

**CURRENT DEVELOPMENTS IN THE INCORPORATION OF GUARANTEE COMPANIES UNDER NIGERIAN COMPANY LAW\***

**Abstract**

*The enactment of CAMA 2020 brought about positive changes to the incorporation process of companies limited by guarantee. The process is mostly the same as in the repealed 1990 CAMA, however, the requirements for procuring the Attorney General's consent has been modified to allow for a simpler and more efficient incorporation, making it more attractive to not-for-profits and other interested stakeholders, who might previously have been discouraged by the onerous incorporation procedure. Adopting the doctrinal research method, this paper examined the current developments brought about by CAMA 2020 with respect to the incorporation of guarantee companies in Nigeria. The findings show that the erstwhile challenge of delayed consent for incorporation of guarantee companies by the Attorney General of the Federation has been resolved. However, the Act fails to provide any mechanism to challenge the decision of the Attorney General's refusal to grant consent where all valid documents have been furnished. The alternative applies solely where the Attorney General of the Federation fails to make any decision within the stipulated timeframe. As such, the writers recommend the provision of a mechanism through which aggrieved persons can challenge the decision of the Attorney General of the Federation refusing to grant approval for the incorporation of a guarantee company.*

**Keywords:** Current developments, incorporation, guarantee company, Nigeria, company law, attorney general

**1. Introduction**

The Companies and Allied Matters Act<sup>1</sup> is the principal law regulating the formation, registration, operation and dissolution of companies in Nigeria. Over the past 3 decades, companies have been regulated by the CAMA, 1990. However, on 7<sup>th</sup> August 2020, President Muhammadu Buhari assented to the CAMA, 2020 which repealed and replaced CAMA 1990 that had been in force for more than 20 years with little modifications.<sup>2</sup> The enactment of CAMA 2020 brought about positive changes to the incorporation process of companies limited by guarantee. Indeed, a major challenge with the formation of companies limited by guarantee<sup>3</sup> is that the Attorney General of the Federation's consent must be obtained before incorporation. The bureaucratic challenges attached to this have made persons adopt the incorporation of trustees in a bid to escape the rigorous process of incorporation of a guarantee company. However, CAMA 2020 therefore provided an alternative where no decision has been made by the Attorney General of the Federation within the 30 days period of making the application to incorporate a company limited by guarantee.<sup>4</sup> As such, the new Act has brought current development that dealt with a matter of considerable difficulty often encountered by promoters of non-profit organization who wait endlessly for the consent of Attorney General of Federation to incorporate a company limited by guarantee. This paper therefore examined these current developments in the incorporation of guarantee company under CAMA 2020.

**2. Nature of a Company Limited by Guarantee**

A company limited by guarantee is a limited liability company wherein the liability of its members is limited by the amount which they undertake to contribute to the assets of the company in the event of winding-up.<sup>5</sup> In other words, it is a company in which the financial liability of its members<sup>6</sup> in the event of it being wound up or insolvent is limited up to the amount guaranteed to be contributed to the assets of the company.<sup>7</sup> CAMA 2020 does not define a guarantee company but gives description of its specific features. Section 26(1) CAMA therefore provides thus:

Where a company is to be formed for the promotion of commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, 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 this Act, the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee.

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<sup>1</sup> Hereinafter referred to as CAMA.

<sup>2</sup> O Jeje and A Tobiloba, 'Review of the Companies and Allied Matters Act 2020 and Emerging Issues', 2021 (4) 2 *UNILAG Review*, 229.

<sup>3</sup> Also referred to as guarantee company in this paper.

<sup>4</sup> CAMA, s 26 (7).

<sup>5</sup> *Ibid*, s 7 (4) (b).

<sup>6</sup> known as guarantors.

<sup>7</sup> The total liability of a member of a company limited by guarantee to contribute to the assets of the company in the event of its being wound up shall not at any time be less than N100,000.00. This is an increase from the previous minimum guarantee sum of N10, 000.00.

Thus, company limited by guarantee is not established for the purpose of making profits to be distributed among members.<sup>8</sup> Rather, any such profit made is re-invested into the company. Consequently, companies limited by guarantee are uniquely suitable for entities established for achieving specific objectives in the interest of the general public without aiming at profit making. Indeed, such business structure is generally viable for non-profit organizations and in this business structure, any profits earned are reinvested into the company to enhance the workings of the entity. They usually take the form of charitable organizations, clubs and non-governmental organizations targeted at meeting specific objectives such as health, education, sport, and development of community projects, clubs and societies.<sup>9</sup> Moreover, a company limited by guarantee is also known as a guarantee company. It is separate from its members and is considered as a unique legal entity. The approach signified that the company is deemed to be responsible for its debts it has amassed. This type of company typically has no share capital. In the repealed 1990 CAMA, a guarantee company was not required to have a share capital but this provision has been deleted from the 2020 CAMA. The intent for the omission is not clear and the writers are of the view that it is necessary to clarify whether companies limited by guarantee are now required to be registered with share capital or with the applicable minimum share capital as introduced under the CAMA 2020.<sup>10</sup> The writers also maintain that the fact that a company limited by guarantee cannot have a share capital limits its fund-raising capacity. Thus, a guarantee company does not have shareholders. Rather, they have guarantors who do not share from the profit of the company as such they do not receive dividend. These guarantors are obliged to pay a certain sum of money in the case the company is being wound up.<sup>11</sup> The amount guaranteed takes effect only if and when the company is in the process of winding up and the guaranteed sum must have been specified by each member at the time of acquiring membership.

### 3. Guarantee Company Distinguished from other Types of Company

A company may be limited by shares or guarantee by an appropriate limiting provision in the company's constitutional documents or by the terms of the issue of the shares.<sup>12</sup> However, where there is no such limiting provision on the liability of the company's members, a company is an unlimited company.<sup>13</sup> Thus, limited liability company is a company in which the financial liability of its members is limited by the memorandum to the amount, if any unpaid on the shares respectively held by them.<sup>14</sup> This accounts for one of the principal advantages of trading through the medium of a limited liability company on the ground that members are liable to contribute towards payment of its debts only to a limited extent.<sup>15</sup> Indeed, where the company is limited by shares, a member's liability to contribute is measured by the nominal value of the shares he holds and where the nominal shares are fully paid, he owes nothing to contribute to the company unlike a guarantee company where it is measured by the amount of the contribution of the members. A company limited by guarantee is also different from an unlimited company where its members' financial liability in the event of it being wound up has no limit. Thus, where the financial liability of the company exceeds its assets, the company may reach into its members' personal property to liquidate its debts. In other words, members of an unlimited company have a joint and non-limited obligation to contribute to the assets of the company to enable settlement of its financial liability, if any, in the event of the company's insolvency.

Indeed, the outstanding attribute which makes unlimited company unattractive is the absence of limitation of liability of its members. The members unlike a guarantee company and company limited by shares are not clothed with the corporate veil offered by limited liability company on incorporation. While members of a limited liability company and guarantee company are not personally liable to the debts of the company, the members of the unlimited company are personally liable to the debts of the company and are personally pursued until the debts are satisfied. Thus, the members can be called upon to satisfy personally the whole of its liabilities to its creditors. The implication in respect of an unlimited company is that, even where the members have paid up the value of the amount of shares respectively held by them, should the company be wound up, the members would be asked to pay more until the debt is discharged. However, in the event that the company is being wound up, members can only be held liable to contribute the amount they have guaranteed in case of a company limited by guarantee. The writers are therefore of the view that it is instructive for investors who would like to go into profit-making ventures such as trading to bear in mind that the main attraction of incorporation is to be insulated by taking the advantage

<sup>8</sup> CAMA, s 26 (3).

<sup>9</sup> M Mullen and J Lewison, *Companies Limited by Guarantee* (3rd edn, United Kingdom: Jordan Publishing Limited, 2011) p 10.

<sup>10</sup> CAMA, s 27 (2) (a).

<sup>11</sup> *Ibid*, s 27(4) (b).

<sup>12</sup> Liability of members of a company is the extent to which members of the company may be requested to contribute to the assets of the company in the event of distress, whether winding-up or dissolution.

<sup>13</sup> L Sealy and S Worthington, *Cases and Materials in Company Law*, (8<sup>th</sup> edn, Oxford: Oxford University Press, 2008) 19.

<sup>14</sup> CAMA, s 21(1). This means that in the event, the company winds up or becomes insolvent, they will not be liable unless the member if any, that has not fully paid up the value of shares held.

<sup>15</sup> R R Pennington, *Pennington's Company Law* (7<sup>th</sup> edn, London: Butterworths, 1995) p 71.

of limitation of liability to which unlimited company lacks the power to provide to its members. Also, it is little wonder that such companies are quite rare on the Nigerian corporate scene.<sup>16</sup> Again, a company limited by guarantee has no share capital hence there are no shareholders unlike a company limited by shares or unlimited company. Instead, they have guarantors who do not share from the profit of the company as such they do not make financial gains. Companies limited by guarantee help to limit the liability of members in the event of winding-up to a specific amount guaranteed by each of them. An unlimited company is a company incorporated with a share capital and where such is not registered with a share capital, it shall not later than the appointed day, register it by altering its memorandum to reflect it as unlimited company having a share capital.<sup>17</sup> This also applies to limited liability company which must be registered with a share capital in order to provide working capital and to measure each members' right in the company. However, in a company limited by Guarantee, a member is only liable to make a contribution to the assets of the company in the event of its being wound up and the total liability of a member to contribute to the assets of the company shall not be less than N100, 000.00.<sup>18</sup>

A guarantee company is however, an unsuitable company where the primary object is to carry on a business for profit and to distribute that profit among members. Despite the availability of a guarantee company for non-profit purposes, it has a limitation in terms of its financing since it is not registered with share capital and there are no shares to be sold and must either operate on the basis that it needs no long-term working capital and rely simply on members' subscription or resort to borrowing as a means of raising its capital.<sup>19</sup> In United Kingdom, due to the limitation of the company limited by guarantee, a new type of company called the community interest company was created<sup>20</sup> to which provisions of the Companies Act, 2006 apply subject to some modifications<sup>21</sup>. Such a company can be either a company limited by shares or by guarantee but its purposes are limited to pursuit of community interests.<sup>22</sup> Clearly, there is no such alternative to a company limited by guarantee under Nigerian Law. Again, a guarantee company unlike company limited by shares or unlimited company requires the consent of the Attorney General of the Federation for its registration<sup>23</sup> and they are also exempted from paying taxes in Nigeria.

The above types of companies may be registered as a private company or a public company.<sup>24</sup> However, in the United Kingdom, only a private company can be unlimited, a public company must be registered as a company limited by shares or guarantee.<sup>25</sup> The writers are of the view that it is curious that limited liability which is the advantage and drives entrepreneurs' decision to adopt the corporate form is not made compulsory by the CAMA in respect of public companies in Nigeria. Perhaps, upon the registration of any of these companies, it assumes a separate legal personality, and becomes endowed with the capacity to sue and be sued separately from its members.<sup>26</sup>

#### **4. Procedure for Incorporation of Guarantee Company**

The law regulating the incorporation of companies in Nigeria is the CAMA. The Act also regulates the formation and operation of other types of business associations in Nigeria. CAMA in its Part A established a regulatory body known as Corporate Affairs Commission and saddles it with the responsibility of registering companies in Nigeria. Indeed, the procedure for the incorporation of a company limited by guarantee is similar to the procedure for incorporation of companies in general and includes the following steps.

##### **Name Availability Search**

The promoters of the proposed company limited by guarantee shall conduct a name search with the Corporate Affairs Commission. Upon the receipt of an application for name availability search and reservation, the Corporate

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<sup>16</sup> TAT Yagba *et al*, *Elements of Commercial Law* (Nigeria: Tamaza Publishing Company Ltd, 1994) 224.

<sup>17</sup> CAMA, s 25.

<sup>18</sup> *Ibid*, s 27(4) (b).

<sup>19</sup> P L Davies(ed), *Gower and Davies' Principles of Modern Company Law* (8<sup>th</sup> edn, London: Sweet and Maxwell, 2008) p 10.

<sup>20</sup> Part 2 of the UK Companies (Audit, Investigation and Community Enterprise Act) 2004.

<sup>21</sup> UK Companies Act, 2006, s 6(2).

<sup>22</sup> N I Lorun *et al*, 'Classification of Companies under Nigerian Law: An Interrogation of the Bases', <<https://bsum.edu.ng>> accessed 27 January 2022.

<sup>23</sup> CAMA, s 26 (4).

<sup>24</sup> A private company under CAMA is one which is stated in its memorandum to be a private company. s 22 (1) CAMA. This provision in the memorandum is by no means an exhaustive criterion. To qualify as a private company, the company must impose restrictions on the members' right to transfer their shares in the articles; it must not have a total of more than fifty (50) members (excluding bona fide present and past employees who are members by virtue of their employment). S 22(2) CAMA. While a public company is any company other than a private company and its memorandum must state the fact that it is a public company. S 24 CAMA.

<sup>25</sup> UK Companies Act, s 3(4).

<sup>26</sup> *Salomon v Salomon & Co Ltd* (1897) AC 22; *Afolabi & Ors v Western Steel Works Ltd & Ors* (2012) 17 NWLR (pt 1329) 286; *Skye Bank Plc v Akinpelu* (2010) LPELR 3073 (SC); s 42 CAMA.

Affairs Commission may reserve an available name pending registration of the company.<sup>27</sup> This means that the approved name would be exclusively reserved for a period of 60 days.<sup>28</sup> Indeed, within this period, any other company proposing to use the name will be barred from doing so on the ground that it is identical with already reserved name. After the 60 days duration, the reserved name shall become and may be reserved for another company.<sup>29</sup> Also, the Corporate Affairs Commission may cancel a name reservation where such was obtained fraudulently or unlawfully.<sup>30</sup>

### **Details of the Proposed Company**

Upon the reservation of the name of the proposed company, the promoters of the company shall work on determining the other particulars of the proposed company. These particulars relate to the various registration requirements provided under CAMA. These includes the registered office of the company, the object of the company or nature of business, the type of company, memorandum of association, articles of association and the statement of guarantee stating the financial liability of each guarantor, and the object of the company in case of a company limited by guarantee.

### **Preparation of Incorporation Documents**

The documents required for the registration of company include memorandum of association, articles of association, notice of registered address of the business, list of particulars and consent of the first directors of the company, statement of compliance etc.<sup>31</sup> The memorandum of association of every company shall contain all the particulars provided under section 27 (1) of CAMA.<sup>32</sup> In addition, the memorandum of association of a company limited by guarantee shall also state that 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, or under CAMA.<sup>33</sup> There must also be a statement that each member 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 after he ceases to be a member for payment of debts and liabilities of the company, and of the costs of winding up, such amount as may be required not exceeding a specified amount and the total of which shall not be less than N 1 00,000.<sup>34</sup>

### **Registration of the Company**

The promoters of the proposed company limited by guarantee shall deliver the memorandum of association of the company to the Corporate Affairs Commission together with an application for registration of the company, other incorporation documents and a statement of compliance.<sup>35</sup> Section 36(2) CAMA provides that an application for registration shall state the company's proposed name, the registered office address and head office of the company, if different and the nature of liability of members, whether or not it is limited and whether limited by guarantee or shares. It must also state the type of company whether private or public, statement of initial issued share capital and initial shareholdings. However, in case of a company limited by guarantee, the application shall include a statement of guarantee, statement of the company's proposed directors and a copy of the proposed articles of association, supplied by the model application of the articles and a statement of compliance. In order to aid further clarity, CAMA spell-out the form of the statement of guarantee. The statement of guarantee shall contain such information as may be prescribed for the purpose of identifying the subscribers to the memorandum of association; and that each member undertakes that, if the company is wound up while he is a member, or within one year after he ceases to be a member, he shall contribute to the assets of the company such amount as may be required for the payment of the debts and liabilities of the company contracted before he ceases to be a member, payment of the costs, charges and expenses of winding up, and adjustment of the rights of the contributors among themselves, not exceeding a specified amount.<sup>36</sup> Indeed, the Corporate Affairs Commission shall register the Memorandum and Articles of Association unless in its opinion they do not comply the provisions of CAMA or the business which the company carry on, or the objects for which it is formed or any of them, are illegal. Also, where any of the subscribers to the memorandum is incompetent or disqualified and there is non-compliance with

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<sup>27</sup> CAMA, s 31(1).

<sup>28</sup> *Ibid*, s 31(2).

<sup>29</sup> CAMA, s 31(4).

<sup>30</sup> *Ibid*, s 31(5).

<sup>31</sup> *Ibid*, s 36.

<sup>32</sup> They are: (a) the name of the company; (b) that the registered office of the company shall be situated in Nigeria; (c) the nature of the business or businesses which the company is authorised to carry on, or, if the company is not formed for the purpose of carrying on business, the nature of the object or objects for which it is established; (d) the restriction, if any, on the powers of the company; (e) that the company is a private or public company, as the case may be; and (f) that the liability of its members is limited by shares, by guarantee or unlimited, as the case may be.

<sup>33</sup> CAMA, s 27(4) (a).

<sup>34</sup> CAMA, s 27(4) (b).

<sup>35</sup> *Ibid*, s 36(1).

<sup>36</sup> *Ibid*, s 38 (1) (a).

the requirement of any other law as to registration and incorporation of a company.<sup>37</sup> Moreover, the memorandum of a company limited by guarantee shall not be registered without the authority of the Authority General of the Federation.

### **5. Consent of the Attorney General of Federation in Incorporating Guarantee Company**

Generally, promoters of a guarantee company must obtain the consent of the Attorney General of the Federation prior to incorporation. Section 26 (4) CAMA retains the consent of the Attorney General of the Federation as a pre-requisite for the registration of a company limited by guarantee. Moreover, section 26(5) provides that the Attorney General of the Federation shall, within thirty days grant authority to the promoters of a company limited by guarantee where there are no objections to the memorandum or other cogent reasons to decline to grant approval to register the company as one limited by guarantee. Indeed, the use of the word 'shall' in section 26(5) CAMA should be interpreted by the courts to mean the Attorney General of the Federation's power to grant the application is mandatory and may only be validly refused where there are objections to the memorandum of association or cogent reasons for the refusal. However, under section 26(7) CAMA, an alternative is provided where all valid documents have been furnished to the Attorney General of Federation and no decision has been made by the Attorney General of the Federation within the 30 days period of making the application.<sup>38</sup> CAMA 2020 therefore introduces a dual publication process as an alternative to the requirement of the Attorney General of the Federation's consent. This entails a publication in three (3) national dailies by the promoters inviting objections, if any, to the incorporation of the company and the consideration of the objections (if any) by Corporate Affairs Commission.<sup>39</sup> Thus, under CAMA 2020, the consent of the Attorney General of the Federation is to be granted within a 30 day period. It further provides that where the Attorney General of the Federation makes no decision after the said period, the applicants may advertise the application in national newspapers calling for objection; after which the Commission may approve the application and incorporate the company.<sup>40</sup> Also, Companies Regulations 2021 provides that an application for incorporation of company limited by guarantee shall not require publications where the Attorney General of the Federation has given consent for registration.<sup>41</sup> In essence, the publication by the promoters inviting objections is only required where the Attorney of the Federation makes no decision. The advertisement of the application shall be at the expense of the applicant.<sup>42</sup> Thus, where there is no objection, the commission shall register the company.<sup>43</sup> However, where there is an objection, the commission may uphold or reject the objection<sup>44</sup> and where the commission rejects the objection, it shall register the company.<sup>45</sup> Moreover, where the Attorney General of the Federation makes a decision outside 30 days period, the commission shall not be bound by the decision.<sup>46</sup> The provision is commendable as it is an attempt to minimize the unchecked power of the Attorney General of the Federation in relation to the approval of the incorporation of guarantee company. In providing for the timeline within which the Attorney General of the Federation can grant approval for the incorporation of guarantee company, CAMA 2020 has dealt with a matter of considerable difficulty often encountered by promoters of non-profit organization to wit-the bottlenecks associated with obtaining the Attorney General of the Federation's consent, who may in his absolute discretion withhold such consent. Indeed, upon taking a close look at the provisions of section 26 CAMA 2020 and the Companies Regulations 2021<sup>47</sup>, the question which readily comes to the writers' minds is what are the mechanisms through which any person aggrieved by the decision of the Attorney General of the Federation can challenge such decision? In essence, the Act does not provide for any mechanism to challenge the decision of the Attorney General of the Federation's refusal where all valid documents have been furnished to the Attorney General of the Federation.

Again, the question is whether the aggrieved person may give notice to the Corporate Affairs Commission requiring it to apply to the Court for directions as stipulated in section 41(1) of CAMA<sup>48</sup> where the Commission

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<sup>37</sup> CAMA, s 41 (1).

<sup>38</sup> Where there are no objections to the memorandum or other cogent reasons to decline to grant approval to register the guarantee company.

<sup>39</sup> CAMA, s 26 (7).

<sup>40</sup> *Ibid*, s 26(7) – (10).

<sup>41</sup> Order 8 Rule 1

<sup>42</sup> *Ibid*, Rule 3.

<sup>43</sup> *Ibid*, Rule 4.

<sup>44</sup> *Ibid*, Rule 5.

<sup>45</sup> *Ibid*, Rule 6.

<sup>46</sup> *Ibid*, Rule 7.

<sup>47</sup> Order 8 Rules 1 – 7.

<sup>48</sup> S 41 (1) CAMA provides that the Commission shall register the Memorandum and Articles unless in its opinion: (a) they do not comply with the provisions of this Act; (b) the business which the company is to carry on, or the objects for which it is formed, or any of them, are illegal; (c) any of the subscribers to the memorandum is incompetent or disqualified in accordance with section 20 of this Act; (d) there is non-compliance with the requirement of any other law as to registration and incorporation of a company; or (e) the proposed name conflicts with or is likely to conflict with an existing company, trade

has failed to register the memorandum and articles of association of a company on the ground of refusal of consent by the Attorney General of the Federation in case of guarantee company? The writers are of the view that the provision of section 41 (1) of CAMA may not avail any aggrieved person as the provision is specific with respect to the registration of memorandum and articles of association of company generally and the refusal of consent of the Attorney General of the Federation in the incorporation of guarantee company is also not among the conditions stated in the said section under which any aggrieved person may give notice to the Commission requiring it to apply to the Court for directions. Indeed, this is a great lacuna provided by section 26 CAMA 2020 for failure to provide any mechanism to challenge the decision of the Attorney General of the Federation's refusal of consent in incorporating guarantee company since the alternative applies solely where the Attorney General of the Federation fails to make any decision.

#### **6. Conclusion and Recommendations**

The consent of the Attorney General of the Federation is still a pre-requisite for the registration of a company Limited by guarantee, however, there is now a specific time within which the Attorney General of the Federation must grant the approval or objection to the incorporation of a company limited by guarantee. Under the repealed CAMA 1990, the Attorney General had the prerogative to issue or withhold consent and there was no timeline attached to such consent. The Attorney General of the Federation is now required to make a decision within thirty (30) days in respect of incorporation of a guarantee company. This provision is a welcome development as it removes a bottleneck in the process of the incorporation of company limited by guarantee and makes the incorporation process simpler and efficient. However, CAMA 2020 does not provide for any mechanism to challenge the Attorney General of the Federation's refusal where all valid documents have been furnished to the Attorney General of Federation as the alternative applies solely where the Attorney General of the Federation fails to make any decision. As such, the writers therefore recommend the provision of a mechanism through which any aggrieved person can challenge the decision of the Attorney General of the Federation refusing to grant an approval for the incorporation of a guarantee company particularly where the applicant has furnished all valid documents to the Attorney General of the Federation.

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mark or business name registered in Nigeria. sub section (2) also provides that any person aggrieved by the decision of the Commission under sub section (1) , may give notice to the commission requiring it to apply to the Court for directions and the commission shall within 21 days of the receipt of such notice, apply to the court for the directions.