

Legal Alert ? May 2014 ? Risk Management and Insurance Legislations

INTRODUCTION

RISK MANAGEMENT AND INSURANCE LEGISLATIONS

The most common medium for undertaking a commercial enterprise is through the registration of a limited liability company, which is also known as a corporation in some jurisdictions.

As with any human undertaking, there are risks associated with a registered enterprise; and where these risks are not kept in perspective, managed and or prevented, such registered enterprise risk levels could become too high, with the result the enterprise may be wound up or liquidated.

Some of the most common compliance requirements that any successful enterprise should adhere to, and insurance covers that such enterprise must always retain, are highlighted herein for your guidance and benefit. Grave fines and other penalties are attached to the contravention of any of these provisions.

COMPANIES AND ALLIED MATTERS

It is a mandatory requirement under the Companies and Allied Matters Act (?CAMA?) for every private company to ensure that at all times, it has a minimum of two (2) Directors and two (2) Shareholders; with its number of members/shareholders never exceeding fifty (50) members at any one time.

It is also a mandatory requirement that a private company shall not, unless authorised by law to do so, invite members of the public to subscribe to any of its shares or debentures. A private company is also forbidden from soliciting from the members of the public the deposit of money for fixed periods, whether or not such moneys bear or earn interest.

Where a private company infringes any of the above provisions, such private company, its Directors and Shareholders shall cease to be entitled to the privileges and exemptions that a private company and its members enjoy. Some of such privileges include the separation of the legal existence of the company from its members or Shareholders; the restriction of the liability of

its members to only the unpaid portion of the shares allotted to them; etc.

Where however the above contravention or contraventions arose inadvertently or for some other sufficient reasonable cause or ground, a Court of law may on such just and expedient terms relieve the private company from the legal consequences of any such default.

COMPLIANCE TO THE OBJECTS OF A COMPANY

Every company is required at registration, to state among other things its objects, which are the nature or kind or type of business or businesses which the company is authorised to undertake.

Where a company undertakes businesses that are not authorised by its Memorandum of Association, consequences like law suits by its Shareholders or investigations by the Corporate Affairs Commission to redress such unlawful or oppressive action or actions could arise.

STATUTORY MEETINGS ? COMPLIANCE AND PENALTIES

Every registered company is required to, within six (6) months of incorporation, for registered public companies, and eighteen (18) months for private companies, hold their first Shareholders Meeting; and subsequent Meetings must be held on an annual basis.

The penalties for not holding the mandatory annual Shareholders Meeting includes fines, which shall be borne by the company and every officer of such defaulting company who is proven to be aware of the default.

ANNUAL RETURNS AND AUDITED ACCOUNTS

Unbeknownst to many, it is the mandatory legal responsibility of the Directors of every registered company to prepare the annual Financial Statements for their company. The Auditors engaged during this process only provide assistance to the Directors with regard to preparing the Statements and Reports.

To be contained in every annual Financial Statement are the Directors' Report, Auditors Report, Balance Sheet, Income Statement (which is also known as the Profit and Loss Account), among

other information.

It is also a mandatory requirement for the Directors to ensure that the Financial Statements are annexed to the statutory Annual Returns which must be filed at the Corporate Affairs Commission.

The failure to prepare the annual Financial Statements, and file them as an annexure to a company's Annual Returns, attracts fines which are inimical to the sustenance of the defaulting company.

DIRECTORS' RISKS, DUTIES, CONFLICT OF INTEREST, ETC

There are numerous Corporate Governance provisions, in CAMA, intended by the legislature to minimise some of the Corporate Governance risks that any company may have to bear.

Some of such risks include:-

(i) The prohibition of any tax-free remuneration to the Directors of a company.

(ii) The prohibition of Directors deriving any secret benefits in respect of any transaction that the Director's company is involved in or such a Director accepting a bribe, gift or commission in the performance of his or her duties.

(iii) The obligation for Directors to disclose any personal interest, and avoid conflict of interest situations while directing the affairs of the company.

FINANCIAL REPORTING COUNCIL OF NIGERIA

The Financial Reporting Council of Nigeria Act, 2011 established the Financial Reporting Council of Nigeria (F.R.C.N).

With the objective of protecting investors and retaining public confidence, the F.R.C.N is charged by statute with the responsibilities of, among other things, developing and publishing accounting and financial reporting standards to be observed in the preparation of Financial Statements of public interest entities in Nigeria.

F.R.C.N is further charged to maintain a register of professionals engaged by public interest entities; and no such professional shall render any service to a public interest entity unless registered with F.R.C.N.

Despite the provisions of the F.R.C.N Act not applying to private limited liability companies, it is recommended that private limited liability companies desirous of fortifying their corporate governance practices should familiarise themselves with the F.R.C.N rules, and implement such rules that will grow and protect their businesses.

INTERNATIONAL FINANCIAL REPORTING STANDARDS (?IFRS?)

Nigeria is among many other countries that have adopted the International Financial Reporting Standards (?IFRS?) in place of the old Generally Accepted Accounting Practice (?GAAP?).

From the phased transition schedule, Nigerian publicly listed companies, and other companies with significant public interest are required to convert their Financial Reporting Standards from GAAP to IFRS before 1st January 2012. Small and Medium sized entities are required to effect the Financial Statement conversion by 1st January 2014.

The implication of the above is that all the Financial Statements prepared and submitted to the Federal Inland Revenue Service (?FIRS?) must be prepared in accordance with the IFRS template. This requirement creates the anomaly of the F.R.C.N Law not been applicable to private companies with no public interest whilst the same private companies must comply with the IFRS regulations as supervised by F.R.C.N. Unfortunately, until these Laws are amended or challenged up to the highest Appellate Courts of Law, private companies will remain in the damning compliance dilemma in this area of the Law.

CREDIT BUREAU REGULATIONS

The unabating financial crisis with ?predatory debtors? that escalate these crisis especially in the banking industry led the Central Bank of Nigeria (?CBN?) to create a central Credit Risk Management System (?CRMS?), which is more commonly known as a Credit Bureau System.

By the provisions of Sections 33 and 57 of the Central Bank of Nigeria (Establishment) Act, 2007,

legal force was provided to the CBN to demand from all licensed Financial Institutions monthly returns on all credits and debits information, with a minimum account opening balance of N1,000,000 (One Million Naira). These returns, according to the CBN website, are compiled and disseminated to all operators and regulators in the Financial Market requiring these information.

Nigerian Banks are now statutorily required to make enquiries from the CRMS regarding any intending borrower so as to determine their eligibility or otherwise for credit.

The CBN is also empowered to licence and regulate private credit bureaux establishments who must also subscribe to the CBN data collection regulations.

Infringement of any of the above provisions attracts penalties.

INSURANCE LEGISLATIONS AND RISK MANAGEMENT

In addition to Corporate Governance minimum compliance requirements, some of which are enumerated above, there are various statutory insurance provisions intended to protect property and persons. Some of these provisions, summaries of which are provided hereunder, are very valuable risk management tools which though are mandatory, we recommend to you as business necessities.

LIFE INSURANCE AND GENERAL INSURANCE POLICIES

The Insurance Act recognises the following categories of insurance businesses:-

A.Fire Insurance

B.General Accident Insurance

C.Motor Vehicle Insurance

D.Marine and Aviation Insurance

E.Oil and Gas Insurance

F.Engineering Insurance

G.Bonds Credit Guarantee and Suretyship Insurance.

H.Life Insurance

I.Miscellaneous Insurance.

All buildings under construction and having more than two floors must be insured with a registered insurer in respect of any construction risk or negligence which may result in bodily injury, or loss of life, or damage to property.

Also, public buildings, whether privately or publicly owned, must be insured with a registered insurer in respect of any loss or damage to property or bodily injury or death suffered by the user of the premises or by third parties to the public building.

It is also a mandatory legal requirement that all goods to be imported into Nigeria must be insured with a Nigerian registered insurer.

All motor vehicles in Nigeria must also have a minimum cover of third-party insurance. This legal requirement applies to the owner of the motor vehicle, whether or not the owner is the driver of the motor vehicle. Further information in this area can be gathered from the Insurance Act and the Motor Vehicles (Third Party) Insurance Act.

OPERATING PERMITS

One of the greatest risks to the existence of any business is for such a business not to be in constant tune with the minimum operating licences required in its industry. Some examples will now be considered.

A non-Nigerian company, whether resident in Nigeria or not, cannot carry on any business in Nigeria unless and until it is incorporated as a Nigerian company, in accordance with the provisions of CAMA. Where a default arises, any contract that such a company enters into will be declared null and void, with the benefits accruing therefrom lost.

A non-resident insurance company cannot carry on insurance business in Nigeria without first of all being incorporated under CAMA; and secondly being registered by the Nigerian National Insurance Commission.

A final example is with regard to the Oil and Gas sector of the Nigerian economy, which presently remains critical to the economic sustenance of the Nigerian Federation. Any business involved in any Oil and Gas enterprise must obtain an operating licence from the Department of Petroleum Resources (?DPR?).

NIGERIAN DEPOSIT INSURANCE CORPORATION ACT

To engender public confidence in the Nigerian Banking system, the Nigerian Deposit Insurance Corporation (?NDIC?) was created and statutorily charged to insure all deposit liabilities of licensed banks and other deposit-taking financial institutions operating in Nigeria. It is therefore mandatory for these licensed financial institutions to insure their deposits with NDIC.

There is however a limit to the amount that a depositor can receive from NDIC in the event that a financial institution?s operating licence is revoked or withdrawn. Presently, the maximum amount for depositors of licensed banks to receive in the event of a liquidation of the financial institution is N500,000; while for other financial institutions, the maximum amount receivable is N200,000.

EMPLOYMENT REGULATORY COMPLIANCES

The manpower capacity of any business is arguably such a business? greatest asset. Mindful of this reality, there are numerous employee compliance provisions, which if not adhered to, bear financial risks to any defaulting enterprise.

WRITTEN EMPLOYMENT CONTRACTS, ETC

Employment Agreements are generally required to be in writing, with both the employer and the employee given the legal right to terminate the employment Agreement with notice.

Employees are also statutorily entitled to sick and annual paid leave. See the provisions of the Labour Act for more information on these areas.

CONTRIBUTORY PENSION SCHEME AND GROUP LIFE INSURANCE

One of such mandatory employee compliance requirement is as stated in the Pension Reforms Act (as amended), which now requires every employer in Nigeria, whether in the public or in the private sector of the Nigerian economy, having five (5) or more employees, to contribute a minimum of seven and a half per cent (7.5%) of each of its employees' monthly emolument to this mandatory contributory pension scheme.

Every employee is also required to contribute another minimum of seven and a half per cent (7.5%) of the employees' monthly emoluments to the contributory pension scheme.

Penalties will accrue where any employer fails to implement the mandatory provisions of the Pension Reforms Act (as amended).

In addition to the above compulsory pension contribution, every employer in Nigeria with five or more employees must maintain a Group Life Insurance Policy in favour of its employees, for a minimum of three (3) times the annual total emolument of each employee.

EMPLOYEES' COMPENSATION ACT ? DEATH, INJURY, DISEASE OR DISABILITY

A further risk compliance requirement on Nigerian employers is their compliance with the provisions of the Employees' Compensation Act, 2010. This Law repealed the Workmen's Compensation Act; and makes robust provisions for compensation to be paid to an employee, whether in the private or in the public sector, in the event of any death, injury, disease or disability which must arise out of or in the course of the employment.

The Nigerian Social Insurance Trust Fund (?NSITF?) Management Board is statutorily empowered to collect the monthly one per cent (1%) contributions of each employer's payroll, which ensures that a solvent compensation fund is managed in the interest of the employees and their employers.

INDUSTRIAL TRAINING FUND

To continuously boost the entire economy, the Industrial Training Fund was created to promote

and encourage the acquisition of skills by indigenous employees.

Every employer with five (5) or more employees, or with a lesser number of employees but having a turnover of N50,000,000 and above per annum, shall in respect of each calendar year contribute one per cent (1%) of its/his total annual payroll to the Industrial Training Fund (?ITF?).

Fortunately, employers that actively train their employees at subjects that are pre-approved by ITF are entitled to apply to ITF for a refund of fifty per cent (50%) of the training expenses incurred by the employer. Where a refund is made by ITF to an employer, ITF is obligated to inform the relevant tax authority of such a refunded training expenditure.

Any breach of the above provisions attracts fines of between N500,000 to N1,000,000 for both the corporate body involved, and its principal officers, i.e. Chief Executive Officer, Secretary, etc. Terms of imprisonment could also be imposed with the fine(s).

TAX RISKS

A key risk to doing business in Nigeria is the recurring multiplication of taxes which stifles the growth of enterprises and the larger economy. To curb this problem, the Federal, Lagos and Edo State Governments are examples of some governments that have passed legislation emphatically demarcating what taxes each tier of government can levy and collect.

It is therefore important that as a business owner, you familiarise yourself with, and adhere to these tax provisions.

Samples of some of these taxes, and which tier of government is authorised to collect them, are stated in the following paragraphs.

Taxes collected by the Federal Government.

1.Companies Income Tax and Education Tax.

2.Petroleum Profits Tax

3.Value Added Tax

4.Capital Gains Tax

5.Stamp Duties Tax, where the parties are corporate bodies and residents of the Federal Capital Territory, Abuja.

Taxes collected by State Governments.

1.Personal Income and Withholding Taxes on the income of individuals only.

2.Capital Gains Tax on the gains earned by individuals.

3.Pools, Betting and Lotteries, Gaming and Casino Taxes.

4.Road Taxes.

5.Business Premises Registration. In urban areas, the maximum amount is N10,000 for initial registration and N5,000 per annum for the renewal of this registration.

6.Development Levy payable by taxable individuals only in the maximum amount of N100 per annum.

7.Naming of Street Registration in State capitals.

8.Right of Occupancy Fees on State Land in urban areas.

9.Market Taxes and Levies where State finance is involved.

Taxes and Levies collected by Local Governments

1.Shops and Kiosks Rate.

2.Tenement Rates.

3. On and Off Liquor Licence Fees.
4. Slaughter Slab Fees.
5. Marriage, Birth and Death Registration Fees.
6. Name of Streets (outside the State Capital) Registration Fees.
7. Customary Right of Occupancy Fees for Land in Rural Areas.
8. Motor Park Levies.
9. Market Taxes and Levies, excluding any market where State finance is involved.
10. Radio and Television Licence Fees (other than radio and television transmitters).
11. Vehicle Radio Licence Fee imposed by the Local Government where the vehicle is registered.
12. Wrong Parking Charges.
13. Signboard and Advertisement Permit Fees.
14. Merriment and Road Closure Levy.
15. Religious Places Establishment Permit Fees.