

# ESTABLISHING AND DOING BUSINESS IN NIGERIA



# INTRODUCTION

One of the objectives of law in any developing country is to promote economic growth and social wellbeing. One way it tries to do this is to lay down rules that anybody wishing to engage in business must follow to ensure peace and harmony in the society.

Many people enter into business without being aware of these rules, even the most basic ones. They consequently run into problems with the law or their business partners. These rules are not static and the law constantly tries to change and amend them to deal with changes in environment, societal and human behavior. We should attempt in short note to give a general overview of the basic rules affecting establishment of business in Nigeria.

The aim is not to give a legal opinion but to give a general introduction. Any information or advice required in particular cases will of course be best dealt with by consulting a lawyer who will give advice base on specific circumstances.



We will examine this topic as follows:

- \* TYPES OF BUSINESS ORGANIZATIONS
- \* ENTERPRISES ELIGIBLE FOR PARTICIPATION
- \* BUSINESSES WITH FOREIGN PARTICIPATION
- \* TECHNOLOGY TRANSFER

In Nigeria, businesses can be organized among the following

- \* \*Sole Proprietorship
- \* \*Partnership
- \* \*Co-operative Societies
- \* \*Companies
- \* \*Incorporated Trusteeship



# The sole proprietor

- \* This is the prevalent business forms in Nigeria. It is a one man business. The proprietor is in business for himself. He takes all benefits and bears all the risks involved in the business.
- \* See T.O. Elias, Law in a developing Society(1973)



# Registration

- \* No registration is required except in the business not conduct under the true name of the proprietor. In that case the law requires that the name be registered as a business name. Examples of such names include “Ado John Sule & Sons” or “Man Must Wak Restaurant”



# Termination and partnership

## TERMINATION

- \* The Sole Proprietorship ends in the death of the sole owner.

## PARTNERSHIP

- \* A partnership exists where two or more people agree to carry on business in common with a view of profit. They pool resources together to form a business entity larger than any of them could form alone. Many professional firm run of this format.



# Advantages

Larger resource pool

\*Shared risks

\*No limit to the number of partners

\*Less regulation of intrusion of the law as compared to a company

# Disadvantages

Partners bear the risks of the business personally except for business liability partnerships

\*Each partner can bind the others and every partner is an agent of the firm.

There can be three types of partnerships. General partnerships, Limited partners and Limited liability partnerships.



# termination

The death of the partner ends the partnership and a new one is formed by the survivors  
obligations of the firm incurred while he is a partner

# Limited partnership

\* A partnership which

There are no more than  
20 members

At least one of the members  
is a general partner i.e liable  
for all the debts and  
obligations of the firm.

Introduced by 2009 amendment to the partnership law of Lagos State. This does not apply to the other state s.10 partnership law Lagos State (2009)

One or more of the members is a limited partner i.e one who at the time of entering the firm contributed thereto a sum as capital who is not liable for all the debts and obligation of the firm amount so contributed.

# Limited partnership Registration

- \* Unlike a general partnership, a limited partnership must be registered otherwise it will be deemed to be a general partnership and every limited partner therein deemed to be a general partner.
- \* A limited partner may not take part in the management of the firm and does not have power to bind the firm and where he does, he shall be liable for all debts and obligations of the firm incurred while he takes part as if he were a general partner.



# Limited liability partnership

- \* A partnership with law grants limited liability as regards the liability of its partners. To this advantage, the law attaches certain costs, by amongst other things prescribing a capital adequacy ratio for the firms accordingly the total capital subscribed and notified by the partners to the registrar of limited partnership shall not be less than 10% of the total stated value of the assets of the firm at any given time. A limited partnership shall not consist of more than 20 persons and must have at least one general partner who shall be liable for all the debts and obligation of the firm beyond the amount he has contributed to the firm on his admission.

# Limited liability REGISTRATION

Save for a limited partnership and a limited liability partnership, a partnership does not need to be registered but its name may be required to be registered if it does not consist only of the true names of the partners without any addition upon registration a limited partnership and a limited liability partnership shall use the abbreviation 'LP' and 'LLP' respectively after their partnership names.



# Partnership deed

A partnership is formed by contract, therefore one has to be careful and seek professional advice when thinking of entering into a partnership. A typical partnership deed will deal with the following matters

- \* \*Name and description of partners
- \* \*Name of the partnership
- \* \*Business of the partnership
- \* \*Area in which partnership to be conducted
- \* \*Banks
- \* \*New partners and exit of exiting partners' accounts
- \* S.54 partnership law Lagos State (2009)
- \* S.58 (2) partnership law Lagos State (2009)
- \* Ibid, S.63
- \* \*Capital contribution and distribution of profits (or less)
- \* \*Liability to third parties
- \* \*Management of the partnership
- \* \*Dispute resolution
- \* \*Termination
- \* The list is no exhaustive



# Cooperative society

- \* Any society which has at its objects to promotion of the economic interests of its members in accordance with co-operate principles, or a society established for the purpose of facilitating the operations of such society under the law. Reference to “co-operative principles”, or a society established for the purpose of facilitating the operations of such societies may be registered as a co-operative society under the law.
- \* Reference to “co-operative principles”, means that the purpose of then society must be the carrying on or exercise in common of any labor, trade, handicraft industry or business. In a co-operative society, members and others are paid for work and services performed by them for the society and members are permitted to receive interest on their subscriptions up to an approved limit. The remaining profit is retained in the society or applied for the provident purpose authorized under the law.



# Cooperative society registration

To be registered, a society for the promotion of economic interest of members must have:

- \* \*At least ten qualified members, while a society established for the purpose of facilitating the operations of their cooperative societies must have at least two co-operative societies as members to be qualified for membership of a registered society , a person must be capable of entering into a legally enforceable contract within the society's area as defined in its by-law or in the case of a society having limited liability a holder of landed property within such area.





# Advantages of Registering a society

Upon registration, a society becomes a body corporate under the name under which it is registered, with perpetual succession and a common seal. It will have the power to:

- \* Hold movable and irremovable property
- \* Enter into contracts, to institute and defend suits and to do all things necessary for the purpose of its constitution
- \* Exemption from income tax (i.e. the society exempt)
- \* Exemption from liability to pay stamp duties on documents
- \* Exemption from requirement of registration of documents
- \* This is a matter of state law as the laws of the various states are largely similar, we refer in this note to the law in force in the Lagos State of Nigeria.
- \* S.6 co-operative societies law CAP 30 laws of Lagos State 1994



# companies

- \* A company is an incorporated body with perpetual succession and a common seal. It is an artificial person with all the rights and duties that a natural person has under the law. It can sue and be sued in its own name and does not end or die with the death or exit of any of its owners or share holders. A company is distinct from its owners or share holders in that it has its own life.



# Advantages of incorporation

The advantages by one forming a corporation are as follows:

- \* \*Limited liability; this means that the share holders/owner cannot be held liability when the company goes bankrupt beyond his investment in the corporation.
- \* \*Perpetual succession; this means that the corporation survives even though the owner /share holder may die.
- \* \*Transferability of shares; this means that the shares acquired can be transferred or sold freely without affecting the existence of the corporation
  - \* i. Property: One of the most obvious advantages of incorporation is that it enables the property of the company to be distinguished from that of its members.
  - \* II. Suing and being sued in its own name.
  - \* III. Borrowing; this means that a company, though an artificial person can obtain loans by securing it with floating charges.



# Disadvantages of incorporation

- \* The disadvantages of incorporation relate to the formalities and expense of incorporation and high regulation in corporate affairs.



# Formation of companies

A company can be formed by at least two adult persons; they do this by complying with the provisions of the companies Act in respect of the registration of companies. No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on business for profit or gain by the company, association or partnership or by the individual members thereof, unless it is registered as

A charge which floats like a cloud over the whole assets from time to time falling within a generic description, but without preventing the mortgagor from disposing of these assets in the usual course of business until something occurs to cause the charge to become crystallized or fixed .

## S.18 Companies and Allied matters Act CAP C – laws of Nigeria 2004

A company under the companies Act, or is formed in pursuance of some other enactment in force in Nigeria, except

- \* it is a cooperative society registered under a law in force in Nigeria.
- \* It is a partnership for carrying all professional practice as a legal practitioner or accountant.



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- \* it is a cooperative society registered under a law in force in Nigeria.
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The following individuals cannot join in the formation of company

- \* An individual under eighteen years
- \* An individual of unsound mind who has been so found by a court in Nigeria or else where.
- \* An undischarged bankrupt
- \* A person disqualified from being a director under the companies Act 15
- \* Note however, that a person under years may join in forming a company if there are two other qualified adults who form the company with him

# Type of companies

There are three types of companies

- \* Companies limited by shares
- \* Companies limited by guarantee
- \* Unlimited companies

Any of these companies may be either a private company or public company

- \* **Companies limited by shares:** This is a company having the liability of its members limited by memorandum to the amount, if any, unpaid on the shares respectively held by them in the company.
- \* **Company limited by guarantee:** This is a company having the liability of its members limited by memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the events of its being wound up. Typically these are companies formed for the promotion of commerce, art, science, religion, sport, 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. No portion of the income and property is distributed.

i.e. a person previously convicted by a high court of any offence in connection with the promotion, formation or management of a company or

ii. A person who is discovered in the course of winding up of a company is to have been guilty for an offence under S.513 of the Act or guilty of fraud in relation to the company while an officer of the company or in breach of his duty to the company of the company whether directly or indirectly, except as permitted by the companies Act 19

Unlimited company: This is a company without limit on liability of its members





# Private company

A private company is one which is stated in its memorandum to be a private company. Features of private companies include

Transfer of the shares of a private company is restricted. This means that members of a private company are not free to transfer or sell their shares in the company to whoever they like or wherever they like

- \* A private company cannot have more than fifty members, excluding employees or former employees who are members.
- \* A private company may not, unless permitted by law, invite the public to
- \* Subscribe for any shares or debentures of the company
- \* Deposit money for fixed periods or payable at call whether or not bearing interest
- \* Any company other than a private company is a public company



# Advantage of Private company

- \* The major advantage of a private company over a public company is in the exemptions granted private companies under the companies' Act. Private companies are not regulated as much as public companies and the Act require them to make fewer filings or reports to the Corporate Affairs Commission. Consequently they are easier to manage.
- \* The minimum amount of capital required to incorporate a private or public company
- \* The minimum amount of capital required to incorporate a private company limited by shares is N10,000 (Ten Thousand Naira) while the minimum required for a public company limited by shares is N500,000 (Five Hundred Thousand Naira) <sup>21</sup>



As from the date of incorporation or registration of a company, the subscribers of the memorandum together with such persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum capable of exercising all the powers and functions of an incorporated company, including

- \* The power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as mentioned under the Act 22 thus, unless the company memorandum or any enactment provides every company has an incorporation and for the furtherance of its authorized business or objects the power of a natural person of full capacity.



- \* Shareholding and control: Typically, the interest of each shareholder is measured by the proportion of his shares to the total number of shares issued by the company. Apart from the case of preferential shares and under the circumstances listed in the Act each share in a company shall have only one vote<sup>24</sup>.
- \* Directors and shareholders: A company Acts through its members in general meeting or through its board of directors or through officers or agents appointed by or under the authority of the members in general meeting or board of directors.<sup>25</sup> In general, the respective rights of the members in general meeting and board of directors are determined by article of association of the company
- \* A company is run or manage by its directors who are appointed by the shareholders or in the case of usual vacancies by the board of directors



A company must have at least two directors.<sup>28</sup> The following persons may not be appointed a director of a company in Nigeria.<sup>29</sup>

- \* An infant, i.e. person under 18 years
- \* A lunatic or person of unsound mind
- \* An insolvent fraudulent or bankrupt person
- \* A corporation
- \* A director stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf.<sup>30</sup> Other duties owed by a director to his company include the duty of care and skill. That is to say that he shall exercise his power and discharge the duties of the office honestly, in good faith and in the best interest of the company and shall exercise the degree of care diligence and skill which a reasonable prudent director would exercise in comparable circumstances



- \* Note that each director is individually responsible for the actions of the board in which he participated and the absence from the board deliberation, unless justified, shall not relieve such responsibility. The same standard of care applies to executive and non executive directors<sup>32</sup>. In the eye of the directors are trustees of the company's money, property and pioneers and must account for all the money over which they exercise control and shall exercise their power honestly in the interest of the company and all shareholders



# Incorporated trustees

- \* Where one or more trustees are appointed by any community of persons bound together by custom, religion, kingship or nationality or by anybody or association of persons established for any religious, educational literary, scientific, social, development, cultural, sporting or charitable purpose, he or they may, if so authorized by the community body or association apply to the Corporate Affairs Commission for registration as a corporate body.
- \* A person shall not be qualified to be appointed as a trustee if he is an infant or a person of unsound mind or an undischarged bankrupt or has been convicted of an offence involving fraud or dishonesty within five years of his proposed appointment.



- \* Upon registration the trustee or trustees shall become:
- \* \*A corporate body by the name describe in the certificate and shall have perpetual succession and a common seal and power to sue and be sued in its corporate name as such trustee or trustees.
- \* \*The power to hold or acquire and transfer, assign or otherwise dispose of any property or interest therein belonging to or held for the benefit of the association. This power to hold or deal in property is to be exercise, firstly subject to the directions of the association or its governing body and secondly, in such manner and subject to such restrictions and provision as the trustees might without incorporation hold or acquire etc.
- \* \*The income and property of a body or association whose trustee or trustees are incorporated shall be applied solely towards the promotion of the objects of the body as set out in its constitution. No portion of such income or property may be paid or transferred to members of the association whether by way of dividend, bonus or by way of profit.





# Enterprise eligible for participation

Upon registration the trustee or trustees shall become:

- \* \*A corporate body by the name describe in the certificate and shall have perpetual succession and a common seal and power to sue and be sued in its corporate name as such trustee or trustees.
- \* \*The power to hold or acquire and transfer, assign or otherwise dispose of any property or interest therein belonging to or held for the benefit of the association. This power to hold or deal in property is to be exercise, firstly subject to the directions of the association or its governing body and secondly, in such manner and subject to such restrictions and provision as the trustees might without incorporation hold or acquire etc.
- \* \*The income and property of a body or association whose trustee or trustees are incorporated shall be applied solely towards the promotion of the objects of the body as set out in its constitution. No portion of such income or property may be paid or transferred to members of the association whether by way of dividend, bonus or by way of profit.



# Business with foreign participation

A non – Nigerian can invest in, own or manage an enterprise in Nigeria, subject to the “negative list”, above. However, there are few more steps and condition the foreigner or enterprise with foreign participation has to certify before commencing business. These include

- \* Incorporate or register the enterprise under the companies and Allied Matters Act
- \* Register the enterprise with the Nigerian investment promotion commission
- \* Obtain expatriate quota allocation, work permits and other approvals if he or any other foreigner is going to work for the enterprise in Nigeria. An expatriate quota allocation in the number of foreigners, a company may employ. It is normally reserved for those offices and positions where there are no or insufficient number of qualified Nigerian available to be hired. A work permit is the permit granted to the foreigner to enable him work in Nigeria. Both expatriate quota allocation and the work permit are granted by the immigration services.



# Technology transfer

In the course of operation of a business, it may be necessary to use technology or know how obtained from other source or persons. This typically will arise where a business relies on trade marks, patents, technology assistance, franchise agreements etc. where the source of the technology or know-how is foreign; the law prescribes that the contact or agreement forming the basis for such transfer of technology must be registered in Nigeria with the national office for technology acquisition and promotion. The aim of the law is to ensure that Nigerians do not pay exorbitant fee for technology transfers and to ensure that there is really some benefit derived under such agreements.

The contracts regulated under the statute are contracts which in the opinion of the national office aim, wholly or partially at the transfer of foreign technology by

- \* The use of trademarks
- \* The right to use patented inventions



## National office for technology acquisition and promotion Act CAP N62 Laws of the federation of Nigeria 2004

The supply of technical expertise in the form of the preparation of plans, diagrams operating manuals or any other form of technical assistance of any description whatsoever

- \* The supply of basic and detail engineering
- \* The supply of machinery and plant; and
- \* The provision of operating staff or managerial assistance and the training of personnel

Where the national office is satisfied that none of the specifications listed in the statute has been contravened by the contract or agreement, the effect of non – registration of a contract or agreement liable to be registered under the Act is that no payment under such contract shall be made to any body outside Nigeria through the banks or other authorized channels.

