



UPDATE

Much Ado About CCIs

It has been almost four hundred years since William Shakespeare wrote the comedy “Much Ado About Nothing” and although we have taken inspiration from its title, there is nothing even remotely funny about the recent confusion around Certificates of Capital Importation (“CCIs”). To explain, CCIs are issued, on application, to parties that inflow foreign currency equity or debt capital into Nigeria and provide such parties with access to Nigeria’s official foreign exchange market for the purpose of repatriating dividends, interest, principal and capital as the case may be. This brief note is an attempt to clear the current confusion and assuage the understandable concerns of the numerous foreign investors that have made investments in Nigeria, been issued with CCIs, who may be wondering whether they can still rely on those CCIs. Hopefully, this note will also assuage the doubts and concerns of prospective investors who plan to invest in Nigeria and to obtain CCIs in connection with such investments. This note is not, however, about MTN Nigeria Communications Ltd (“MTNN”), and the reference to the Central Bank of Nigeria’s (“CBN”) recent sanction against MTNN is mentioned below, only by way of background.

Recent Events

It is fairly well known that in the last week of August 2018, the CBN wrote a letter to MTNN, the operator of Nigeria’s largest mobile network, in which the CBN alleged that following an investigation carried out by the CBN on Standard Chartered Bank Limited, Stanbic IBTC Bank PLC., Citibank Nigeria Limited and Diamond Bank PLC. (“the Banks”), it had been determined by the CBN that between 2007 and 2015, the Banks used “illegally issued CCIs” to “illegally repatriate” US\$8.13 billion to MTNN’s shareholders. Following the above determination the CBN decided, among other things, that MTNN and the Banks had breached Nigeria’s foreign exchange laws and

regulations and that the “illegally repatriated” sum of US\$8.13 billion should be “refunded to the coffers” of the CBN immediately. The CBN also imposed fines totaling NGN 5.87 billion on the Banks.

Are You a Worried (Past or Prospective) Foreign Investor?

If an “Authorised Dealer” (more on that shortly) has issued you with a CCI in the past, or the recent events have made you concerned about whether the CCI regime can be relied on, then to borrow a phrase (or more accurately: part of a phrase) used by William Shakespeare in the play Cymbeline, “fear no more...”. We shall explain why below.

The Law: The FEMM Act

If you have had any contact with the Nigerian banking system, or plan to do so, you will have come across (or will soon come across) the term “Authorised Dealer.” Quite simply, an “Authorised Dealer” is a Nigerian bank that is licensed by the CBN to deal in foreign exchange under the provisions of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (Chapter F34) Laws of the Federation of Nigeria 2004 (“the FEMM Act”).

A little more (‘boring’ but necessary!) background. Section 1 of the FEMM Act establishes the Nigerian Foreign Exchange Market (“the Market”) where transactions in foreign exchange can be conducted, and empowers the CBN to issue guidelines to regulate the procedures for transactions in the Market and in relation to such other matters as the CBN may deem appropriate for the effective operation of the Market. One of such “guidelines” is the Foreign Exchange Manual (strictly speaking, a collection of foreign exchange guidelines issued by the CBN), which was first issued in 1990, reissued in 2004 and 2006, and updated in 2018. Section 8(1) of the FEMM Act also empowers the CBN to supervise and monitor the operation of the Market in order to ensure that the Market performs efficiently. In order that the CBN can effectively discharge its functions, Sections 5(1) and (2) of the FEMM Act empowers the CBN to appoint banks that have adequate resources and capacity as Authorised Dealers, and to delegate to the Authorised Dealers such powers as may be specified by the CBN in their respective letters of appointment. The role of the CBN under the FEMM Act is consistent with one of its powers under section 2 of the Central Bank of Nigeria Act 2007, which is to “maintain external reserves to safeguard the international value” of the Naira.

By virtue of their appointment Authorised Dealers apply the FEMM Act, the Foreign Exchange Manual, and other regulations issued by the CBN in relation to their dealings in foreign exchange. In doing so Authorised Dealers will, from time to time, have to make decisions and create enforceable contracts with third parties - all the time while acting as delegates of the CBN. And where power has been lawfully delegated it is for the delegate to act within the scope of the actual power that has been delegated. Even where an Authorised Dealer exceeds such powers, however, the CBN has a responsibility to affirm the approvals granted, and the transactions processed, on its behalf by its delegate. And where the Authorised Dealer has exceeded or wrongly exercised its delegated powers the CBN’s proper recourse is to sanction the Authorised Dealer, in such manner as is provided in the FEMM Act.

The Law: Delegation of Authority

A little more about the delegation of authority. As already indicated above, Section 1 of the FEMM Act empowers the CBN to regulate the procedures for transactions in the Market, while Section 8(1) of the FEMM Act empowers the CBN to monitor and supervise the operations of the Market in order to ensure its efficient performance. We have also indicated that Section 5 of the FEMM Act permits the CBN to appoint Authorised Dealers that will operate in the Market on the terms and conditions prescribed by the CBN. And whenever, in the exercise of such authority, an Authorised Dealer is not clear about any issue in relation to a foreign exchange transaction, the Foreign Exchange Manual requires the Authorised Dealer to seek clarification / approval from the CBN. The seeking of such clarification is entirely for the Authorised Dealer to do - or not do as the case may be. It is clear from the Nigerian case law on the subject that whatever an Authorised Dealer does, pursuant to its delegated authority, is done for and on behalf of the CBN. This was the position of Nigeria's Supreme Court in the case of *Ondo State University v. Folayan* (1994) 11 NWLR (Pt. 168) 1 – 41 where the late Justice Coker said:

“It is a trite principle of Administrative Law that where a power has been delegated, the delegating authority will be bound by the decision of its delegate and will be therefore incapable of rescinding that decision.”

The Law: Agency

The relationship between the CBN and Authorised Dealers also has elements of agency, in the sense that the CBN can be regarded as a principal and the Authorised Dealers as its agents. This is consistent with the decision of the Supreme Court in the case of *Tunde Bamgboye v. University of Ilorin & Anor.* (1999) 10 NWLR (Pt.622) 290 @ 329 para g, where Justice Onu stated that: “An agent, in my view, means more or less the same thing as a delegate ...” Under the Nigerian law of agency, a person or entity that has been disclosed by an agent to be the agent's principal, (a “disclosed principal”), is bound by any decisions made or contracts entered into by the agent on the principal's behalf.

Although not expressly stated in these terms by the FEMM Act Authorised Dealers are, in our opinion, the agents of the CBN in relation to dealings in foreign exchange and the CBN is a disclosed principal. We have arrived at this conclusion after considering whether the key characteristics of agency are present in the relationship between the CBN and an Authorised Dealer. Such characteristics include: (a) the fact of the agent providing a service or doing an act on behalf of its principal; (b) the fact of the agent representing its principal; and (c) the creation, by an agent, of legal rights and liabilities on behalf of the principal. These principles have been considered by the Supreme Court in cases such as *Niger Progress Ltd v. N.E.L. Corp.*, (1989) 3 N.W.L.R (Part 7), Pages 68-100 where the court held that agency is a relationship which exists between two persons, one of whom expressly or impliedly consents that the other should represent him or to act on his behalf and the other of whom similarly consents to represent the former or so to act. It does not matter that the parties have not described themselves or their relationship as that of principal and agent but, rather, a determination as to whether the relationship of agent and

principal exists will depend on the true nature of the agreement between agent and principal and on the exact circumstances of the relationship between the alleged principal and the alleged agent.

The Law: Delegation Has Been Confirmed by the CBN

But forget about legal theories, opinions and Supreme Court decisions! The good news is that the CBN itself has confirmed that it delegated its decision-making powers to Authorised Dealers, particularly in relation to the issuance of CCIs. This was confirmed by the CBN in a press release dated 19th September 2018, where the CBN stated that:

“...the delegation of the issuance of Certificates of Capital Importation (CCIs) to commercial and merchant banks some years ago was done to instill confidence in the investor community and encourage the flow of foreign direct and portfolio investments into the Nigerian economy.”

The CBN also confirmed in the same press release that:

“...the integrity of the CCI regime remains sacrosanct and there shall be no retroactive application of foreign exchange rules and regulations.”

Where Does That Leave Private Equity and other Foreign Investors?

- Foreign investors have only two obligations. The first is to ensure that the bank they are dealing with is an Authorised Dealer - an easy obligation to satisfy since the banks that are Authorised Dealers are well known. The second obligation is to ensure that they provide the Authorised Dealer with all the supporting documents that the Authorised Dealer requires in order to issue the CCI.
- Foreign investors have no obligation under the FEMM Act, the Foreign Exchange Manual, or other relevant regulations to take steps to ‘verify’ that the CCIs issued to them are genuine or valid, or that the Authorised Dealers have first complied with all the conditions stipulated by the CBN before issuing the CCIs. They are entitled to assume that such Authorised Dealers are validly exercising the authority conferred on them by the CBN.
- As we have indicated elsewhere in this note, the CBN is bound by decisions taken by Authorised Dealers on its behalf pursuant to the authority conferred on them by the CBN. As the Court of Appeal rightly held in the case of *F.G.N v. Shobu (Nig.) Ltd.*, [2014] 4 N.W.L.R (Part 1396) 45-64 “he who does an act through another is deemed in law to do it himself”.
- Foreign investors and other third parties are legitimately entitled to rely on steps taken and documents issued by Authorised Dealers. Where an Authorised Dealer incorrectly or improperly issues a CCI, through no fault of an investor, the investor cannot, lawfully, be made to bear the consequences of that action.

- If an Authorised Dealer has in some way exceeded its authority, or breached the regulations applicable to the issuance of CCIs and dealings in foreign exchange transactions, the Nigerian courts should not allow a foreign investor to be punished for what is, in effect, a breach by the CBN itself - albeit through its delegates / agents.
- We are not saying anything new or novel. This is the law. This has been the law since 1995. Nothing has changed!

Conclusion

In closing we shall again quote Shakespeare who said, in “Measure for Measure”, that “Our doubts are traitors, and make us lose the good we oft might win, by fearing to attempt.” We hope we have been able to clear the doubts of foreign investors in relation to CCIs and that, as regards their past or prospective investments in Nigeria, foreign investors will “fear no more”.

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