

COMPANIES & MARKETS

THE COMPANIES AND ALLIED MATTERS ACT (REPEAL AND RE-ENACTMENT) BILL 2019 – WHAT YOU NEED TO KNOW

PART 9 – SCHEMES OF ARRANGEMENT

By Udo Udoma & Belo-Osagie

BACKGROUND

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 (CAMA) was enacted in Nigeria as a decree of the military government in 1990, and in the past 28 years, there have been no significant amendments to the CAMA. This is, however, all set to change if the Companies and Allied Matters (Repeal and Re-enactment) Bill 2019 (CAMA Bill), which was passed by the Nigerian Senate on 15th May 2018 and by the House of Representatives on 17th January 2019, is passed into law. In this series, which is scheduled to run for 12 weeks, Udo Udoma & Belo-Osagie will provide insights and digestible excerpts on the effect of key changes proposed by the CAMA Bill.

SCHEME OF ARRANGEMENT – THE CONCEPT

Section 537 of CAMA defines an “arrangement” to mean “any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected thereby”. Simply put, a scheme of arrangement is an arrangement between a company and its shareholders or its creditors for the purpose of effecting a transaction which cannot be effected pursuant to any other provision of CAMA. Examples of transactions that are usually implemented using schemes of arrangement include mergers and corporate restructurings. A scheme of arrangement could also be used in the context of a share acquisition to ensure that the shares sought to be acquired by an investor are acquired from all shareholders on a uniform basis. The focus of this article is on schemes of arrangement between a company and its members.

THE CURRENT REGIME

Where an arrangement is proposed between a company and its members, an application is submitted to the Federal High Court (“Court”) and, pursuant to that application, the Court will order the company to hold a meeting of its members – commonly referred to as a court-ordered meeting. The resolution required to approve a scheme of arrangement (“Scheme”) is a special resolution, that is, a minimum of 75% of the votes cast by members present and voting at the court-ordered meeting.

Under the CAMA, once the Scheme is approved by the shareholders, the Court has the power to refer the scheme to the Securities and Exchange Commission to investigate the fairness of the Scheme and, thereafter, submit a report to the Court. If the Court is satisfied as to the fairness of the Scheme, the Court will sanction the Scheme and, once this is done, the terms of the scheme become binding on all the shareholders of that company. The Scheme becomes effective when a certified true copy of the Court order is registered with the Corporate Affairs Commission.

RE-INTRODUCTION OF PROVISIONS RELATING TO MERGERS AND SHARE ACQUISITIONS

The CAMA Bill re-introduces provisions prescribing the process for (i) effecting mergers and other forms of arrangements; and (b) acquiring the shares of dissenting shareholders.

The background to this is that when the Investment and Securities Act 1999 (“ISA 1999”) was passed, it repealed Part 17 of the Companies and Allied Matters Act 1990 (“CAMA 1990”). Some of the repealed provisions included sections 591 to 593 of CAMA 1990 which dealt with schemes of arrangement. Specifically, section 591 dealt with reconstruction and merger of companies, section 592 dealt with powers to acquire shares of dissenting shareholders and section 593 dealt with the right of a dissenting shareholder to compel the acquisition of his shares. The text of these three sections were re-enacted as sections 100 to 102 of ISA 1999. When the Investment and Securities Act 2007 (“ISA 2007”) repealed the ISA 1999, however, only sections 101 and 102 of the ISA 1999 made it into the ISA 2007 - as sections 129 and 130; section 100 of the ISA 1999 was not so fortunate and was omitted. The effect of this omission was that there was no longer a statutory basis for the market practice that had developed in Nigeria, in relation to the process by which schemes of mergers and other forms of reconstruction, were carried out (that is to say, the process of applying to the court for an order to convene meetings to approve the scheme and, ultimately, to sanction the scheme and make a wide range of orders relating to the transfer of rights and liabilities under the scheme).

The Federal Competition and Consumer Protection Act (“FCCPA”) was signed into law on 30th January 2019. One of its effects was the repeal of sections 118 – 128 of the ISA 2007 dealing with mergers and acquisitions. Unlike the previous repeal of Part 17 of the CAMA 1999 and the repeal and re-enactment of the ISA 1999 as the ISA 2007, the text of the repealed ISA 2007 provisions was not reproduced in the FCCPA. Fortunately, the Technical Advisory Committee on the CAMA Bill considered the effect that the FCCPA would have on schemes of arrangement (particularly in relation to mergers) if passed into law before the CAMA Bill. As a result, the CAMA Bill was drafted to re-introduce the texts of the previous sections 591 – 593 of the CAMA 1990 (which are identical to sections 100 – 103 of the ISA 1999). This re-introduction is significant for several reasons:

- a) it will ensure that there is no lacuna in the process of effecting a scheme of arrangement and that the law once again sets out clearly the process by which all forms of schemes can be effected;
- b) there will once again be statutory backing of the right to invoke the Court’s jurisdiction to make orders for various matters to be dealt with in the context of a merger such as the transfer of rights, assets and liabilities from one company to another, the allotment of any shares or other interests and matters incidental or consequential to the Scheme;
- c) the process for dealing with dissenting shareholders in a scheme (i.e. sections 129 and 130 of the ISA 2007) has been reunited with the provisions that set out how to conduct a scheme (i.e. the repealed section 591 CAMA 1990 and section 100 ISA 1999); and
- d) as a consequence of the above, the CAMA Bill contains a complete set of provisions for the conduct of schemes of arrangement including schemes of mergers.

Udo Udoma & Belo-Osagie actively participated in the drafting of the CAMA Bill. Corporate Partner, Ozofu 'Latunde Ogiemudia was the chairperson of the Technical Advisory Committee set up by the office of the Senate President to advise on the CAMA Bill and the bill to amend the Investments and Securities Act 2007. Managing Associate, Christine Sijuwade was a member of that committee and led the drafting sub-committee on the CAMA Bill.

