

**END OF
COMPANY
SECRETARY OR
NEW BEGINNING**



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END OF COMPANY SECRETARY OR NEW BEGINNING?

INTRODUCTION

When in 1996, the widely acclaimed bestseller by Richard Susskind "The End of Lawyers?" first hit the bookstores, it provided a tidal wave of debate not just within the legal profession but amongst service providers everywhere. While some hailed it as an inspiration, a vast majority simply regarded it as no more than a heresy. The challenge which Susskind threw to all service providers was to ask themselves what elements of their current workload could be undertaken differently.

Put more pointedly, what elements of the current services of lawyers and by extension company secretaries could be undertaken at a faster pace, cheaper rates and most of all, much more efficiently? This is the question this article intends to answer especially against the backdrop of the confusion which the recent repeal of Nigeria's premier corporate legislation, the Companies & Allied Matters Act (CAMA) has brought in its wake, especially Section 330(2) and (4) of the new CAMA 2020 which has led numerous clients of Aina Blankson and its corporate services subsidiary, ABCS to ask "Do we still need a Company Secretary?"

While a number of the provisions which CAMA 2020 introduces are laudable for their innovative and progressive stance, the challenges which the controversial Section 330 could bring to the infrastructure of the corporate world could be potentially damaging especially for "private" corporations that fall into the CAMA fallacy that they no longer require a company secretary. This write up makes the case that the bigger challenge and threat is not legislative but disruptive and only those prepared for the realities of the new world order are likely to survive. Perhaps what every corporation; be they private or public; start up or legacy corporation; requires in the new age is no longer the traditional company secretary but an Office of the Company Secretary.



BEFORE CAMA 2020 & IMPORT OF NEW CAMA

Under CAMA1990, Section 293(1) very simply provided that **every** company shall have a company secretary. Straight off the bat, there was no observable restriction of the provision to only one type of company; hence, it applied to both public and private companies.

The Act in Section 295 went further to point out the qualification for company secretaries in both public and private companies. For private companies, it simply provided that it must be a person who has requisite knowledge and experience to discharge the functions of a secretary of a company. For public companies, it listed a category of individuals that were eligible, from chartered secretaries / administrators to legal practitioners, etc. The question is, what changed and why?

According to Section 330(1) of CAMA 2020, all companies except **small** companies are expected to have a secretary. The section states:



“330(1) Except in the case of a small company, every company shall have a secretary.

Prima facie, this appears to mean that the duty to have a secretary is placed on every other type of company except small companies i.e. both private and public companies but not small companies. This therefore forces the question: what is a small company?

According to Section 394(3) of CAMA 2020 a company meets the qualification of a small company in a financial year if:

- a. It is a private company;
- b. Its turnover is not more than N120,000,000 or such amount as may be fixed by the Commission from time to time;
- c. None of its members are aliens (i.e. foreigners);
- d. None of its members is a government, government corporation or agency or its nominee; and
- e. In the case of company having share capital, the directors between themselves hold at least 51% of its equity share capital.

It is important to point out that for a company to qualify as a small company it must satisfy all the

above conditions cumulatively. Following this, it is important to point out that **all small companies must be private companies but not all private companies are small companies**. Some private companies, for instance, have higher turnovers.

Thus, it would appear that a sole reading of Section 330(1) only exempts small companies from having secretaries but not private and public companies. However, is this completely valid? Section 330 is provided below for ease of reference:



"330(1) Except in the case of a small company, every company shall have a secretary.

*(2) Where at the commencement of this Act a **public** company has not appointed a secretary, the company shall not late than six months after the commencement of this Act appoint a Secretary.*

(3) Anything required or authorised to be done by or of the secretary may, if the office is vacant or there is for any other

reason no secretary capable of acting, be done by or of any assistant or deputy secretary or, if there is no assistant or deputy secretary capable of acting, by or of any officer of the company authorised generally or specially by the directors.

*(4) If a **public** company contravenes the provisions of this section, the company and the directors of the company are liable to a fine in such amount as the Commission shall specify and, in the case of continued contravention, to daily penalty in such amount as the Commission shall specify.*

A holistic consideration of all subsections under Section 330 shows that the insistence of owning a secretary is fixed more on public companies. For instance, the requirement to appoint a secretary within six months of the commencement of the CAMA 2020 is placed solely on public companies; leaving out private companies and small companies. Also, Section 330(4) of the Act specifically fixes a punitive measure for non-compliance with Section 330 solely on public companies. The implication of this is that the absence of a punitive measure on the other categories of companies (private and small) means that non-compliance is not compulsory. Thus, ending the compulsory reign of company secretaries in private and small companies in Nigeria.

WHAT IS THE RATIONALE?

With the several innovations introduced in the new CAMA, we can only combine logic and trained legal deductions to ascertain the rationale behind these innovations. What could be the possible rationale for removing the requirement of company secretaries for small and private companies in Nigeria?



A possible rationale can be seen in Section 18(2) of CAMA 2020 which introduces a new provision that allows an individual (sole subscriber) form and incorporate a private company and this applies to only private companies. The economic implication of the amendment is that it further encourages

small businesses to register their businesses as companies thereby enjoying the advantage of corporate legal personality while at the same time retaining ownership of the company and acting as sole directors.

Thus, if Section 330 of CAMA 2020 were to have made the inclusion of company secretary compulsory for private companies, this would mean private companies formed by sole subscribers will be affected; especially if that private company is not a small company. This is because such an individual would have to find a company secretary for his company which may affect the economic intention of Section 18(2) of CAMA as pointed out above. Thus, where he forms a private company solely and enjoys the right of being a sole director, such advantage of individuality ends upon his obligated need to find a company secretary. This may therefore discourage the intention of Section 18(2)'s new provision in the first place and become a regulatory burden for the sole subscriber/director. The drafters may have reasoned that there needs to be a synergy of intentions between Section 330 and Section 18(2) of CAMA 2020 to ensure the purpose of both provisions are achieved.

THE COMPANIES ACT, 2006, UNITED KINGDOM

What does the UK Law say on this issue? Given the influence of the UK on Nigerian laws by virtue of colonisation, it is not strange to see similar provisions in the laws of both jurisdictions.

Interestingly, this is seen with respect to the topic currently being analysed.

In Section 270(1) of the Companies Act, UK, it provides explicitly that a private company is **not** required to have a secretary. In Section 271 of the Act, it however states that a public company **must** have a secretary. Thus, what the Nigerian Act provides by implication, the UK Act provides explicitly.

In fact, the UK Act goes further to state that in the case of a private company without a secretary, wherever the company requires a secretary, the director or any person authorised by the company, can act instead.

THE 21ST CENTURY COMPANY SECRETARY AS THE CORPORATE BACKBONE



If CAMA 2020 and the UK Act do not make it compulsory for private companies to have a secretary then what is the best business move for a private company: to have or not to have?

I. Statutory Argument:

From a statutory standpoint, we immediately see an acknowledgement by CAMA of certain fundamental duties which the company secretary is required to undertake. These duties are listed under Sections 335(1)(a)-(d):

- a. attending the meeting of the company, the board of directors and its committees, rendering all necessary secretarial services in respect of the meeting and advising on compliance by the meetings with the applicable rules and regulations;
- b. maintaining the registers and other records required to be maintained by the company under this Act;
- c. rendering proper returns and giving notification to the Commission required under the CAMA 2020; and
- d. carrying out such administrative and other secretarial duties as directed by the director, or the Company.

II. Corporate Governance Argument:

From the collapse of Lehman Brothers due to its inadequate corporate governance practices and

disdain for same, to the failure of Skye Bank; there is proof a direct relationship between corporate governance and the efficient survival of a company. Large multinational corporations have gone bankrupt within a very short period because of corporate governance failures. Conversely, we have also witnessed businesses go from modest profits to resounding successes by embracing sound corporate governance principles. This is not to say that corporate governance is the sole determinant of business success, however, if history is anything to go by, corporate governance is a key ingredient to sustainable business growth.

The company secretary is the principal officer needed to ensure the workability of the corporate governance mechanisms in a company. The company secretary is the lifeline that a company needs for the formulation of internal control mechanisms needed in place to not only safeguard against regulatory complacency but for the survival of the management structure and modus operandi of the company. It is the company secretary that is instrumental to developing corporate risk management tools which the Board can act upon.



Hence, the company secretary is combining a broad range of skill sets from corporate finance to governance, strategy, ethic and compliance, etc. The multi-faceted roles played by the company secretary with high levels of professionalism determines the degree of compliance to acceptable codes of corporate governance.

The UK Code of Corporate Governance and the FRC Guidance on Board Effectiveness help us understand how key the company secretary is with respect to communication with stakeholders. It is the company secretary that exercises the responsibility of communicating with investors and is usually the first point of contact where questions arise. There is therefore a need for the company secretary to maintain a working relationship with the chairman and the Board. The lack of proper engagement of investors/shareholders is also a big factor that contributes to corporate governance failure.

III. Technology Argument:

With the COVID-19 pandemic, Board meetings and General Meetings have been totally redefined with major decisions affecting the future of the company and shareholders without the traditional conference table and personal interactions by board members. In the midst of the corporate governance and related challenges, technology has become the much needed mitigant to business interruption, with products like Zoom, email, and work-focused applications which enabled some organizations to virtually carry on business.

Today's company secretary is a person or institution that has an adept understanding of the value of technology in business operations. The company secretary understands how the introduction of technology can facilitate access to documents and data as well as efficient tracking and preservation of compliance-focused activities and decisions. For instance, a company secretary who understands the value of e-signatures and its impact on business operations (where statutorily allowed) especially as it concerns disrupting the need for physical meetings needed for the signing of documents. The company secretary also understands the role of technology through virtual management systems and software that can offer access to corporate information and germane documents to ascertaining discrepancies in managerial operations of the company as well as assisting in analysing strategic decisions needed for investment and business expansion. Hence, the company secretary can see to the creation of custom-built applications like **Board Portals** specifically created to facilitate communications between the Board of Directors and other members of the company and access to corporate information in a protected setting.

A question may be raised on the value of the company secretary if his role appears susceptible to replacement by technology. However, such a question is in fact a fallacy and does not fully appreciate the degree of importance of the company secretary and the reasons are simple:

a. Data Mining:

For the proper incorporation of technology into the business operations of a company, it requires scanning, collecting, interpreting, validating, extracting and uploading relevant and germane information which can only be undertaken by individuals or institutions who are not only tech savvy but are also legally equipped to understand the import of the information being extracted. Hence, the 21st century company secretary combines legal and financial skills, *inter alia*, with technological skills to ensure continuous business operations. Absence of the former means that technology is incorporated without any understanding of legal or business implications.

b. Cyber-risk Management:

The 21st century company secretary also understands that while the introduction of technology in a company's business operations may be advantageous, it is also the duty of the company secretary to analyse the possible risks that may arise (especially from cyber-attacks). Hence, the company secretary is focused on ensuring that customer and client data is safe from cyber-security threats. To this end, the company secretary is therefore responsible for training the staff and also updating systems.

Not only must the company secretary be focused on the technological aspect to risk management but focus must also be given to the legal perspective especially as it concerns compliance with domestic and international data protection regulations.

The technological argument rather than phase out the need for company secretaries, goes forward instead, to reemphasise how essential company secretaries are. This is because the inclusion of technology in the operations of a company cannot work on the sole basis of being a tech expert but must also incorporate skills that understand the implications involved from a legal and business standpoint; which a company secretary possesses. In fact, we see that the complete 21st century company secretary is an individual or institution that can combine services rendered with technology.

Where a private company chooses not to employ the services of secretary it is tantamount to disregarding the services of an expert with specialised knowledge and replacing the expert with an officer of the company with average knowledge. The consequences of such a move for a private company (especially with a high net worth) could be catastrophic.

In all, the conversation today should not be on the need or place of a company secretary but rather the nature of and the redefinition of today's company secretary. Research reveals that about 40% of Fortune 500 companies have outsourced their corporate secretarial services to external organisations dedicated to offering such a service. Top companies around the world from start-ups to more established corporations have at various times in their business operations employed the use of external companies for their corporate secretarial needs.

The Senior Director, Corporate Counsel of LinkedIn Corporation pointed out that in 2011, the company had to utilise the services of an external organisation to satisfy its corporate secretarial, accounting and tax compliance needs. This was needed in order for the company to not breach Japanese regulations after setting up operations in Japan. The Senior Director pointed out that employing such a model, allowed the company use minimal resources enabling them the opportunity to focus on other pressing issues.

In the same vein, Toshiba Global Commerce Solutions equally utilised an external company for its corporate secretarial services. The Chief Legal Officer pointed out that the external company was able to show flexibility by efficiently maintaining and centralising its corporate enterprise for its 47 subsidiaries globally. Such a move for them was cost-effective in the long run.

EDITORIAL

This publication succinctly makes the case on the relevance of company secretaries despite the provisions of CAMA 2020. It makes an argument from three perspectives: (i) the statutory argument (ii) the corporate governance argument and (iii) the technology argument.

The statutory argument pushes forward the statutory duties of the company secretary which reveals the value of the company secretary. However, beyond mere statutes, we appreciate the need for a company secretary under the other two heads of argument: corporate governance and technology. From the corporate governance argument, we see how germane the company secretary is in the formulation of an internal control mechanism needed for proper adherence to acceptable codes of corporate governance which may be the thin line between corporate success and failure.

The technology argument reassesses the skillset of the company secretary as an individual or institution who not only understands the value of technology in business operations but also knows how to interpret and extract information for the proper operations of technological tools (data mining) as well as manage cyber-security risks that may arise (cyber-risk management).

The paper proves how dynamic, intricate and multi-faceted the role of a company secretary has

become which has most definitely grown from mere note-taking to requiring specialised professional skills cutting across several fields of study. The arguments is well made that not only can there be no end to company secretaries but it is now not enough for companies to vest the role of a company secretary in a **single individual**. A forward-thinking company understands that efficiency in all these roles can only be attained where corporate secretarial services are offered by an **Institution/company**, bifurcated into several departments to pay specific and tailored attention to each role of the company secretary. ABCS as an establishment understands this perfectly and does not see an end to company secretaries. For us, it is indeed a new beginning.



ABOUT ABCS

AB Corporate Solutions (ABCS) is a subsidiary of Aina Blankson, LP. It was established to meet the business and tax advisory, incubation, corporate governance and company secretarial needs of corporate organisations and especially clients of the Firm. With the growth of Aina Blankson and its client portfolio, it became imperative to extricate the company secretarial and business advisory services from core legal service of AB. Business priorities differ in relation to various factors which include the socio-economic environment and the developmental stage of the business. While a start-up may prioritize funding and market entry, a more established business will prioritize new market penetration, change management, innovation and corporate governance. Whatever the business stage, ABCS will provide strategic support for business success.

We are a team of experienced professionals, knowledgeable in regulatory matters, corporate governance, innovative company secretarial solutions that enable our clients achieve their business objectives.



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