Interview on Law Reform (Company and Insolvency Law): 6 August, 2021

Reviews:

- Comprehensive Review of the Institutional, Regulatory, Legislative & Associated Instruments Affecting Businesses in Nigeria: Final Report (January 2016)

Interviews:

- Commercial Law Reform
- Reform of Public Enterprises

Commercial Law Reform: 6 August, 2021

You undertook a Comprehensive Review of the Institutional, Regulatory, Legislative & Associated Instruments Affecting Businesses in Nigeria, presenting the Final Report in January 2016: Could you give us the background to that report?

- Who appointed you?

We were appointed by Adam Smith International and carried out the study on behalf of the 8th National Assembly – Office of the Senate President & Speaker of the House of Representatives but sponsored by

- Department for International Development (DfID) through its programs:
- Enhancing Nigeria Advocacy for a Better Business Environment **(ENABLE 2)**
- Growth & Employment in States **(GEMS 3)**

Our Final Report was peer reviewed by the Nigerian Economic Summit Group (NESG) and NBA, Section on Business Law.

I must state that the Senate President of the 8th NASS, HE Dr Bukola Saraki was very interested in law reform and drove the process.

The Final Report was subsequently validated by an Economic Impact Assessment.

- Why?

- Since the inception of World Banks's Doing Business report series in 2005, Nigeria has not fared well when compared to other countries for ease of doing business. For instance, in 2008, out of 183 countries, Nigeria ranked 114 but ranked 170 in 2015.[1]
- Nigeria was ranked 169th out of 189 Countries in the *Doing Business 2016 Report* published by the World Bank Group on October 27, 2015.
- The Report gauges the relative ease or difficulty of opening and running a small to medium-size business when complying with relevant regulations. It, therefore, offers a useful and candid assessment of economies' relative standings in the world as it concerns bureaucratic barriers to business.
- The National Assembly considered Nigeria's ranking to be unsatisfactory. The aim of this initiative was to improve the regulatory environment for doing business in the country by engaging with the private sector and the business community to craft a legislative agenda for economic reform that will improve private sector growth in the country and provide a framework for the review and improvements of legislation and policy affecting businesses in Nigeria.
- In turn, it is hoped that this will create a better business enabling environment, leading to increased and sustained private sector development and investment in the country.

- The assignment was made up of the following six (6) elements:
  - ✓ A diagnostic review of current and proposed laws relevant to the business environment in Nigeria and the key institutions involved, including but not limited to procurement laws, competition laws, company laws, investment laws, finance and contract laws.

  - ✓ Identification of significant legislative gaps or deficiencies in the existing framework.

[1] See *Doing Business* 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015: The International Bank for Reconstruction and Development/The World Bank, Washington DC.

- ✓ Whether they are consistent with international good practice.
- ✓ The extent to which they provide a conducive environment for the creation and operation of private sector enterprises, especially MSMEs.
- ✓ Specific aspects in which the laws act as barriers or impediments to MSME development.

- ✓ Recommendations on priority legislative areas to be addressed by the Roundtable and the National Assembly, in consultation with the private sector.

- Who else was on the panel?

The following were appointed by Adam Smith International as Consultants (Advisers) for the assignment:

1. Prof. Paul Idornigie, SAN – Team Leader
2. Leonard Ugbajah
3. Eberechi May Okoh
4. Isaiah Bozimo

- Though we will delve into this more during the course of our interview, could you summarise the main findings of the report?

We reviewed Laws/Bills, identified the significant legislative gaps/deficiencies therein and made recommendations.
The Final Report Reviewed 54 Acts of the National Assembly, 48 Bills pending in the National Assembly as at January 7, 2016.

Our key findings include:

a) The ranking of economies in the *Doing Business* (DB) Report is determined essentially by regulatory processes, procedures and practices and not enactments.
b) According to the 2016 World Bank *Doing Business* Report, ***"for policy makers trying to improve their economy's regulatory environment for business, a good place to start is to find out how it compares***

with the regulatory environment in other economies. … Also useful is to know how it ranks relative to comparator economies and relative to the regional average." [2]

c) In this Final Report, we have shown where Nigeria stood in relation to comparator economies. Consequently, for Nigeria to improve on her ranking, the collaboration of States like Lagos and Kano is imperative.

d) Likewise, out of the 189 economies studied by the World Bank, 103 no longer have a minimum share capital.[3]

e) Other practices and regulations affecting SMEs include taxes (in Lagos and Kano States there are a minimum of 18 taxes or mandatory contributions) and getting electricity.

f) Similarly, there are two Bills on Competition before the House of Representative and one at the Senate. In the House, there is the Federal Competition Bill sponsored by the Speaker and the Federal Competition and Consumer Protection Bill sponsored by another Honourable Member. In the Senate, there is also the Federal Competition and Consumer Protection Bill. In terms of content and orientation, the Federal Competition and Consumer Protection Bill which is one of the Reform Bills is more comprehensive than the Federal Competition Bill and ought to be the preferred Bill.

Generally, there is the need for collaboration between the States in terms of Governor's consent to assign land under the Land Use Act, obtain credit, liberalise land allocation and in the review of planning laws, environmental laws, among others. There are several Federal and State enactments in the housing sector that require harmonization.

g) In terms of private sector participation, we have identified legislative gaps/deficiencies in existing laws (including the Constitution) and recommended the passage of the Reform Bills identified in this Report and amendment of some laws.

---

[2] See page 8 of the Economy Profile for Nigeria,

[3] In the 1968 Companies Act, there was no requirement for a minimum share capital. However, at page 50 of the Report on the Reform of Nigerian Company Law, Nigerian Law Reform Commission, 1988, the Commission recommended the introduction of minimum share capital of N10,000 for a private company and N500,000 for a public company. This can now be found in section 27(2)(a) of CAMA. The reason given then for the introduction is the prevention of irresponsible and indiscriminate incorporation. We are not sure whether this has worked. The CAC will need to drastically review its Regulations/Guides to ease incorporation of companies and registering of business names.

h) These Reform Bills drafted as far back as 2003-2007 include the Federal Competition and Consumer Protection Bill, National Transport Commission Bill, the Ports & Harbours Bill, etc.

i) There appears to be no 'clearing house' in the National Assembly where bills are scrutinized and reviewed before presentation to the National Assembly for First Reading. We found many bills on the same subject sponsored by different members without reference to similar bills already pending before the National Assembly. We also found bills not properly drafted pending before the National Assembly. Such a 'clearing house' will assist the National Assembly to ensure that all bills are properly filtered and scrutinized before presentation.

- Let's start by examining the context of law reform in Nigeria.
  - One of the challenges that many of our researchers have found is a multiplicity of laws and agencies working on the same or connected issues in Nigeria without a clear delineation of powers. The 2016 report discusses this and other problems of law-making in Nigeria:
    - Could you take us through some of the problems you observed, explaining how (i)they affect law reform at the National Assembly (ii) how these problems affect the regulatory landscape of Nigeria.

i. We found that there are similar bills in the National Assembly sponsored by different members. We recommended that the National Assembly should establish a central clearing house for all bills to ensure that they are streamlined and duplication avoided before presentation to the National Assembly.

ii. We also found some bills that are not bills properly so-called. We found proposed amendments that are badly drafted. The establishment of a central clearing house will ensure that before a bill is listed for first reading, a proper evaluation has been carried to determine its desirability or otherwise. It is inefficient

to wait till public hearing before the fact that similar bills are pending in the National Assembly is known.

iii. Although the Public Procurement Act was passed in 2007, the relationship between the Bureau of Public Procurement (BPP) established under the Act and that of the Infrastructure Concession Regulatory Commission established under the Infrastructure Concession Regulatory Commission Act of 2005 (ICRC Act) is unclear. For example, are public-private-partnership (PPP) transactions subject to the prior review of the BPP? Is the procurement of works, goods and services the same thing as entering into a concession agreement? More fundamentally, the National Council on Public Procurement provided for in the Act has not been constituted and yet the BPP has been operating without a Council. The legality of the BPP's operations since 2007 is questionable.

iv. Similarly, although the Public Enterprises (Privatization and Commercialization) Act was passed in 1999 and the ICRC Act was passed in 2005, their relationship is unclear as public enterprises listed for either privatization or commercialization are also listed for PPP transactions under the ICRC Act. The ICRC Act was passed without reference to the Public Enterprises (Privatization and Commercialization) Act – no repeal, no consequential amendment.

v. There is a conflict between the powers conferred on the Nigerian Ports Authority by virtue of the provisions in sections 7, 8 and 30 of the Nigerian Ports Authority Act 2004 and sections 8, 9 and 11 of the Nigerian Inland Waterways Authority Act, 2004.

vi. Furthermore, section 13 of the Nigerian Inland Waterways Act prohibits persons from taking sand, gravel or stone from the waterways without the consent of the Authority. When it is borne in mind that these are minor economic activities of the locals, it is clear that this provision negatively affects SMEs in the affected areas.

vii. In terms of consumer protection, there are conflicts between the provisions of the Consumer Protection Commission Act and the

Civil Aviation Authority Act and the Electric Power Sector Reform Act, among others. It is hoped that when the Federal Competition and Consumer Protection Commission Act is passed into law, the conflict will be eliminated.

viii. Section 281 of CAMA, 1990 provides for multiple directorship. During the trial of bank directors in the era of failed banks in Nigeria, it became obvious that this provision has adverse effect on the Nigerian economy.[4] We believe that the number should be pegged at a maximum of 5.

ix. Section 351 of CAMA defines 'a small company' to exclude aliens. We believe that that is inconsistent with the provisions of the NIPC Act that provides for 100% equity participation even by aliens except in the "negative list".[5]

x. There is no provision on corporate social responsibility. At the moment, it is a matter of moral suasion or requirements of Code of Corporate Governance. Other than the duty owed to shareholders and workers by directors, there is no such duty to suppliers, customers nor is there any provision on the impact of the company's operations on the community and environment.[6]

- What steps did you propose to remedy these challenges?

We proposed law reform and amendments to these laws and where appropriate, repeal or repeal and re-enactment, for example the repeal and re-enactment of the Public Enterprises (Privatization and Commercialization) Act to merge it with the Infrastructure Concession Regulatory Commission, Act so that one entity will handle privatization, commercialization and concessioning.

---

[4] See also paras 117-121 of the Nigerian Law Reform Commission's Report on the Reform of Nigerian Company Law, 1988 where the number was pegged at 4 but this was not reflected in CAMA and paras 34-38 of the Nigerian Law Reform Commission's Report on the Review of CAMA, 2009. It is noteworthy that section 19(3) of the Banks and Other Financial Institutions Act, Cap B3, LFN, 2004 prohibits multiple directorship.

[5] See sections 17 and 18 of the NIPC Act.

[6] See section 172 of the UK's Companies Act 2006 that provides that a director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard, amongst other matters, to (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, and (d) the impact of the company's operations on the community and the environment.

- What is the relationship between your project and the Nigerian Law Reform Commission?

  The mandate of the Nigerian Law Reform Commission is statutory – see the Nigerian Law Reform Commission Act. The Long Title of the Act provides thus: An Act to set up a Law Reform Commission for Nigeria to undertake the Progressive development and reform of substantive and procedural Law applicable in Nigeria by way of **codification, elimination of anomalous or obsolete laws and general simplification of the law** in accordance with general directions issued by the Government from time to time and for matters connected therewith.

  We were merely an administrative committee set up to make recommendations to the NASS. I must confess that we used materials from the NLRC in our Report.

- We move now to your review of Nigerian laws:
  - Company Law:
- The report notes that MSMEs are responsible for over 84% of employment in Nigeria. That is massive. It outlined the challenges entrepreneurs face in registering and running businesses in Nigeria.
  - Could you tell the links between the report and CAMA 2020, including the journey to the new Act, as well as some key changes you were delighted to see?

  The following are the links between our Report and CAMA 2020 and the changes that I am delighted to see:

i. Section 18(2) of CAMA 2020 now **allows a single shareholder/director of a private company**.
ii. Section 27 – replacement of **authorized share capital with minimum issued share capital** of N100,000.00 – is this really in the interest of small companies or start-ups? I do not think so when compared with the provisions in section 27 of CAMA 1990 that provided for authorized share capital of 10,000 out of which 25% should be taken.

iii. **Section 40(1) – statement of compliance can be signed by an applicant or his agent, not necessarily a legal practitioner**
iv. **Section 98 – procurement of a common seal no longer a mandatory requirement**
v. Section 176(1) – provides that instruments of transfer of shares shall **include electronic instruments of transfer.**
vi. **Section 240(1) – provides that small companies and companies having a single shareholder, can hold their general meetings outside Nigeria**
vii. **Section 240(2) provides that private companies may hold their general meetings electronically, provided that such meetings are conducted in accordance with the Articles of Association of the company**
viii. Section 265(6) provides that the **chairman of a public company** shall not act as the chief executive officer of such company.
ix. Section 275(1) provides for at least 3 **independent directors** for public companies
x. Section 307(1) restricts **multiple directorship** to not more than 5 public companies.
xi. **Section 402 – provides for the exemption of small companies or a company having a single shareholder from appointing auditors.**
xii. **Section 330(1) – appointment of company secretary now optional for private companies**
xiii. Sections 434-442 and 443-549 – provide for **business rescue provisions for insolvent companies and sections 718-721 on netting.**
xiv. Section 861 – provides that certified true copies of **electronically filed documents** are admissible in evidence.

- Was there anything proposed or that you wanted to see personally that was omitted?

i. Out of the 189 countries studied by the World Bank in Doing Business 2016, 103 countries no longer have provision on minimum share capital to incorporate a company. International best

practice requires that we eliminate or reduce minimum share capital.

ii. Section 27 – replacement of **authorized share capital with minimum issued share capital** – is this really in the interest of small companies?

iii. In Doing Business 2020[7], it clear that countries are either eliminating or reducing minimum paid up capital and that '*Data suggest that higher requirements for paid-in minimum capital are associated, on average, with lower new business entry.*' On the issue of investor or creditor protection, '*investor protection is guaranteed with much more efficient ways than the requirement of a fixed paid-in minimum capital for all companies.*

iv. This issue of minimum share capital should be revisited by reviewing the provisions of section 27 of CAMA 2020.

v. Section 394(3)(d) of CAMA 2020 provides that for a company to qualify as a small company, none of its members should be an alien. This is inconsistent with sections 17 and 18 of the NIPC Act that provides for 100% equity participation even by aliens except in the negative list.

vi. Section 394(3)(d) of CAMA 2020 merely reproduced section 351(3)(d) of CAMA, 1990.

vii. There is no provision on corporate social responsibility as you will find in section 172 of the UK Companies Act, 2006 (duty to promote the success of the company).

- There was a CAMA 2018 bill that was passed but not signed into law could you tell us what the circumstances where and how these changed in CAMA 2020?

  Unfortunately, I did not have a copy of the CAMA 2018 despite my attempts to get one. You know how the system works. You hear that a Bill has been passed and there are challenges in getting a copy. Even when a Bill is consented to, you find that it is easier to

[7] *Doing Business, 2020*, pp 43-46 available at <https://openknowledge.worldbank.org/handle/10986/32436> accessed 4 August, 2021

get it from hawkers in Abuja than a known place. The consequence is that you have different versions of the same law.

- CAMA 1990 was lauded by leading company law scholars in Nigeria. Prof Akanki described it as progressive company law reform. What effort was made to understand and continue this progressive ethos?

  Prior to CAMA 1990, we had Companies Act, 1968. This was a time when legislation on company law was skeletal but the bulk of the law was either common law or equitable principles. What CAMA did was to codify the common law and equitable principles. It was a major breakthrough and unprecedented.

  I will not forget the earlier company law principles based on cases, ***Salomon v Salomon*** – principle of separate personality, ***Ashbury Railway Carriage and Iron Co Ltd v Riche*** concerned the objects clause, ***Royal British Bank v Turquand***, people transacting business with companies are entitled to assume that internal company rules are complied with, even if they are not. This "indoor management rule" or the "Rule in Turquand's Case", and the Rule in ***Foss v Harbottle*** a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is known as "the proper plaintiff rule" They were codified in sections 37, 39, 69, and 299 of CAMA, 1990 respectively.

- Continuing with the same theme, one observation that has been made in terms of CAMA 2020 is that the reform was not accompanied by an annotated report unlike CAMA 1990, which incredibly was passed during the military era, yet had a comprehensive report. Even the report that we have been discussing is not publicly available. Do you have any thoughts as to how this may affect the interpretation of the new Act, particularly in places where the changes that have been made are unclear?

  CAMA 1990 is a product of the Nigerian Law Reform Commission established under the Nigerian Law Reform Act, 2004. The Commission has the statutory powers to codify, simplify and

eliminate laws. In exercise of these powers, the Commission produced a Report on the Reform of Company Law, 1988. Thus CAMA 1990 was based on this Report. However, for CAMA 2020, there is the Report of the Technical Advisory Committee on the CAMA Bill, 2018 which was presented to the National Assembly. The former President of Senate, HE Bukola Saraki inaugurated the Committee on 8 May, 2017. The Committee was driven by NASSBER, CAC and PEBEC (Presidential Enabling Business Environment Council)

- Insolvency Law:
  - The report focused on two main issues: (i) reforming the so-called pro-creditor and liquidation-oriented CAMA 1990 (ii) Preventing debtors from selling corporate assets at an unreasonably low price to a second company that they own. These points were not developed much, however. Could you provide insights into specific findings that informed these opinions?

  - How would you describe the nature of the insolvency reforms of CAMA 2020?

    I will describe the nature as follows:

i. As you will find in the following sections, the provision on administration in CAMA 2020 is designed to assist companies experiencing temporary financial difficulties but with a strong business model, to appoint an administrator where a receiver cannot be appointed. This is one of the reforms in the UK insolvency laws, Australia and Canada.
ii. Similarly the provisions in CAMA 1990 on receivership is for receiver to recover the debt owed to the creditors without any regard to the survival of the company.
iii. The focus of administration is how to rescue the company from its difficulties so that the company can survive and not be liquidated.

iv. The administrator is appointed to act in the interests of the company and not, as in the case of receivership, in the interest of the person that appointed him.

v. Appointment of an administrator will prevent the right of the creditors to appoint their own receivers to strip the company of its assets and recover their monies.

vi. In consequence, sections 434-442 [voluntary arrangement] and 443-549 [appointment of administrator] **and netting – ss 718-721)** all dealing with **business rescue provisions for insolvent companies instead of winding up as provided in CAMA 1990.**

vii. Under section 434, the directors of a company may make a proposal to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs – this is known as voluntary arrangement.

viii. Section 443 provides for the appointment of an administrator by the administration order of the court or holder of a floating charge or the company or its directors.

ix. The administrator may do all such things as maybe necessary for the management of the affairs, business and property of the company and shall perform the functions with the objective of rescuing the company, achieving a better result, realising property in order to make a distribution to one or more secured or preferential creditors.

x. Administration order is made where the court is satisfied that the company is or is likely to become unable to pay its debts and administration order is likely to achieve the purpose of administration.

xi. Under section 513 of CAMA 2020, the appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the date on which it takes effect though the term can be extended by an order of court or a period not exceeding six months by consent by each secured creditor of the company and if the company has unsecured debts, creditors whose debts amount to more than 50% of the company's unsecured debts.

xii. Netting has a broad definition in section 718. Netting is a process that permits a party to a financial contract to

i. terminate the contract if the counterparty becomes insolvent;
ii. calculate the termination values of the obligations of the parties; and
iii. set off the said termination to arrive at a net amount payable by one party to the other.

Netting is the primary means of mitigating credit risks.

- We proceed now to wind down.
  - Did the report include an evaluation mechanism to monitor the impact of your recommendations? For example, how many changes have been made? What remains to be done?

i. We reviewed Laws/Bills, identified the significant legislative gaps/deficiencies therein and made recommendations.
ii. To assist the Government in doing this, we ranked the Acts/Bills into "high", "medium" and "low" categories. Those ranked "high" should be given immediate legislative attention.
iii. NASSBER is following up on our Report. Indeed we presented our Final Report at the Inaugural Roundtable of NASSBER on 21st March, 2016.
iv. The former President of Senate, HE Bukola Saraki inaugurated the Committee on 8 May, 2017. The Committee was driven by NASSBER, CAC and PEBEC (Presidential Enabling Business Environment Council) and the Committee produced a Report on the draft bill.
v. I am member of NASSBER Advisory Council where we monitor the implementation of our Report.

- What have been the successes of the law reform project?

For me, Federal Competition & Consumer Protection Council Act 2019 and CAMA 2020 are major achievements. Prior to 2019, we had no comprehensive regime on competition apart from the sectoral provisions [the bill had been in the NASS since 2003!!]; secondly CAMA 1990 was 25 years old.

Others include:

- Secured Transactions in Movable Assets Act, 2017 (otherwise known as Collateral Registry Act)
- Credit Reporting Act, 2017

Other Bills include:

- The Reform Bills – Ports & Harbours Bill, Nigerian Railway Corporation Bill, Federal Roads Bill, Federak Roads Fund Bill, Nigerian Transport Commission Bill, Nigerian Postal Commission Bill, etc
- Electronic Transaction Bill
- Payments System Bill
- Nigeria Agricultural Quarantine Service (Establishment) Bill
- National Fertilizer Bill
- National Agricultural Seed Council Bill
- Plant Variety Protection Bill

Indeed, NASSBER is working on all the Bills that we recommended in our Final Report.

- How can Nigerians access a copy of your report?

  From the Website of NASSBER.

- What advice do you have for law reform in Nigeria going forward?

  Amendment of section 5 of the Nigerian Law Reform Commission Act – provides thus:

> **5.** (1) Subject to the following provisions of this section, it shall be the duty of the Commission generally to take and keep under review all Federal laws with a view to their systematic and progressive development and reform in consonance with the prevailing norms of Nigerian society including, in particular, the codification of such laws, the elimination of anomalies, the repeal of obsolete, spent and unnecessary enactments, the reduction in number of separate enactments, the reform of procedural laws in consonance with changes in the machinery of the administration of justice and generally the simplification and modernisation of the law.

(2) For the purposes of subsection (1) of this section, the Commission-

(a) shall receive and consider any proposals for the reform of the law which may be made or referred to it by the Attorney-General of the Federation (hereinafter referred to as "the Attorney-General");

(b) may prepare on its own initiative and submit to the Attorney-General, from time to time, programmes for the examination of different branches of the law with a view to reform;

(c) shall undertake, pursuant to any recommendations approved by the Attorney-General, the examination of particular branches of the law and the formulation, by means of draft legislation or otherwise, of proposals for reform therein;

(d) shall prepare, from time to time, at the request of the Attorney-General, comprehensive programmes of consolidation and statute law revision, and undertake the preparation of draft legislation pursuant to any such programme approved by the Attorney-General.

- ✓ I am aware that the Nigerian Law Reform Commission is a parastatal under the Federal Ministry of Justice. I will prefer that the Nigerian Law Reform Commission Act is amended to provide for time frames within which the Attorney General should submit proposals from the Nigerian Law Reform Commission to the NASS.

- ✓ Section 7 of the Edo State Law Reform Commission Law, 2010 provides

  that the Commission shall at such intervals of time (not exceeding ten (10) years) the Governor may, upon the advice of the Attorney-General, direct, carry out a review of the Laws of the State and

prepare consolidated revised edition of the Laws pursuant thereto

- ✓ We need an amendment to the Nigerian Law Reform Commission Act to have a similar provision.
- ✓ The work of the Nigerian Law Reform Commission goes through the Attorney General to the Federal Executive Council and thence to the National Assembly as Executive Bills. This procedure is rather long. There is always a challenge if Executive Bills are not passed in any legislative calendar – they need to be re-presented otherwise members of any of the houses then adopt them as private members' bill.

THE END