Register.

DISSOLUTION OF PARTNERSHIP

I. Modes of Dissolution

Sometimes partnership business, even though registered under Part B is governed by the partnership deed (even though this deed is not registered with CAC).

There are several ways of bringing partnership to an end. However, recourse is first had to the partnership deed. Where the partnership deed is silent: then, it can be caused by any of the partners in the following ways –

A. By Act of the Parties: This can be done either –
1. By giving notice of intention to dissolve the partnership (could be provided for in the agreement)**;** or
2. By reason of ill-health making a partner permanently incapacitated and the partnership not being able to continue
3. Where a partner creates a charge on his or her share of the partnership property – ***Section 34(b) of Partnership Law of Lagos*****;** or
4. By providing for a clause like power of expulsion in the partnership agreement/deed

B. By Operation of Law if –
1. It is for a fixed term, at the expiration of the term
2. It is for an undertaking, at the performance of the undertaking and sharing of the proceeds – ***Ureli v. Dada.***[39]
3. It is supervening illegality
4. It is for death or bankruptcy or insanity of a partner (i.e. partner has lost legal capacity)

C. By Order of Court: a partner can apply that the partnership be dissolved based on –
1. Persistent breach of agreement - ***Uredi v. Dada***; or
2. Mental ground
3. Where it is obvious that a partner is permanently incapable of continuing with the partnership
4. Carrying on the business at a loss or
5. On any equitable ground

II. Procedure for Dissolution of the Partnership

1. Notice of requirement, dissolution, or expulsion is served on another partner referring to the appropriate clause in the partnership agreement.
2. The partners prepare and execute the dissolution agreement.
3. Distribution of assets and liabilities will commence
4. Notice of dissolution/cessation is given to (this can be done after expulsion):
   (a) Corporate Affairs Commission, if registered
   (b) Published in the gazette and national newspapers.
   (c) Clients or customers.

III. Dissolution of Assets on Final Settlement

In settling accounts between the partners after dissolution of partnership subject to any agreement between the partners, the following rules shall be observed:

1. Losses including losses and deficiencies of capital shall be paid first out of profits, next out of capital and lastly, if necessary by the partners individually in the proportion in which they were entitled to share profits.
2. The assets of the firm including the sums if any contributed by the partners to make up losses or deficiencies of capital shall be applied in the following manner and order:
   (a) In paying the debts and liabilities of the firm to persons who are not partners therein
   (b) In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital
   (c) In paying to each partner rateably what is due from the firm to him in respect of capital
   (d) The ultimate residue if any shall be divided among the partners in the proportion in which profits are divisible.

For limited partnership, read ***Section 46-57 of Partnership law of Lagos State***.

[39] (1988) NWLR (Pt. 69) 237

DISSOLUTION OF NON-BUSINESS ORGANISATIONS (INCORPORATED TRUSTEES/ASSOCIATIONS) UNDER PART C OF CAMA

Federal High Court is the court with jurisdiction.

I. Persons who can Bring Petition for Dissolution

The Petition for its dissolution can be brought by any of the following persons:

1. The Governing Body or Board of Trustees
2. One or more trustees of the association
3. Members of the Association constituting not less than 50% of the total membership.
4. The Corporate Affairs Commission: as monitoring agency of bodies registered under Part C can petition for dissolution of IT if there are grounds to support this. Members of the public can write to CAC if IT is doing something against public policy etc. and CAC will investigate and if the IT is encouraging something illegal or against public policy, CAC can petition for dissolution - ***Section 608(1) of CAMA***

II. Grounds for Dissolution

By virtue of ***Section 608(2) CAMA*****,** the grounds for the dissolution of incorporated trustees may be any of the following:

1. That the aims and objects for which it was established have been fully realised and no useful purpose would be served by keeping the corporation alive.
2. That the body corporate is formed to exist for a specified period and that the period has expired (effluxion of time)
3. That all the aims and objects of the association have become illegal or otherwise contrary to public policy; and

   4. That it is just and equitable in all the circumstances that the body corporate be dissolved (e.g. fraud or crime, oppressive acts by the organisation e.g. trustees acting in a manner prejudicial to other members, organisation is frustrated by financial constraints, high indebtedness i.e. liabilities outweighing assets of the organisation, conflict of interest, rancour and misunderstanding in the board of trustees)

Note: this ground are not conjunctive, so one ground is sufficient.

III. Procedure for the Dissolution

1. **Resolution for Dissolution:** It is dissolved voluntarily by an ordinary Resolution passes by not less than 50 % of the members on any of the grounds stated above
2. **Petition for Formal & Effectual Dissolution:** File a Petition to the Court for a formal and effectual dissolution
3. **Notice to Persons Likely to be affected by the Dissolution:** All the persons likely to be affected by the dissolution (e.g. creditors/trustees) shall be put on Notice - ***Section 608(3) of CAMA*****.** A formal advertisement of the hearing of the petition following an Order of Court will suffice as Notice.

IV. Distribution of Assets of a Dissolved Incorporated Trustee

The distribution of the assets of a dissolved incorporated trustee is to be done in accordance with the Special Clauses in its Constitution as follows: ***Section 608(4) CAMA***

1. Satisfaction of all just debts and liabilities of the Association
2. If the properties remained after the payment of liabilities, they are not to be distributed among the members of the Association but to be transferred to some other institutions having similar objects of the Association as will be determined by the members of the association at or before the time of dissolution.
3. If there is no institution with similar objects, the remaining property shall be transferred to some charitable objects **–** ***Section 608(5) CAMA*****.**

SAMPLE DRAFTS

Notice of Retirement/Resignation

To:
1. Joel Adamu
2. Mathias Ayuba
3. Joel Anthony

I, Killi Nancwat, hereby give you notice under clause 15 of our partnership agreement (or deed of partnership) dated the 16th day of October, 2011 of my intention to retire from the partnership subsisting between us as from 1st day of November, 2011 and immediately after the 1st day of May, 2019.

Dated the 22nd day of April, 2019

(Signature of Partner giving notice)

Notice of Dissolution

To:
1. Joel Adamu
2. Mathias Ayuba
3. Joel Anthony

Pursuant to Clause 16 of our partnership agreement (or deed of partnership) dated the 16th day of October, 2011, I, Killi Nancwat, hereby give you notice dissolving the partnership subsisting between us under the said agreement (or deed). I hereby exercise my option to purchase on the date of dissolution your share in the partnership on the terms therein stipulated.

Dated the 22nd day of April, 2019

(Signature of Partner giving notice)

Notice of Expulsion

To: Joel Anthony

We, Killi Nancwat, Joel Adamu, Mathias Ayuba, hereby give you notice that in exercise of the power for this purpose given us by clause 14 of the partnership agreement (or deed of partnership) dated the 16th day of October, 2011 under which we have carried on business in partnership with you, we hereby expel you from the said partnership with effect from the date of service of this notice upon you on the ground "that you have suffered your share in the partnership to be charged for your separate debt under the Partnership Law".

Dated the 22nd day of April, 2019

(Signature of partners giving notice)

Notice of Dissolution for Insertion in the Official Gazette or Newspaper

Notice is hereby given that the partnership subsisting between (Killi Nancwat, Joel Adamu, Mathias Ayuba and Joel Anthony) carrying on business as a shoe production firm at No 139B Mission Road Hwolshe, Jos South, Plateau State under the style of or firm of M & N Concepts has been dissolved as from the 1st day of May, 2019 (or as from the date hereto) so far as concerns the said Killi Nancwat who retires from the said firm. All debts due to and owing by the said late firm will be received and paid respectively by Mathias Ayuba who will continue to carry on the said business in partnership under the style or firm of Mathias Business Enterprise.

Dated the 22nd day of April, 2019

(Signature of partners giving notice)