

# The Use of the Common Seal by Incorporated Trustees Under the Companies and Allied Matters Act 2020

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G.O. SODIPO AND CO.

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## INTRODUCTION:

The Companies and Allied Matters Act 2020 which repealed the 1990 Act has made it optional for the associations registered under the Act to have and use a common seal. There are certain documents that are however required by law to be executed under seal. Has the CAMA excluded incorporated trustees from the categories of persons that must execute some documents under seal?

In this review, I will critically analyze the common seal provisions of the Act as they relate to incorporated trustees and the general rule on use of seal, and submit that the general rule on use of seal still applies to incorporated trustees notwithstanding the provisions of the Act.

## POSITION UNDER CAMA:

There are five different provisions in the Companies and Allied Matters Act 2020 that seem to show that incorporated trustees do not need to have a common seal. The relevant sections are sections 825(2), 827, 830(1)(b) 840, and 841 of the Act. The sections state as follows:

1) Section 825(2)(c) provides:

There **shall** be attached to the application (for registration) –

**(c) the impression or drawing of the proposed common seal, if there is one.**<sup>1</sup>

The effect of the above provision is that application for registration of an association under the Act may now be submitted to the Corporate Affairs commission without the common seal of the association only if the association does not have a common seal.

The corollary of the above is that where an association already has a common seal at the time of the application, that particular seal must be affixed or attached to the application form, that is, the **FORM CAC/IT/1**. This is a mandatory requirement for associations that have common seal, as the Act uses the word shall.

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<sup>1</sup> Section 825(2) of CAMA 2020

Although the Act does not state the legal implication of the failure to attach the impression of an existing seal of the association on the application form, it is the writer's view that such failure amounts to substantial non-compliance with the Act and renders the Application form invalid. The failure may also amount to misrepresentation of fact by those signing the application and anyone of the trustees signing the Trustees Declaration Forms under section 825 (3)(4) of the Act.

Also, section 825(6) of the act provides that if any person knowingly makes any false statement or gives any false information for the purpose of incorporating trustees under the Part F, he commits an offence and is liable on conviction to imprisonment for one year or to a fine as the Court deems fit.

## 2) Section 827:

**The constitution of the association shall in addition to any other matter –**

**c) make provisions, in respect of the following –**

**(ii) the use and custody of the common seal, if there is one,<sup>2</sup>**

In a similar way, section 827(c)(i) also makes it mandatory for the constitution of the association to make a provision for the use and custody of the common seal of the association. This mandatory requirement only applies to associations that already have common seals at the time of the application.

One of the legal implications of the provision is also that if an association that was registered without a common seal decides to have one, it must immediately amend its constitution to provide for the use and custody of the common seal. Section 833 of the Act provides for the alterations of the Constitution of the association. Failure to do this will amount to a breach of the provision. Unfortunately, the Act fails to provide for the implication of failure of the association or the trustees to immediately alter the constitution and to provide for the use and custody of the common seal. It is hoped and recommended that the omission is cured in coming amendment of the Act.

## 3) Section 830:

**From the date of registration, the trustees shall become a body corporate by the name described in the certificate, and shall have -**

**(b) a common seal if they so wish;<sup>3</sup>**

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<sup>2</sup> Section 827 of CAMA 2020

One of the legal implications of the above section is that the trustees of the association need not have a common seal at the time of the incorporation. Another is that the trustees incorporated without a common seal may choose to have one after incorporation. Section 830(1) of the Act is also clarification to any person that still believes that it is the association that is incorporated under CAMA. The association is merely registered while the trustees are the ones incorporated. The body that is legally recognised as having the common seal is the incorporated trustees who must use same in the best interest of the association to which they owe their allegiance as agents. To this end, the trustees can only use the common seal on the legal documents of the association.

4) Section 840:

***The common seal, if any of the body corporate shall have such device as may be specified in the constitution, and any instrument to which the common seal of the corporate body has been affixed in apparent compliance with the regulations for the use of the common seal shall be binding on the corporate body, notwithstanding any defect or circumstance affecting the execution of such instrument<sup>4</sup>.***

Section 840 of the Act also confirms that the common seal is for the use by the corporate body which by virtue of S.830(1) of the Act is the trustees. By section 840, the common seal must be of device as the constitution of the association may provide. The constitution here is that of the association, as there is no provision for constitution of the corporate body in the Act. Again, the common seal here is only relevant if there is already an existing common seal of the association. What is the effect of the failure of the corporate body to affix the common seal on certain documents of the Association?

5) Section 841:

**Subject to the provisions of this Part of this Act and of the constitution of the association, the corporate body may contract in the same form and manner as an individual.<sup>5</sup>**

It is worthy of note that the association registered under the Act acts through the incorporated trustees which is the body that has corporate personality in law. The official documents of association like contract are executed by and in the name of the incorporated trustees. The association can only sue using the prefix *Incorporated Trustees of* before the name of the association.

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<sup>3</sup> Section 830(1)(b) of CAMA 2020

<sup>4</sup> Section 840 of CAMA 2020

<sup>5</sup> Section 841 of CAMA 2020

### Documents under Seal:

The law requires that certain document have to be executed under seal. Examples include any document transferring an interest in land, a power of attorney requiring the attorney to transfer any interest in land. The **Real Property Act**<sup>6</sup> which applies to the northern and eastern part of Nigeria and S. 77 of the **Property and Conveyancing Law**<sup>7</sup> of Western Nigeria provide among others that a partition and an exchange of any tenements or hereditaments, and a Lease, required by Law to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, and not being an interest which might by law have been created without writing, shall also be void at Law, unless made by deed. In general, deed is used in creating an obligation that is binding on any legal entity.

Section 102. (1) of the new CAMA provides that a document is validly executed by a company as a deed for the purposes of this Act, if it is duly executed by the company and it is delivered as a deed.

The Act equally provides that a company may execute a document described or expressed as a deed without affixing a common seal on the document by signature on behalf of the company by a director of the company and the secretary of the company; at least two directors of the company; or a director of the company in the presence of at least one witness who shall attest the signature<sup>8</sup>.

Section 102 (3) also provides that a document mentioned in subsection (2) that is signed on behalf of the company in accordance with that subsection has the same effect as if the document was executed under the common seal of the company.

The Court of Appeal in **S.P.D.C. (Nig.) Ltd V. Allaputa**<sup>9</sup> while relying a similar section 77 of the CAMA 1990, held that a document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal unless otherwise so required by CAMA.

Also in **International Merchant Bank Ltd v Speegaffs Co. Nig Ltd**<sup>10</sup>, it was argued by the Respondent that the loan agreement the subject matter of the suit, was not enforceable on the ground that the common seal of the respondent company was not affixed to the agreement. It was held that the letters of offer and acceptance, read

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<sup>6</sup> Section 3 of the Real Property Act 1845

<sup>7</sup> Section 77 of the PCL

<sup>8</sup> Section 102 (2) of CAMA 2020

<sup>9</sup> (2005) 9 NWLR (Pt. 931) 475 at 514

<sup>10</sup> (1989) FHCLR 380

together constitute a valid and binding agreement between the parties notwithstanding that the resulting agreement is not under seal.

The Companies and Allied Matters Act<sup>11</sup> provides that where any written law or rule of law requires any document to be under or executed under the common seal of a company, or provides for consequences for not sealing, the document is deemed to have satisfied the provisions of that written law or rule of law if the document is signed in the manner set out in sections 101 and 102 stated above.

Applying the literal rule of interpretation to the above provisions, it is clear that sections 101, 102 and 103 only apply to companies. There are no similar provisions in relation to incorporated trustees.

### **Conclusion:**

The implication of all the above authorities is that any document of a company duly signed by its officers is deemed to be under the seal of the company and failure to attach a seal on such document does not affect the validity of the document.

The Companies and Allied Matters Act 2020 only makes it optional for associations registered under the Act to have a common seal. The Act does not discourage the use of common seal as required by the law by the incorporated trustees. Hence, it is recommended that trustees of associations should ensure that they not only have a common seal, but also that they are affixed to their official documents.

The first reason is obviously to comply with the statutes such as the RPA, the PCL and other relevant laws. Where the constitution of an association specifically provides for the use and custody of the common seal, the provisions of the constitution should be complied with. Another reason is for transparency and due consultations. Use of common seal brings transparency such as where resolution is required before each use of the seal.

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<sup>11</sup> Section 103 of CAMA 2020