Anti-Dollarization Policy: Managing Reality – Issues and Discontents

Originally published in *BD Legal Business* (legal section of *Business Day Newspaper*), on 8th December 2016, *p. 34.*

t.chikwendu@lelawlegal.com

c.okoriekwe@lelawlegal.com

Introduction

The Central Bank of Nigeria (CBN) in its effort to stave off pressure on the Nigerian currency had drawn the public's attention to its *Currency Substitution and Dollarization of the Nigerian Currency* Circular issued on 17th day April 2015 ("the Circular"). The Circular essentially leveraged existing legislative provisions to reiterate the bar against denomination and pricing of local (visible and invisible) transactions in any foreign currency.

The Circular has spurred a series of questions in the minds of Nigerian in highbrow areas of Lagos, Abuja and Port Harcourt, etc where rents, school fees and payment for other services are made in foreign currency, especially United States Dollars (USD). These residents in the wake of the reminder now question the validity of contracts entered with counter parties (e.g. landlords and service providers, together "payees") on settlement of their local obligations in USD. These residents are insisting that such contracts are invalid. Prospective residents and/or clients argue – and rightly so it may seem - that the contracts are contrary to the Circular and insists on Naira payment.

In light of these developments, can Nigerian residents continue to make payment for local transactions in USD? If payors are reluctant, can payees insist on payment in USD? The key components of the regulatory framework are the *Foreign Exchange (Monitoring & Miscellaneous Provisions) Act (FEMMPA), Central Bank Act (CBN Act), the Circular, The Revised Guidelines for the Operation of the Nigerian Inter-Bank Foreign Exchange Market ("The Guidelines")*, and decided cases. These would help in addressing the issues of whether investors collecting USD denominated rents and feescan continue without any implication.

CBN'S Position on Dollarization of the Nigerian Economy

In *the Circular*, the CBN frowned at the trend of currency substitution and dollarization, reiterating that Naira remains the only legal tender in Nigeria. *The Circular* reminded banks and other operators of the provisions of *sections 15* and *20, CBN Act* which state that the unit of currency in Nigeria shall be the *Naira.*

The CBN further reiterated that it is illegal and an offence to price or denominate the cost of any product or service (visible or invisible) in any other foreign currency. It warned that no business offer or acceptance (with the exception of businesses in the oil and gas industry, maritime, aviation, operators in the free trade zone and selected government agencies) should be consummated in Nigeria in any currency other than the Naira. *The Circular* clearly stated that its provisions supersedes the provisions of CBN's *Memorandum 16* of the *Foreign Exchange Manual* and *Paragraph (XI) Section 4.2.1*, of the *Monetary, Credit, Foreign Trade and Exchange Policy Guidelines for Fiscal Years 2014/2015*.

These moves were geared towards preventing full dollarization of the Nigerian economy as witnessed in Zimbabwe and Liberia. The impact of a full dollarized economy is that the country losses it national pride, as the foreign currency will be favored more than the local currency. The Central Bank of such country losses grip of the monetary policies and high impact decisions on the 'dollarized' economy are taken in the country whose currency is being used.

Conflicting Legislation - *CBN Act* and *FEMMPA*

The Circular is contrary to, and may appear to be of no effect in the face of *section 22* *FEMMPA* which provides that "***<u>notwithstanding anything to the contrary</u>*** *contained in any enactment or law (including the CBN Act) and except as provided in subsection (2) of this section, no person shall, in Nigeria, make or accept* ***cash payment, whether denominated in foreign currency or not****, for the purchase or acquisition (a) landed properties (b) securities, including*

stocks, shares, debentured and all forms of negotiable instruments; and (c) motor cars, including other vehicles of any description whatsoever". The section further provides that "*payments for the aforementioned items shall, as from the commencement of the Act, be made by means of* ***bank transfers or cheques drawn on banks in Nigeria only.***" The implication of the use of "*notwithstanding*" is that the provision supersedes any conflicting provision on the same subject matter. The Supreme Court in ***Nigeria Deposit Insurance Corporation v. Okem*** *[2004] 10 NWLR (Pt.880), 107 at 182*, held that: *"when the term 'notwithstanding' is used in a section of a statute, it is meant to exclude an impinging or impeding effect of any other provision of the statute or section so that the said section may fulfil itself."*

Thus, a careful reading of the above provision shows that in the case of land – lease or assignment (and other categories listed above) the lessee/assignee can, based on the *FEMMPA* provision, actually make USD payment through bank transfer or cheques. The subsection only prohibits cash payments; once cash is not involved, then the parties have arguably not violated the provisions of the Circular? It could therefore be possible for the Parties (subject to risk appetite of the counter party), to agree a Naira amount in a lease agreement with the understanding that USD equivalent be wired to the lessor's domiciliary account. It appears the use of foreign currency for local transaction is further supported by the tax laws that require payment and accounting for taxes in the currency of the relevant transaction, for example VAT and withholding tax.

It however gets more interesting. Although the argument above is plausible and takes advantage of the lacuna in *FEMMPA*, the *CBN Act* (and *the Circular*) appears to have plugged the loophole. The Circular mandated, with penal consequences, that Deposit Money Banks (DMBs) should desist from collecting foreign currencies for payment of domestic transactions on behalf of their customers and the use of customers' domiciliary accounts for making payments for transactions originated and consummated in Nigeria. Thus, pursuant to the *CBN Act*, payees are seemingly constrained in insisting on USD rents and other payments. In the face of what appears to be an inconsistency in the two federal legislation the question arises: does the *FEMMPA* supersede the *CBN Act* (the basis for the Circular) and *vice versa?*

Superseding Legislation: Interpretative Considerations

There seems to be an apparent inconsistency/contradiction in the two principal legislations (*CBN Act and FEMMPA*) regulating forex in Nigeria. Whilst the CBN Act has stringent and prohibitory provisions, as described above the *FEMMPA* has a lacuna that could be utilized if legal analysis were to determine the provisions of *FEMMPA* will prevail in the event of conflict between the two laws. The question therefore is which of these two legislations will supersede? Two rules may be resorted to in resolving the conflict.

The first is that a subsequent legislation prevails over an earlier one. Secondly, *specific legislation may* prevail over a *general legislation*. For this purpose, the *FEMMPA* is a specific legislation for forex transactions, whilst the *CBN Act* which primarily regulates banking, would be a general legislation with respect to forex transactions. It is arguable however that the *CBN Act* is also a specific legislation since it gives the CBN power to regulate the Nigerian currency. This may mean that the two legislation neutralize themselves on this point. Furthermore, in considering *the general legislation vs. specific legislation rule,* the supremacy provision of the *FEMMPA* becomes irrelevant in the instant case because the *CBN Act* was later in time to the FEMMPA. The irrelevance of the *FEMMPA* is predicated on the fact that the legislator is presumed not to legislate in vain, and is also presumed to have carefully considered existing legal provisions before enacting the later law - such that the later Act evidences legislative intention to amend the law through the express inconsistent provision with the earlier Act.

To further support the argument above, it is axiomatic that where a special or private Act is absolutely inconsistent and repugnant with a subsequent general Act, the courts have a duty to declare the prior special or private Act or any of its provisions repealed by the subsequent general Act: ***Cowpact Disc Technologies Ltd & Ors. v. Musical Copyright Society of Nigeria Gtd. (MCSN)****(2010) LPELR-CA/L/787/2008*.

Consequently, local forex transactions (unless those exempted by the CBN) would be caught by the prohibition pursuant to the *CBN Act* and subsidiary instruments, such as *the Circular*. Following this argument, it appears that payees may find it difficult to denominate or price any transaction in any other currency other than Naira.

The CBN further reiterated its position in *the Guidelines*. Whilst introducing the *OTC FX Futures* financial product, the CBN indirectly reinstated in *Guideline 2.2.1* that *Naira* is the only acceptable currency for transactions in Nigeria. Our view is that this is a resounding way for the CBN to maintain its position. Although Futures transaction is hedged against the USD, *the Guidelines* insists that at settlement of trade, the difference between the contract and spot price is paid to the counter party in *Naira* and not in USD. It is therefore apparent that payees cannot continue to demand for USD denominated fees or rent, as the case may be, in the wake of the CBN Circular. Having determined payees' position going forward, the issue of the validity of extant contracts entered into before the Circular, remains.

It is trite law that parties are bound by their contracts; and when there is a change in law on a particular issue, such change affects existing (payment) obligations of contracting parties in the absence of any stabilisation or freezing clause in the

agreement. Stabilization or freezing clauses ensure that where economic situation or condition changes, the parties' rights are not directly affected rather, terms are renegotiated to ensure economic equilibrium. This clause is common in oil and gas contracts and many were highlighted in recent PSC crude entitlement arbitrations. The Nigerian courts have however held that where it is established to the satisfaction of the court that due to a subsequent change in circumstances which was clearly not in the contemplation of the parties, the contract is said to become impossible to perform: ***Diamond Bank Ltd. v. Ugochukwu [2008] 1 NWLR (Pt. 1067) 1 at 28.*** The Implication therefore is that the restatement by the Circular is tantamount to a change in circumstance thus the parties are obligated to renegotiate their contract in the local currency.

In the American cases of ***Anderson v. Equitable Assurance Society of United States*** *(1926) 134 LT 557* and ***British Bank for Foreign Trade Ltd v. Russian Commercial and Industrial Bank*** *(1921) 38 TLR 65*it was held that performance of a payment obligation must be effected in whatever is considered legal tender at the time of performance **(unless there is a stabilization clause).** Flowing from this principle therefore, it appears that the CBN position in the Circular affects both existing and new agreements.

From the foregoing, although payees negotiated and entered into existing agreements with counterparties before the change, they may not be able to collect rent/other fees in USDin the face of the Circular. It will be illegal and an offence to denominate the rent payable either for the renewal or new lease/fees in USD.

Leeway for Investors

Vietnam had a similar situation as Nigeria, some years back. In the wake of *Vietnamese Ordinance on Foreign Exchange* in 2005 (Ordinance No. 28/2005/PL-UBTVQH11) amended in 2013 (Ordinance No. 06/2013/UBTVQH13), the Vietnamese Courts were approached severally to determine whetherparties can take advantage of USD denominated contracts.

In one of such cases, the Vietnamese Supreme Court *(Resolution No. 04/2003/NQ-HDTP)*, held that if an economic contract contains agreements on prices and payment in foreign currencies whilst either or both parties is or are not allowed to make payment in foreign currencies, but later the contracting parties agree to make payment in Vietnamese Dong (VND); or if in the economic contract, the contracting parties agree to use foreign currencies as price-determining currency (in order to stabilize the contracted value) but make payment in VND, then this economic contract is not considered entirely invalid. Consequently, the contract shall be valid if parties make the actual payment in VND.

The Vietnamese position appears to be similar to what is ongoing in Nigeria; payees can take advantage of the structure adopted in that country in determining whether it can reference the parallel market in its agreement. The query at this juncture is whether the parallel market is recognized as a legal market in Nigeria?

The parallel market is not provided for under any existing local legislation in Nigeria, thus, the market is mainly informal. The only forex market known to law is the Autonomous Foreign Exchange Market created under *section 1 FEMMPA*. Notwithstanding the recognition of the Autonomous Market, there seems to be no law in existence that prescribes reference to the parallel market in order to access USD. In fact, the CBN at some point recognized the existence of the parallel market. Thus, although the market is not provided for, it is not illegal and at least the regulatory authorities have exhibited a "permissive" attitude towards its existence and operation.

The "permissive" attitude of the authorities towards the parallel market was displayed in CBN's comments following the introduction of the OTC FX Futures and other policies on FX. The CBN mentioned that one of the reasons for its policies and introduction of the financial productis to foster a convergence of the interbank and parallel market USD rates. Furthermore, *Section 9 FEMMPA* seems to also recognize this market when it states that "*the rate at which each transaction in the Market shall be executed shall be the rate mutually agreed between the applicant purchaser and the Authorised Dealer or Authorised Buyer concerned.*"

In our view, since the parallel market adopts the price determination mechanism created by the *FEMMPA*, it is not in breach of any extant legislation, but rather, appears to be recognized under the law. In any event, following the Vietnamese position above where their Supreme Court held that benchmarking contract amount in dollars is not illegal (albeit only a persuasive authority), it appears that payees can also reference the parallel market in their agreements.

Conclusion

We take the view that once the parties deal independently and at arm's length, a reference to parallel market by parties in consummating their contract may be recognized. This position is based on the fact that parties commonly benchmark their contracts against the *Nigeria Inter Bank Offer Rate (NIBOR)* or the *London Inter Bank Offer Rate (LIBOR)*. In the same way, it appears parties can reference the parallel market in their contracts in order to hedge against currency fluctuations.

LeLaw Disclaimer:

Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact authors, Tochukwu Chikwendu at t.chikwendu@lelawlegal.com and Chuks Okoriekwe at c.okoriekwe@lelawlegal.com.