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THE CAMA 2020 SERIES

The New Netting Provisions in Nigeria's Companies and Allied Matters Act, 2020

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Netting, a procedure for aggregating multiple payment obligations between two or more parties and offsetting the value of the multiple obligations against each other in order to arrive at a single payment due and payable between the parties, was largely unrecognised under Nigeria's statutory legal regime prior to August 2020. Whilst netting arrangements between counterparties pre- insolvency were enforceable, legal uncertainty surrounded their enforceability in the insolvency of a party.

Prior to August 2020, what would appear to be a close-recognition of netting agreements in an insolvency scenario is the statutory set-off provisions in the Bankruptcy Act, 1979 (the "**Bankruptcy Act**"). The Bankruptcy Act, a statute dealing with the bankruptcy of natural persons and the distribution of their assets in bankruptcy, was also made applicable to companies². **Section 33** of the Bankruptcy Act (the "**Statutory Set-off Provisions**") stipulates that:

"Where there have been mutual credits, mutual debts or other mutual dealings between a debtor against whom a receiving order is made in an insolvency proceeding, and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the other party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

Section 33 was the closest statutory recognition of close-out netting. Although the Statutory Set-off Provisions were mandatory, they were limited by, subject to (and their application could be excluded) factors, such as fraudulent preferences, contingencies and transactions at an undervalue. Furthermore, the absence of Nigerian case law on the meaning and applicability of the Statutory Set-off Provisions exacerbated the legal uncertainty surrounding the enforceability of netting agreements in the insolvency of a party. As such, it would be fair to have described Nigeria as a non-netting jurisdiction.

Nigeria's new Companies and Allied Matters Act, 2020 (the "**CAMA 2020**")³, which received presidential assent on August 7, 2020, has specific netting provisions in its Chapter 28 (sections 718 – 721). CAMA 2020, essentially recognises, validates and makes enforceable netting arrangements contained in qualified financial contracts⁴. Such netting arrangements are also not subject to and cannot be overridden by bankruptcy or insolvency events stipulated in any insolvency statute.

CAMA 2020 defines a "*netting agreement*" to mean any:

- "(a) agreement between two parties that provides for netting of present or future payment or delivery obligations or entitlements arising under or in connection with one or more qualified financial contracts entered into under a netting agreement;*
- (b) master agreement between two parties that provides for netting of the amounts due under two or more master netting agreements; and*
- (c) collateral arrangement related to or forming part of one or more of the foregoing."*

¹ This publication does not constitute legal advice and does not create a client-attorney relationship. For assistance with any legal issues in this practice area, please contact us at gelias@gelias.com; or derivatives@gelias.com.

² The now-repealed Companies and Allied Matters Act, 1990, s. 493 mandated the application to companies of the Set-off Provisions in the Bankruptcy Act, section 33.

³ Download a copy of CAMA 2020 here https://www.proshareng.com/admin/upload/report/13880-Companies%20and%20Allied%20Matters%20Act,%202020_-proshare.pdf

⁴ CAMA 2020 netting provisions largely mirror the 2018 ISDA Model Netting Act.

To be sure, CAMA 2020 section 721(1) stipulates that the provisions of a netting agreement are enforceable in accordance with their terms including, amongst others, against an insolvent party and shall not be stayed, avoided or otherwise limited by, amongst others, any action by a liquidator, a provision of law relating to bankruptcy or law that may be applied to an insolvent party. Parties to a netting agreement may, however, choose to specify in the agreement that it would be enforceable only in accordance with statutory provisions. CAMA 2020 section 721(2) & (3), for example, provides that after the commencement of insolvency proceedings, in relation to a party, the only obligation or right, if any, of either party to make payment or receive payment or delivery under a netting agreement shall be equal to its net obligation or its net entitlement with respect to the other party as determined in accordance with the terms of the applicable netting agreement.

CAMA 2020 netting provisions were highly anticipated by ISDA and foreign investors, especially global banks who regularly execute repurchase, securities lending, currency swaps and other derivative transactions with Nigerian banks and other corporates. The benefits to Nigeria's financial markets are enormous: efficient use of capital; credit, settlement and liquidity risks mitigation; and more effective control on regulatory capital. Significantly, leading global banks, now armed with a clean netting opinion, can take critical and deliberate steps in doing business with Nigerian counterparties. Now that the netting provisions have found their way in the statute books, the expectation is that it would drive and promote investments in the Nigerian economy, instill confidence in foreign investors contracting with Nigerian counterparties and hopefully assist in deepening the Nigerian financial markets.

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