THE MEMORANDUM OF ASSOCIATION

Section 28 of the CAMA provides that subject to the provisions of section 27, the form of the memorandum of association of (a) a company limited by shares; (b) a company limited by guarantee; and (c) an unlimited company shall be as prescribed by regulation issued by the Corporate Affairs Commission.

As provided by section 36(1), "The memorandum of association shall be delivered to the Commission together with an application for registration of the company, the documents required by this section, and a statement of compliance."

The Name of the Company

The memorandum of association must state the name of a company ending with the appropriate word or phrase that tells the character of the company for example, Limited or Ltd; Public Limited Company or PLC, Limited by Guarantee or Ltd/Gte; or Unlimited (Ultd) respectively, as case may be – section 29 of the CAMA.

In the choice of a name for the company, the solicitor or agent engaged to form the company must consider the following:

1. **Names that are prohibited**: By virtue of section 852 (1) of the CAMA, no company, limited liability partnership, business name, or incorporated trustees shall be registered under the Act by the following names:

a. A name that is identical with that by which a company or limited liability partnership in existence is already registered, or so closely resembles that name as to be calculated to deceive, except where the company or limited liability partnership in existence is in the course of being dissolved and signifies its consent (that the name be used) in the manner required by the CAC.

   In the case of ***Niger Chemists*** **v** ***Nigeria Chemists*** (1961) 1 All NLR 171, the court held that the name "Nigeria Chemist" was so similar to the name "Niger Chemists" as to be likely to cause confusion. Therefore, it restrained the defendant by injunction from using that or any other similar name;

b. A name that contains the words: "Chamber of Commerce", unless it is a company limited by guarantee;

c. A name, which in the opinion of the CAC, is capable of misleading as to the nature or extent of the activities of the proposed company, or a name that is undesirable, offensive, or otherwise contrary to public policy;
d. A name which, in the opinion of the CAC, would violate or conflict with any existing trademark or business name registered in Nigeria, or body corporate formed under this Act unless the consent of the owner of the trade mark, business name, or trustees of the body corporate has been obtained - See the case of ***Ogunlede* v *Mercury Builders (Nig) Ltd*** (1970) NCLR 38; See also **Trademarks Act** as well as **Patents and Designs Act, LFN 2004**;
e. A name that contains any word which, in the opinion of the CAC, is likely to mislead the public as to the nationality, race, or religion of the persons by whom the business is wholly or mainly owned or controlled;
f. A name which, in the opinion of the CAC, is deceptive or objectionable in that it contains a reference to, or suggests association with, any person, institution, personage, foreign state or government, international organization or international brand, or is otherwise unsuitable; or
g. A name that is capable of undermining public peace and national security.

2. **Restricted names:** These are names that a company, limited liability partnership, business name, or incorporated trustees may register only with the consent of the CAC as provided under section 852 (2) of the CAMA, and they are as follows:

a. A name that includes the word 'Federal' or 'National' or 'Regional' or 'State' or 'Government' or any other word, which, in the opinion of the CAC, suggests or is calculated to suggest that the proposed company enjoys the patronage of the Government of the Federation, the Government of a State in Nigeria, any Ministry or Department of Government;
b. A name that contains the word "Municipal" or "Chartered" which, in the opinion of the CAC , suggests or is calculated to suggest connection with any municipality or other local authority;
c. A name that contains the word "Cooperative" or the words 'Building Society'; or
d. A name that contains the word "Group" or "Holding".

Keep in mind the procedure in section 853 for application for the approval of the Commission for section 852 matters, which include the requirement that the applicant seek the view of the affected government department or other body.

It is important to note that in addition to the prohibitions and restrictions that are name-based, section 852(3) & (4) have miscellaneous prohibitions as follows:

3. No individual or firm shall be registered under PART D or E of the CAMA dealing with limited partnership and business name respectively if it has a member that is less than 18 years, unless the applicant proves in writing that there are at least two other individuals in the organization aged above 18; and
4. No company, business name, or incorporated trustee shall be registered where there is uncontroverted evidence that the company, business name, or incorporated trustee has previously been involved in fraudulent trade malpractices, either in local or international trade.

Name Search and Reservation

Under the Act, an applicant for registration must fill out form CAC 1 either online or manually to verify the name of a proposed company. Usually, two names are suggested in the boxes (spaces) provided, and if both are approved by the Commission, they are reserved for 60 days from the date of approval, and the applicant is free to use either of, or the approved name(s) if the CAC approved only one.

The Capacity and Powers of the Company

A company is generally at liberty to limit its own powers and capacity, and it is bound by that limitation. For that reason, section 44(1) of the CAMA provides that a company "shall not carry on any business expressly prohibited by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act."

It is important to note that according to section 43(1), every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity, except to the extent that the company's memorandum or any enactment otherwise provides.

However, there are statutory limitations on the powers exercisable by a company such as we have in section 43(2) that, "A company shall not have or exercise power either directly or indirectly to make donation or gift of its property or funds to a political party or political association, or for any political purpose…." A breach of this provision subjects the officers in default and any member who voted for the breach to joint and several liability to refund to the company the sum or value of the donation or gift in addition to criminal liability to a fine equal to the amount or value of the donation or gift.

The Business or Object Clause and the Ultra Vires rule

A very important clause in the memorandum of association is the business or object clause. It is clause No. 3 in the memorandum of association, stated after the name clause and the situation of the registered office clause. A company may transact any lawful business or carry on any lawful business that it has not excluded by its memorandum of association or sections 27 (1)(d) of the CAMA.

In practice, the CAC does not encourage convoluted or lengthy business or object clause. However, historically it is usual for promoters of businesses to load the memorandum of association with all imaginable types of business, thereby giving the company a wide latitude in the businesses that it may do. It is recommended that the business or object clause be made as short as possible. In fact, with the advent of online registration of companies, there is a limit on the platform to the space available for businesses/objects and the entire memorandum of association.

The unwritten norm should be that the business or object clause be about one to two pages, in fact a page should be sufficient. In England, the practice is that it is sufficient if a 'for profit' company states as follows: "The company shall be a trading company."

The Ultra Vires Rule at Common Law

Simply put, ultra vires means "beyond the authority of". Thus, an act that is done without the authority required is classified as ultra vires, while that which is done with the requisite authority is intra vires. By that rule a company was restricted to its stated objects or businesses, and any act that the company did, or any transaction that it entered into, beyond the scope of its authorized objects or businesses was held ultra-vires, that is null, void and of no effect.

In the case of ***Ashbury Railway Carriage & Iron Co. Ltd* v *Riche*** (1875) LR 7 HL 653, a case that appears to be the *locus classicus* on the application of the ultra vires doctrine to companies, a company had the object (now business) to lend or hire railway carriages and wagons and all kinds of railway plants, fittings, machinery and rolling stocks and to carry on business as mechanical engineers. The company bought a concession to build a railway in Belgium, and sub-contracted the work to the defendant. Thereafter the company repudiated the contract.

The House of Lords held that the construction of a railway was outside the company's objects clause. Therefore, the company lacked the capacity to enter into either the concession contract or the sub-contract. The contacts were void for ultra-vires, and the defendants had no right to damages for breach. In addition, the members of the company could not ratify the contract, nor enforce its performance.

See also ***Attorney General* v *Great Eastern Railway Co*** (1880) 5 AC 1473

In ***Re German Date Coffee Company*** (1882) 20 Ch. D 169, the company was formed for the specific purpose of acquiring a patent under which it would produce coffee and dates. The company failed to get a grant of the patent, but it continued in operation. Consequent upon that, the members petitioned the court that the company be wound up since it was no longer possible for it to achieve its main object, that is, the purpose for which it was setup and raised capital.

The court held, granting the petition, that since the main substratum had disappeared or gone, the company had to wind up and could not diversify its operation. The diversification would be ultra vires.

See also the following cases:

- *Re Jon Beaufort* (1953) 1 Ch 131
- I*ntroductions Ltd* v *National Provincial Bank* (1970) 1 Ch 109

Devices introduced to evade the *Ultra Vires Rule*

The first evasive device that drafters of memorandum of association employed to circumvent the ultra vires rule was to include in the objects clause all conceivable businesses. In response to this, the court introduced the 'main objects' rule of construction, by which it declared certain

objects/businesses as the main objects, and all the other objects as subsidiary or incidental objects meant to be pursued for the achievement of the main objects. See the cases of:

Anglo Overseas Agencies Ltd v *Green* (1961) 1 QB 1; and

Re German Dates Coffee (supra)

The courts' decision on 'the main object clause' did not last long in efficacy or achieve much. The drafters of memoranda of association responded with the device of "independent object clause", otherwise known as "the Cotman Clause" arising from the case of ***Cotman* v *Brougham*** (1918) AC 514. In that case, the opening paragraph of the object clause authorized the company to acquire, takeover, work, and develop any licences, concessions and estates, plantations and properties. The memorandum contained about 30 other sub-clauses that covered diverse kinds of business, including 'clause 12' that allowed the company to hold and deal in securities. The objects clause ended with a statement that, *the object clause was not to be read restrictively and the meaning of each sub-clause must not be limited by reference to another sub-clause*. The company underwrote and acquired shares in an oil company. The issue that fell for determination, then, was whether or not the underwriting was ultra-vires the company.

The House of Lords held that the underwriting was authorized by the clause on dealing in securities, and that the clause must be interpreted independently without it being limited in meaning by reference to any other sub-clause in the objects clause. The court added that the company had been registered, and the certificate of incorporation that had been issued in respect of the company was conclusive of the matter.

In ***Re Horsley & Weight Ltd*** (1982) 3 WLR 431, at 437, Buckley J remarked that,

> "It has now long been a common practice to set out in memorandum of association a great number and a variety of objects so called, some of which, for example to borrow money, to promote a company's interest by advertising its products or services, or to do acts or things conducive or incidental to the company's objects, are by their very nature incapable of standing as independent objects, which can be pursued in isolation as the sole activity of the company. Such 'objects' must, be interpreted merely as powers incidental to the true objects of the company and must be so stated notwithstanding the presence of a separate object clause."

The *dictum* is an authority for the proposition that despite the decision in *Cotman* v *Brougham*, there are certain sub-clauses that the courts would not permit to exist independently or allow to be pursued exclusively.

Another device that the drafters of memorandum of association employed to circumvent the effect of the ultra vires rule was 'subjectively worded object clause'. That clause was drafted, and is still drafted in the following words: "The company shall have power to carry on any other trade or business whatsoever which, in the opinion of the board of directors, could be carried on advantageously by the company in connection with or as ancillary to any of the above businesses of the company."

The memorandum of the company in ***Bell Houses Ltd* v *City Wall Properties Ltd*** (1966) 2 QB 656 had that kind of sub-clause. In that case, the opening object of the company was to carry on the business of builders and developers. However, sub-clause 3 was the subjective clause paraphrased above. In addition, the company had power to turn into account any of its property. In the course of its business, the company made useful contacts with Swiss bankers who were able to lend money on mortgage for the business of property development. The defendant company sought for the help of the plaintiff company who agreed to introduce the defendant to the Swiss bankers for a loan in consideration for an introduction fee or a commission that the parties agreed upon. The defendants refused or failed to pay the agreed fee and commission, arguing that the contract was ultra vires the plaintiff company and void since its objects did not include mortgage brokerage. Therefore, the plaintiff brought an action.

In the court of first instance, it was held that, the contract was ultra vires the company because the transaction involved was not related to the main object of the company.

On Appeal, the court held that although the object "any other trade" was subjectively left to the opinion of the directors and therefore did not put any limit to the objects that the company could pursue, it was valid so that the agreement for commission was binding on the parties.

However, in the case of ***Continental Chemists* v *Ifeakandu*** (1966) 1 NLR 1, the plaintiff company's memorandum of association stated the objects of the company *inter alia* as to,

(a) Import and export drugs;

(b) Buy and sell drugs;

(c) Manufacture drugs;

(d) Compound drugs;

(e) Enter into any business, which the directors think will increase the profits of the company

(f) Borrow money, and that, "The company can do all such businesses as may be incidental and conducive to the attainment of the above objects and powers or any of them."

The company agreed to sponsor the education of the defendant so that he would become a medical doctor. In turn the defendant agreed "to serve and practice" under the plaintiff on an agreed salary. After the defendant qualified, the company employed him to take care of patients in a clinic that is opened, but the parties soon fell out with each other, and the defendant left the company. Consequent upon which the plaintiff sued the defendant for breach of contract.

The trial judge found that the company was carrying out a hospital business that it had no authority for under its objects clause. It therefore dismissed the action.

On Appeal, the plaintiff/appellants argued that,

(a) The trial judge erred in constructing the doctor's duty under the contract by reference to the employment that the plaintiff gave him at the clinic; and

(b) The contract was intra-vires the plaintiff/appellant by virtue of paragraphs (e) and (f) of the objects clause.

The court held that, the fair meaning of "to serve and practice" under the company was to practice as a doctor in its employment. The objects clause did not include the employment of the doctor to examine patients, and there was no basis for using the ancillary powers in the subjective clause in the final paragraph of the company's objects to justify the company's employment of the defendant/respondent.