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The Nigerian Limited Partnership: An Unnecessary Proliferation of Business Forms?

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Abstract

This article examines the limited partnership form as provided for under the Companies and Allied Matters Act of 2020-an entity which confers liability protection on limited partners, while general partners continue to bear unlimited liability for its debts and obligations. It asks whether the limited partnership is necessary in the light of the fact that Nigeria has also provided for the limited liability partnership, a form which embodies more elaborate entity and partner protections than the limited partnership. In order to resolve the core question the article highlights the histories, relevance and advantages of both entities and notes that while the limited partnership may some advantages of its own, it is in all likelihood going to be eclipsed by the limited liability partnership. It concludes that the limited partnership is unnecessary for the present time and that its continued existence may only engender confusion for the public (most of which are illiterate) as to the consequences of dealing with either entity with respect to limited liability.

Key Words: Limited Partnership, CAMA 2020, company law

Introduction

In 2020 Nigeria's National Assembly enacted the Companies and Allied Matters Act ('CAMA 2020'). The Act is the first attempt by the West African Nation to overhaul its company law regime since it enacted the first CAMA in 1990. CAMA 2020 modernizes Nigeria's company law by incorporating aspects of digital technology aimed at improving the ease of doing business in the country. It also contains elaborate provisions aimed at rescuing financially troubled companies such as netting and administration, while also codifying aspects of corporate governance which had hitherto been left within the realm of ethics. Of relevance to this article is the fact that for the first time in Nigeria's history, CAMA 2020 also provided for the registration of limited liability partnerships (LLPs) and limited partnerships (LPs), and in both entities it confers some level of limited liability (liability protection) on partners.

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Although both entities are referred to as partners, the LP is more closely akin to the general partnership[1] while the LLP more closely resembles the company than it does the partnership.[2] The LP is a unique entity. It comprises of general partners and limited partners who are by law conferred with certain rights or protections as the case may be. Of primary importance is the fact that limited partners of LPs 'enjoy' liability protection, similar to what obtains in incorporated companies. This means that limited partners are shielded from the debts and liabilities of the firm on the condition that they do not take part in its management. The protection does not cover general partners though, who continue to bear unlimited liability for the debts and obligations of the LP the full amount but are in return, conferred with extensive powers of management and control. In providing for the LP, Nigeria joined the growing number countries which have sought to protect non-management or limited partners, while imposing unlimited liability on management or general partners.

This article examines the LP form as provided for in Nigeria. It notes that the LP form may be necessary for the facilitation of trade through small and medium scale enterprises. While liability protection may also incentivize the development of professional partnerships since it shields limited partners. But the article will also be asking whether the LP form is necessary in the light of the fact that the LLP which offers liability protection to managing and non-managing partners already exists. In other words, is there any attraction to the LP in the light of the LLP? Is the LP not an unnecessary surplusage of forms? It will be argued that while the LP may have its uses in the promotion of SMEs, it is in all likelihood going to be dwarfed by the LLP which confers liability protection on all partners irrespective of their involvement in management, while also conferring separate personality on LLPs. Furthermore, the similarity in name may confuse the public and third parties who deal with both entities as to the implications of dealing with either entity.

In order to provide a framework and reference point for the discussions that follow, this article is divided into four main parts. Part one, 'the partnership form and the search for limited liability' will examine the partnership form in general as well as the search for limited liability. Part two, 'An overview of the legal framework for the Nigerian LP' highlights the salient provisions relating to the LP as contained in CAMA20, while part three, 'How relevant is the LP in the light of the LLP?' which enquires into the necessity

[1] The partnership is defined as being a 'voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them,' See Black's Law Dictionary, 1120 (6th ed. 1990).

[2] In fact Professor Alan R. Bromberg had initially referred to the LLP being a radical departure from the general partnership. See W Borges, 'Partners' Liability Bill Hits Rough House Waters,' (1991) TEX. LAW.1991, at 7.

of the LP, compares both entities, highlighting their salient aspects. Part four, 'conclusion' summarizes key findings and offers further suggestions.

The partnership business form and the search for limited liability

The passage of the Joint Stock Companies Act of 1844 in England made incorporation of companies by a process of registration, easily and cheaply available.[3] Then in 1855 the Limited Liability Companies Act was enacted. This Act made it possible for shareholders of companies to 'enjoy' liability protection. Both laws which were later consolidated in 1862, heralded the decline of the partnership as the business form of choice. Since then the registered company has unquestionably become the dominant and most widely used business form globally.[4] And liability protection is its primary attraction. But what is liability protection and why is it so popular?

Where conferred, liability protection shields a company's members or shareholders from its debts and liabilities, with corporate defaults and liabilities being met out of the company's assets.[5] This means that shareholders who have zero liability to the company, are 'absolutely' immune from its liabilities and obligations.[6] The protection does not entirely eliminate the risks associated with the company but rather externalizes them to company creditors who are thus barred from suing shareholders for corporate debts unless where those shareholders are themselves indebted to the company.[7] Limited liability thus confines creditors' claims to corporate assets, thus forcing them to bear a significant amount of the risks associated with corporate insolvency. In essence the risks borne by shareholders of a company are limited basically to the fact that they may lose the funds they invested in the company, but nothing more.[8]

[3]See LCB Gower, 'The English Private Company' (1953) 18 Law and Contemporary Problems, 540

[4] See generally W.B. Truitt, *The Corporation* (Greenwood 2006) 32

[5] Hansmaan et al, have argued that long before limited liability became formally available to companies, it was available to parties who relied on contracts through which firm creditors agreed to limit or waive their right to levy the owners' personal assets. See generally H Hansmann et al, 'Law and the Rise of the Firm' (2006) Vol 119 HLR , 1341

[6] The full extent of liability protection was given judicial recognition in *Salomon v Salomon and Co Ltd* (1897) A.C 22. In that case, the unsecured creditors of an insolvent company were not only barred from proceeding against its main shareholder, but their claims were also subjected to his secured claims.

[7] For a more comprehensive treatment of limited liability See P. Blumberg, 'The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality' (1993) 11 J.Corp. L. 573, 139; see also S M Bainbridge, 'Abolishing Veil Piercing' (2001) 26 Journal of Corporation Law, 479, 489.

[8] See P Subai 'Between Tort Creditors and Shareholders of Closely Held companies (2013), 12 Nigerian Law and Practice Journal 186. But even that risk can be mitigated by effective portfolio management which may entail the spreading investments on multi-sectoral lines. Here again, the possibility of spreading investments along multi sector lines, would have been impossible without limited liability, as investors would have been very reluctant to invest in companies they have limited knowledge or control of. See E. Ferran and LC. Ho, *Principles of Corporate Finance Law* (Oxford 2014) 18; see also H G Manne, 'Our Two Corporation Systems:Law and Economics,' (1967) 53 VA. L. Rev. 259 262.

Liability protection enables scattered investors to fund large corporations, receive dividends and capital gains on their investments, while all the time remaining immune from the consequences of misconduct or misjudgment of corporate agents. The protection has been used since the nineteenth century in England as a risk avoidance, and investment stimulation mechanism and for providing equity funds for large business ventures.[9] Commenting on its general usefulness, C.W Eliot once observed that liability protection is the 'the corporation's most precious characteristic' and 'by far the most effective legal invention **...**made in the nineteenth century.'[10] Similarly, NB Butler also noted that '...the limited liability corporation is the greatest single discovery of modern times...even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it.'[11] But what are the justifications for conferring such elaborate protection on shareholders?

Liability protection may be justified first on the basis that the company has a legal personality which is separate from its members. Additionally, company law assumes a manager-shareholder distinction in the company. The company is managed by a group of professional men and women called a board of directors who are primarily responsible and answerable to it, and not to its members.[12] The protection is also justified on the absence of agency in the relationship between the company and its members; as such the actions of the firm and its managers cannot be imputed to its members.[13] Another justification for limited liability is rooted on the assumption that corporate creditors are fully aware of implications of the corporate personality, liability protection, and of the financial and credit standing of the companies with which they contract.[14] These creditors are thus deemed to have voluntarily undertaken to bear default risks and are thus rightly

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[9] Gower notes that 'after lengthy and heated controversy in Parliament, Royal Commissions, Departmental Committees, the Press, and, indeed in every forum of public and commercial opinion, Parliament under pressure from the Government of the day passed the Limited Liability Act, 1855, thus conferring limited liability on companies which completed registration under the 1844 Act. See LCB Gower, (n 3) 536. See also PI Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 Journal of Corporation Law 573, 604.

[10] Quoted in Cook, "Watered Stock"--Commissions---"Blue Skay Laws"-Stock Without Par Value, (1921) 19 Mich. L. Rev 4

[11] Quoted in BD Catlado, 'Limited Liability with One-man Companies and Subsidiary Corporations' (1953) 18 Law and Contemporary problems, 473

[12] Under CAMA20 for example, directors are only required in law to have regard for the interests of the company's members, employees, s.305(4)

[13] In the same vein, the members of a company are not regarded as its agents, as such their actions cannot be imputed to the company except where they act as members in general meeting, the board of directors or as its agents.

[14] In practice the presumptions which justify shielding shareholders, do not always apply to all the creditors of the firm. For instance, creditors who supply goods and services may not always be able to bargain with the company. Such persons may also be unable to steps to protect themselves from limited liability *ex ante.* See S M Bainbridge, 'Abolishing Veil Piercing' (n 7) 479, 508

'barred' from proceeding against shareholders, except there is proof of fraud or wrongdoing on the part of the latter.[15]

Liability protection has also been justified on the basis that the risks borne by creditors in the event of corporate insolvency, are lesser than what shareholders would have had to bear in the absence of shareholder immunity.[16] For instance, all a creditor may lose in the event of corporate insolvency is what remains unpaid of his credit and interest thereon. By contrast, a shareholder stands to lose all of his personal assets, absent liability protection.[17] Lastly there is the argument that when compared to shareholders, creditors are better risk avoiders, with ample opportunities to mitigate corporate insolvency risks. A contract creditor can for instance, rely on insurance. He may contract out of limited liability,[18] demand for a stake in management,[19] or charge higher interests as a tradeoff for higher default risks.[20]

Its benefits notwithstanding, it is worthy of note that liability protection is conferred on companies at some cost. For in a view to creditors and corporate stakeholders from the opportunism of management and unscrupulous persons, company laws consistently subject companies to a myriad of regulations and laws geared towards maintaining and upholding corporate distinctness. These laws are also aimed at ensuring that companies are managed in accordance with proper corporate governance principles. They are geared towards limiting opportunistic behaviour and agency problems and for the protection of creditors and third parties. Some of these rules include meeting requirements, limiting the application of corporate funds via the ultra vires principle,[21] capital maintenance rules, internal governance rules, greater disclosure and filing requirements etc.

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[15] Or where the company was a sham or was established to evade legal obligations See *Public Finance Securities Ltd v Jafia* (1998) 3 NWLR, (pt. 543) 602.

[16] For a more detailed analysis of the reallocation of shareholders' risks to creditors, see R Posner, 'The Rights of Creditors of Affiliated Corporations' (1976) 43 u.Chi L. Rev, 499, and F.H. Easterbrook, 'Limited Liability and the Corporation' (1985) U.Chl. L. Rev. 89, at 91

[17] But again, that line of argument will not apply to tort creditors, who may have suffered the loss of life, health, or limb by virtue of a corporate tort, and are thus often in a worse situation than shareholders who only stand to lose their money. See generally H Hendersen, 'Piercing the Veil on Corporate Groups in Australia(2009) 33 MLR, 335

[18] In theory , some form of liability protection can be acquired by contract if a firm's owners require its ' agents (including the owners themselves when they act on behalf of the firm) to negotiate clauses in the firm's contracts whereby its creditors would agree to limit or waive their right to levy execution on the owners' personal assets'. See H Hansmann et al, (n) 1341

[19] Taking advantage of section 41(3) of CAMA20 for instance, a prospective creditor may require that he be given the right to appoint and fire a company's management board.

[20] H Hendersen, 'Piercing the Veil on Corporate Groups in Australia(n 17) 335

[21] Transactions beyond the firm's objects may also be objected to by its shareholders or secured creditors, ss 44 and 45 of CAMA20.

In contrast to the company, persons trading under the partnership form have had to bear unlimited liability for its debts and obligations to the full amount, whether jointly or severally.[22]It operated under a principle of 'all for one, one for all' with the firm being viewed as comprising of profits and losses.[23]

This exposure was justified on the basis that the firm is not separate from its partners but is regarded as their agent. Conversely partners are viewed as the agents of the partnership while carrying on the business of the firm, and they are also regarded as agents of each other.[24] Unlimited liability was also justified on the assumption that every member of the firm was involved in management.[25] Thus while the partnership form enjoyed greater flexibility, speed, less restrictions, and greater confidentiality, partners remained exposed to the risk of bearing liability for the debts of the entity. Unlimited liability also meant that the risks of an investor multiplied with the number of firms in which he was a partner because it implied that by agreeing to become a partner of a firm, a person invariably pledged his entire estate for the fulfillment of the debts of the entity whether or not he was directly involved in the management of the entity. The absence of liability protection increased the risks associated with organizing under the partnership form, particularly for partners who were not directly involved in management. This made partnerships unattractive to risk averse investors.[26] The extension of liability protection to management and non-management corporate members, barring their involvement in criminality or wrongdoing saw the use of the partnership restricted to professional firms, and highly informal business entities, for the most part.

Having said that, liability protection has been conferred on non-management or silent partners in some jurisdictions. This protection can be dated to the middle Ages and was found in the Italian *commenda*. The *commenda* was a contractual arrangement adopted in Italy under which investors committed funds to traders for use in mercantile operations on the understanding that they would be shielded from the debts and liabilities of the business while being still entitled to share from its profits.[27] The tradition of extending liability protection to non-managing partners was later adopted in France through the *Code de Commerce* of 1807, and in Ireland through an 'Act to promote Trade and Manufacture, by regulating and encouraging Partnerships,' in 1781. In the USA, liability

[22] See s.9 of the PA1890

[23]See SS Fortney, 'Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships' (1998) 39 S Tex L Rev 399, 400

[24] S.5 PA1890

[25] S.24(5) PA1890

[26] A risk averse investor who desired to extend funds to the partnership form had the option of doing so as a creditor. Since in that capacity he would have a first line charge against the assets of the partnership in the event of insolvency. The drawback was that creditors could participate in the profits of the firm as their claims were limited to sums lent to the firm and interests on such sums.

[27]J Henning, 'The Cape and Natal Special Partnerships Limited Liability Acts - A Statutory History' (2015) 21 Fundamina 251, 253

protection was extended to partnerships through the Revised New York Limited Partnerships Act of 1829, and later through the Uniform Limited Partnership Act of 1914.[28] In English Colonies, liability protection was conferred on non-management partners via the Anonymous Partnerships Act of 1853 in New South Wales, South Australia, and Victoria. In South Africa liability protection was conferred by virtue of the Cape Special Partnerships Limited Liability Act of 1861.

For England, liability protection was a long time in coming. For example as far back as 1854 the House of Commons had noted that imposing unlimited liability on every person, who, though not being an ostensible partner, shares the profits of a Trading Concern, was unsatisfactory, and should be so far modified as to permit persons to contribute to the capital of such concerns on terms of sharing their profits, without incurring Liability beyond a limited amount.[29] It was however in 1907 that the Limited Partnerships Act of 1907 extended liability protection to 'sleeping' or 'non-managing' partners and designated them limited partners. The issue was, as Morse notes that *'by then, the ability to invest in companies on such terms and the linkage of limited liability with non-interference in management of the firm made them obsolete as general commercial vehicles almost before they started.'*[30]Since then several countries have sought to confer some level of protection on non-management partners from firm debts.[31] Like one born out of due season, Nigeria has only recently joined the list of countries which extend liability protection to non-management partners. [32] It extends liability protection to limited partners of LPs perhaps on the ground that they are not involved in the management of the LP and on the basis that unlike general partners, their powers and rights as will be seen shortly, are severely limited. The part that follows will examine the Nigerian LP, noting its key elements while the part that follows after will then enquire whether the LP, which closely resembles the LP in name and form, amount to unnecessary proliferation of forms.

An overview of the legal framework for the Nigerian LP

Similar in many ways to its English counterpart, the Nigerian LP consists of not more than twenty partners. Its partners must comprise of a mixture of general partners and limited partners. Under the CAMA 2020, it is mandatory for businesses carried on as LPs

[28] There was also the Uniform Limited Partnership Act of 1916 in the USA,

[29] Hansard 1854, 764, 800.

[30] G Morse, 'Partnerships for the 21st Century - Limited Liability Partnerships and Partnership Law Reform in the United Kingdom' (2002) 2002 Sing J Legal Stud 455, 463

[31] Others include Japan, Germany, and Denmark etc.

[32] LPs in Nigeria are registrable under Part D of CAMA20, ss 795-810. The partners in the LP may comprise of natural persons and corporate bodies, see s.795 (2). There are no limits on natural persons other than they must not be bankrupt or be judicially confirmed to be of unsound mind, s.796

to be registered with the Corporate Affairs Commission (CAC).[33] Unlike the registered company, LPs are not subjected to extensive and very detailed regulations. It is essentially a partnership entity and it is governed principally by the agreement of the parties and aspects of the Partnership Act 1890 ('PA 1890').[34]Some significant differences exist between the LP and the general partnership however, with CAMA 2020 modifying the general partnership law particularly as it relates to the powers of limited partners *vis a vis* general partners. Most of what is known about the traditional partnership law as codified in the PA 1890 continues to apply to general partners of LPs, while limited partners on the contrary, are subjected to certain restrictions and are entitled to liability protection. Thus general partners continue to bear unlimited liability for the debts and obligations of LPs in return for extensive managerial and control powers over it. Limited partners in contrast, enjoy liability protection and are thus shielded from its debts and obligations. But the cost of this protection is that they are 'barred' from being involved in the management of LPs.[35] Additionally, limited partners are subjected to other restrictions in relation to the firm.[36] For instance their powers are curtailed with respect to the extent to which they may dissolve it.[37] Essentially, in contrast to general partners, limited partners are unable to dissolve LPs by notice.[38] *And their* death,

[33] S.797 (1). Under s.797(2) an unregistered partnership described as an 'LP' will nonetheless be regarded as a general partnership and be subjected to the general laws of partnership. And under s.804 it is a fineable offence to operate as an 'LP' without due registration. The process for registration of LPs is quite straightforward.

[34]Recognising the LP as being a partnership, s.808 of CAMA20 subjects it to the PA1890 to the extent that they are not inconsistent with the provisions of CAMA20 itself. This dispenses with the need to expend funds in drafting elaborate partnership agreements at least at the basic level. Again in recognition of its partnership nature, CAMA20 imposes relatively few obligations on LPs. First it requires changes to the general nature of the business, the principal place of business, the partners, terms of character of the partnership, sums contributed, liability of each partner etc., are to be notified to CAC within seven days of such changes occurring. In that regard CAMA20 imposes a penalty on every general partner in the event of default. S.800. Moreover, notice of any arrangement of transaction under which a person will cease to be a general partner and become a limited partner or under which the share of a limited partner will be assigned to any person is to be filed with CAC within five days, upon which such arrangements shall come into effect, s.801. And in order to adequately notify the public of the fact that some partners of the firm enjoy liability protection, CAMA20 mandates that the name of every LP is to end with the words 'LP' in uppercase or lowercase letters, s.802. LPs arealso subjected to the provisions of part C of CAMA20 which deals with LLPs to the extent that they are not in conflict with the express provisions of Part D of the Act**,** S.807,As such they may be subjected to financial disclosure rules under s.772, be obligated to disclose the identity of persons who have significant control in the business under s.791, rules oninvestigations under ss 775-785, and winding up rules under ss 789-790.

[35] They would lose their liability protection if they get involved in the management of the firm. S.806(1)(b)

[36] S.795(4 and 5)

[37] Traditionally a partnership can be dissolved by the death, lunacy or bankruptcy of any partner. In addition, such firms can be dissolved by notice, see ss 32, 33 and 37 of the PA1890.

[38] S.806(4)(e)

bankruptcy or lunacy will not automatically dissolve the firm.[39] Limited partners also require the consent of general partners in order to assign their shares and rights in the firm.[40] And while they may inspect its books and advise the partners, they cannot bind LPs by their actions.[41] Lacking in voting rights, limited partners may also not take part in resolving disputes relating to the LP- prerogative reserved for general partners.[42] Limited partners are also subjected to contribution requirements and they may have to surrender their rights to withdraw funds so contributed.[43] And while general partners do not require the consent of limited partners to introduce new partners to the LP, limited partners cannot do the same without the consent of the former.[44] What CAMA20 has thus done is to extend liability protection to limited partners, but in doing so it has curtailed their powers significantly. The protection may be justified first on the basis that unlike the general partner he is prohibited from being involved in the management in the LP. Secondly, his powers and rights in the firm as shown earlier, are limited. And thirdly as shown earlier, the limited partner may be required to make financial contributions to the capital pool of the LP. But are there benefits to be gained from introducing the LP form to the Nigerian economic environment? The LP may have some relevance to family run businesses, SMEs, small businesses, and professional partnerships. As a form it can operate flexibly since it is not subjected to stringent rules and regulations bordering on asset partitioning, meetings, internal governance etc. Furthermore, barring limited partners from being involved in governance may enable general partners to run LPs with minimal interferences. In addition, the introduction of liability protection to the LP has also increased the advantages of trading with this type of business form some of which will be seen presently.

To start with, extending liability protection to LPs aligns with Nigeria's desire to foster the development of SMEs in its bid to diversify its economy from being over dependent on oil.[45] And if properly harnessed it can enable LPs to raise equity funds from third parties who seek to be 'silent' but at the same time desire to 'participate' fully in the profits but are unwilling to bear the risks of firm failure.[46] LPs can potentially foster the funding of small businesses as they can enable entrepreneurs to raise funds from profit sharing non-management investors who would bear equity risks but be excluded from the

[39] S.806(4)(c). Unless in the case of lunacy, the partner's share cannot be otherwise ascertained and realised S.806(2)
[40] S.806(4)(b)
[41] S.806(1)(a)
[42] 806(4)(a)
[43] S. 795(4,5)
[44] S.806(4)(d)
[45] Nigeria, 'Economy' http://www.nigeriaembassyusa.org/index.php?page=economy, accessed 11 May 2015. 86 See AA Olugbenga, 'Policy Support and Performance of Small and Medium Scale Enterprises in South-West Nigeria' (2012) Vol 4(9) European Journal of Business and Management, 9-10
[46] See *Cox v Hickman* (1860) 8 HLC 268, 11 ER 431.

liabilities of the firm. Liability protection may also incentivize more professionals to go into partnerships. Currently, the vast majority of professionals in Nigeria operate as sole proprietorships and unlike the USA, Australia or the UK, large professional partnerships are rare in the country. This can partly be traced to the absence of liability protection, which may have made lawyers, accountants, estate managers, or doctors who trade under the partnership form to remain averse to being called upon to bear liability for the professional negligence of their colleagues, or for the debts of the entity. Liability protection has however dealt with that concern significantly for non-resident partners. Liability protection has also reduced transaction costs for partners who may have sought to limit their liability through contract. What this means is that absent liability protection, a risk averse partner who desired limit his liability for the firm's debts may have done so through contract law. He may for example, require potential creditors to limit or waive their right to proceed against him for firm debts prior to trading with the firm.

But this option would have been costly, and cumbersome as he would have had to contract with every potential third party client/customer of the firm. And even at that contractual protections would have been limited in their reach, since they would not have absolved the partner from liability which may arise with regard to damages suffered by tort or involuntary creditors of the firm.[47] Statutory liability protection as contained in CAMA20, has however made it unnecessary as far as limited partners are concerned, to enter into contracts with creditors or to be concerned about involuntary creditors. Lastly, the protection may incentivize greater formalization of the partnership form in a country where the vast majority of small and medium scale enterprises (SMEs) operate under informally with minimal documentation.[48]

That is not to imply that limited partners are without responsibility in relation to the LP or its creditors. They may still bear unlimited liability if the courts determine that they were involved in wrongdoing in relation to the firm. Limited partners may also bear unlimited liability if at any time they become involved in the management of the firm whether directly or indirectly. Determining a limited partner's involvement in management is a matter of facts that would depend on the merits of each particular case. Recall that they are entitled to give 'advice' to general partners on steps to take with respect to the business.[49] It is unclear whether such 'advice' may amount to being involved in management. Suffice it to state that general advice may not translate to being involved in management. But even at that, a limited partner should still make it clear that what he offers is 'advice' and nothing more. He should not insist that his advice be taken. The management must remain independent of his control. For should a limited partner exert

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[47] See H Hansmaan et al, (n 4)1341

[48] See AA Olugbenga, 'Policy Support and Performance of Small and Medium Scale Enterprises in South-West Nigeria' (2012) Vol 4(9) European Journal of Business and Management, 9-10

[49] S.806(2)(b)

'control' or undue influence over the general partners from the 'shadows' he may lose his liability protection. And where the general partners become accustomed to obeying his instructions, the courts may interpret same as involvement in management. A flip side to this is that conditioning liability protection on non-involvement in management may 'rob' LPs of the expertise and experience of limited partners who may shirk from offering useful suggestions to the firm in order not be accused of being involved in management.

That said, it should still be borne in mind that the LP remains what it is: an unincorporated entity whose assets are not intricately separate from those of the partners. For the creditor and third party dealing with the entity, certain risk remains. The LP can for example, be easily dissolved. There are not asset partitioning rules aimed at separating it from the partners. LPs also do not have capital maintenance rules. This means that nothing stops the partners from dissipating the funds of the entity when they choose. And even though limited partners may be required to contribute or undertake to contribute funds even that is not mandatory but may apply by default.[50] This means that even the funds contributed to the capital pool of the firm can with the written permission of all the partners, draw out what has been deposited into the firm's pool.[51] This means that creditors and third parties should take more care in dealing with the LP. Unlike the general partnership where the joint and several liability improved their chances of recovery, they are now limited to general partners and to the assets of the entity. Conceded that the availability of unlimited liability remains, but that means that creditors have to assure themselves of the creditworthiness of the general partners and to ensure that they have adequate assets in the event of insolvency of the firm, or that the contributions or undertakings to that effect made by the limited partners are sufficient. This is because lacking in asset partitioning rules extending credit to the LP increases creditor risks as the assets of the LP can be easily dissipated or may be charged by the personal creditors of the partners. To compensate for the loss of the right to sue limited partners, a creditor may want to impose higher interest rates than would have been the case where he traded with a general partnership.

How relevant is the LP in the light of the LLP?

This article questions the relevance of the LP form in the light of the fact that Nigeria has also provided for the registration of the LLP. In order to resolve this question it is pertinent to highlight the nature and features of the LLP. Originating in Texas in 1991, the LLP is a partnership entity which is upon registration, conferred with a separate corporate personality from its partners.[52] It was later adopted in the UK in 2001 where it

[50] S.795(4)

[51] S.795(5)

[52] LLPs began in 1991 when the US state of Texas enacted the Texas amended its Uniform Partnership Act in 1991. The law shielded partners in professional firms from firm debts as a means of protecting them from the consequences of wrongdoing of their fellow partners. There was an avalanche of actions which were instituted against professionals in the wake of the savings and loans debacle of the 1980s which made

was initially designed for auditing firms who complained of unrealistic expectations and deep pockets syndrome due to their inability to limit their liability but later extended to other professionals and businesses.[53]

Like the LP, the 'members' of the LLP are referred to as partners.[54] The LLP is a hybrid of the general partnership, and the registered company.[55] As a partnership, it may operate flexibly, with the parties being free to order the business as they deem fit with the relationship of the parties among themselves and it is heavily reliant on the partnership agreement.[56] And being a partnership the LLP is not subjected to extensive regulations like the company. For example it is not required to have mandatory meetings, nor is it subjected to *ultra vires,* or elaborate procedural requirements. As a partnership, all its partners may be involved in management, may share equally in the capital, profits and losses of the firm and may be indemnified for payments made or personal liability borne in the ordinary and proper conduct of the business, or for anything necessarily done for the preservation of the firm or its property.[57] And similar to the general partnership, the LLP is a closed entity. This means that by default all existing partners must consent before a new partner may be added to the firm.[58] And similar to the general partnership, there is some presumption of agency between the partners and the firm, although unlike the former, there is no such presumption between the partners themselves. Hence partner A cannot be called upon to bear liability for the acts of partner B.[59]

Morse has described the LLP as being essentially a company externally but one which may run with minimal formal legal requirements since there is no formal requirement for a written agreement regulating the partners, perhaps other than a few default rules.[60]In its capacity as a corporate entity the LLP is conferred with a separate legal personality.[61] It has perpetual succession and changes in the partners will not affect the existence, rights

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it all the more precarious to trade or carry out business or professional practice under the partnership form. See SS Fortney, (n 23) 403

[53] See Department Of Trade and Industry, Limited Liability Partnership (1997) (Consultation paper), see also J Freedman, 'Limited Liability Partnerships in the United Kingdom - Do They Have a Role for Small Firms' (2001) 26 J Corp L 897

[54] Partners may be individuals or corporate bodies

[55] YH Ying, 'Nature and Liability Shield of Limited Liability Partnerships in Singapore' (2007) 19 SAcLJ 409, 423

[56] S.762

[57] See 763(5); see also paragraphs 2, 3, and 5 of the Fifteenth schedule to CAMA20.

[58] Par 7

[59] S.765

[60] Morese 465

[61] Ss 746, 756. Additionally, partners in the LLP may trade with it, and retain the same rights and obligations against it as any non-partner, 792.

or liabilities of the entity.[62]Being a separate legal entity the partners in an LLP cannot bind the firm by their actions unless they are expressly authorized to do so.[63] And similar to the company, the assets of the LLP are shielded from those of the partners. This implies that creditors of individual partners would not be allowed to proceed against the assets of the firm in order to satisfy debts owed by such partners.[64] But perhaps the most crucial feature of the LLP is that it clothes the partners with liability protection, irrespective of their involvement or non-involvement in management. This protection is set to make the LLP attractive to professionals and entrepreneurs since it shields all partners from firm debts.[65] The main attraction of the LLP is that it can allow a small business to enjoy incidents of incorporation such as limited liability and separation personality but be free at the same time from the extensive obligations to which companies are subjected.

Now to the cardinal question this article seeks to resolve, it is crucial to note that at face value the LP and the LLP appear similar. They are designated as partnerships. They are suited for small businesses and professional firms which desire to operate with the flexibilities of the partnership while also conferring some level of liability protection. Both entities are closed in terms of persons who may join as partners with both appearing not to have asset partitioning rules.[66] And while there are capital contribution requirements for LPs and LLPs, the details are left largely to the agreement of the partners.[67] But that may be as far as the similarities of the LLP and the LP go. A deeper analysis will reveal that several significant distinctions exist between the LLP and the LP.

[62] S.746

[63] S.776(1)

[64] See 746

[65] S.767 (1), provided that they do not use the LLP as a vehicle for fraud, see s.769 (1). Similarly such persons every person who was knowingly a party to the fraudulent activity through the LLP will be liable to be prosecuted under criminal law and on conviction may be imprisoned for not more than two years or liable to pay a fine as the court may deem fit under s.769(2). Furthermore the partners, designated partners, or employees of the firm who were complicity in the fraudulent conduct, will be liable to compensate any person who suffers damages or losses by reason of the fraudulent conduct. The LLP will also be so liable unless it establishes that the said complicity partners, or designated partners or employees, acted without its knowledge under s.769 (3). And partners who are directly involved in the commission of wrongs would still have to bear unlimited liability along with the firm 766(2) Lastly liability protection is also conditioned upon the firm maintaining at least two partners and if at any time it carries on business with only one member beyond six month, the remaining partner would lose his the protection of limited liability provided he was aware of that fact and allowed the business to be carried on by one partner, s.748.

[66] Asset partition rules are designed to ensure a clear distinction between the assets of an entity from those of its members or partners. H Hansmann (n 4) 1337

[67] Under ss. 770 and 771, every partner in the LLP may be required to contribute to the firm's capital. But it appears that this requirement is not mandatory. Even at that it is unclear if partners of the LLP may be allowed to withdraw funds which they have contributed to the entity. Somewhat similar, limited partners in LPs may be required to contribute to the firm's capital although the same requirement may be waived by

First, while liability protection is extended to all partners in the LLP, only limited partners are shielded in LPs provided they are not involved in the management of the firm. But this non-involvement may make limited partners more susceptible to agency problems in contrast to LLPs, where investors may be able to reduce agency problems by being involved in management, and be shielded from the firm's debts at the same time. There is also the fact that the LLP has a separate legal personality, while the LP does not have separate personality.[68] One implication of separate personality is that the assets of LLPs are squarely its own and are shielded from the personal creditors of the partners. In a two partner LLP for example, partner A would not have to be overly concerned with the fortunes or misfortunes of partner B. This is in contrast to LP's, which do not have separate personality and are thus exposed to the personal creditors of each of the partners whose creditors may 'easily' attach the assets of the firm. And not being a separate person, the LP cannot own property, transact, or sue in its name. And while there are no asset partitioning rules in the LP, asset partitioning may be inferred for the LLP by virtue of its separate personality.[69] Again unlike LLPs, LPs do not have perpetual succession, which may hinder them from continuing beyond the life of the general partners.[70] Lastly, while LPs cannot have more than twenty members, LLPs have no limit on the number of members they may have. This makes LLPs more suitable for large partnership firms.

From the foregoing it is obvious that the LLP has significant advantages over the LP because it embodies the most significant attractions of the LP such as internal flexibility and liability protection, but goes further by extending the protection to all partners of the firm, in addition to separate personality. These advantages will in all likelihood result in the LLP eclipsing the LP in the same way the limited liability company has eclipsed the unlimited company. Thus while the LP may be an improvement on the general partnership because it confers liability protection on limited partners, it comes nowhere close to the LLP.

This is not to imply that the LP is totally irrelevant? Its attraction may yet remain for a small group of persons who desire to exercise the dominance of the sole proprietor while benefiting from the support of equity investors as well. These equity investors will be able to benefit from the firm but will not be able to control or interfere in management. Commenting on its usefulness in the UK, Morse also notes that since the LP confers '*limited liability only at the expense of the loss of any management functions, the form is*

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the rest of the partners. In addition, funds so contributed may be withdrawn by them with leave of the general partners, s, 795(4,5)

[68] S.746(1)

[69] Be that as it may, funds contributed by limited partners may not be withdrawn by them without the leave of the general partners.

[70] The LP stands to be dissolved upon the death, notice, bankruptcy or resignation of any of its general partners, this is the effect of a combined reading of ss. 805(2) and 808 of CAMA20, and ss 32, 33 and 37 of the PA1890.

today confined in the UK generally to a niche market of venture capital and property investment vehicles, and for agricultural tenancies in Scotland.[71]It is obvious that the form will not be useful for the general populace. But that said it remains to be seen which form between the LP and the LLP would prove to be more popular. But even with these advantages, deciding which form to settle for will still remain a matter of choice for entrepreneurs. The LLP will be preferable to persons who desire to establish large partnerships numbering over twenty partners. The LLP will not be attractive to an entrepreneur who does not wish to shed management and control rights, on the other hand the LP may prove to be more attractive for an entrepreneur wishes to exercise ultimate control and dominance, although the cost for this is that he would have to bear unlimited liability for the firm's debts.[72]

In conclusion it is submitted that there are no unique objectives which the Nigerian legislator aims to achieve by providing for the LP and the LLP to exist side by side. Nigerian company law has for long mirrored English company law and developments in that country. While that is not wrong in itself, care should be taken to avoid hurriedly importing unnecessary business forms without necessarily appreciating the mischief or aims which these forms were enacted to address. It is admitted that in some other jurisdictions like the USA for example there are a myriad of business forms at state and federal levels such as the General Partnership, Limited Liability Company, Master Limited Liability Partnerships, C Corporations, S Corporations and the Limited Partnership.[73] But for the most part, these forms are introduced with a view to addressing specific challenges or confer specific benefits. For example the Master Limited Partnership was introduced in the USA in 2013 by the Master Limited Partnership Parity Act for a specific purpose. The Act amended the federal tax code in order to allow renewable energy companies to form master limited partnerships with a view to gaining valuable financing and tax advantages. The Act thus aimed at clearing the way for the formation of master limited partnerships investing in renewable energy in the hope that same would have positive impact on clean energy production in the United States.[74] It is the view of this author that there are no specific advantages which the Nigerian government aims to confer on LPs which do not already exist in the LLP.

It is also noteworthy that having the LP and the LLP exist side by side may result in some confusion with respect to third parties. This is more so as the illiteracy level in Nigeria is high and so consequently a vast majority of the populace may not be able to differentiate

[71]G Morse,(n 30) 456

[72] An entrepreneur who trades under the LLP may still be able to exclude other partners through the partnership agreement given that the right of every partner to be involved in management operates by default and is thus variable.

[73] See SJ Toson, 'The Master Limited Liability Partnerships Parity Act: Friend or Foe' (2015) 32 Pace Envtl L Rev 285

[74] Ibid 285

the difference between the LP and the LLP.[75]To address this limitation will require some form of public enlightenment and training of government officials on the nature of the LLP and the LP and the implications that follow each of them. It is also suggested that if Nigeria desires to retain the LP form it is suggested first that its name should be changed in order to minimize the possibility of confusion and secondly it should improve its attraction, by not subjecting the entity to the same regulations as the LLP.[76]The LP attraction may also be improved if the fees charged by CAC for registration and post-registration compliance are significantly lower that what is imposed on LLPs. But it remains to be seen how this will turn out in practice.

Conclusion

This article examined the Nigerian LP. It was shown that the country increased its business forms when it provided for the registration of LPs and LLPs under CAMA20. It noted that although the partnership form had been in existence from immemorial, it lost its pride of place to the company in the 19th century following the advent of incorporation by registration, and the additional component of liability protection. It then proceeded to examine the merits and implications of liability protection. It was shown that the protection provides a strong incentive for risk averse investors to plough their funds into corporate entities. It was also shown that although unlimited liability is the default rule for partnerships, liability protection has nonetheless been conferred by some countries such as the USA, UK, South Africa, etc., on partners who are not directly involved in management. Thereafter the core features of the Nigerian LP were examined as well as its merits. It was then compared with the LLP, where it was demonstrated that while the LP is a significant improvement from the general partnership because it confers liability protection on non-management partners, it comes nowhere close to the LLP which embodies virtually all the advantages of the LP. Thereafter it was concluded that the existence of the LLP with its more elaborate and robust advantages, are likely to make the LP an unnecessary surplusage of business forms which may engender confusion in a country whose vast majority are still illiterate.

[75] See MO Ovbiebo, 'Illiteracy and Vulnerability To Hiv/aids: The Case Of Igueben Women In Nigeria.' (2011) 30Problems of Education in the 21st Century, 97..

[76] By virtue of s.807, LPs are subjected to the regulations contained in part C of CAMA20. This means that they would be subjected to financial disclosure rules under s.772, be obligated to disclose the identity of persons who have significant control in the business under s.791, rules oninvestigations under ss 775-785, and to winding up rules under ss 789-790.