THE INFLUENCE OF OWNERSHIP ON CORPORATE GOVERNANCE – REALITIES VERSUS BEST PRACTICES

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Outline of Presentation

- Introduction
- The Theory of Corporate Personality
- Provisions in CAMA
- Duties of Directors
- Powers and Rights of Shareholders
- Codes of Corporate Governance
- Realities versus Best Practices
- Concluding Remarks

Introduction

- I would like to thank ICSAN for the opportunity to share my thoughts on this subject.
- When the Branch Chairperson approached me to make this presentation, I had no hesitation in accepting the offer
- As a Corporate Lawyer, Chartered Secretary and Chartered Arbitrator, Corporate Governance is an area of interest to me
- Since 1897 when in *Salomon v Salomon*, the principle of corporate personality was fully established, the relationship between owners and managers of corporate entities has remained enigmatic, oscillating between a successful marriage and forced cohabitation underscored by conflict of interest.

…..Introduction

- When shareholders incorporate a company and appoint or subsequently elect directors, is this a delegation or abdication of responsibilities?
- Is the duty of the directors owed to the shareholders only or to stakeholders?
- Are directors agents of the shareholders or the company?
- What are the powers and rights of shareholders?
- Can shareholders influence the way the company is managed?
- In this presentation, all these will be examined within the context of corporate governance

…..Introduction

- Corporate governance is basically the systems and processes established by corporate entities for ensuring proper accountability, probity and openness in the conduct of the company's business.
- The basic principles of corporate governance include transparency, accountability, fairness and responsibility founded upon the concept of disclosure to encourage the necessary trust and confidence of shareholders
- The collapse of Enron and WorldCom in 2002 brought the issues to the fore but there is no global model - determined by national laws, codes, regulations, markets, etc.

.....Introduction

- There is the Companies & Allied Matters Act, 2004 (CAMA) regulating the registration and management of companies
- There are constitutional documents like the Memorandum and Articles of Association
- There are still other regulatory instruments
- What have the Codes on Corporate Governance added to these instruments?
- Are the Codes for private/public or public sectors?
- We intend to interrogate all these in this presentation

The Theory of Corporate Personality

Salomon v Salomon & Co (1897) A.C. 22

- Aron Salomon, a trader, sold his business as a leather merchant and wholesale boot manufacturer to a limited company with a nominal capital of 40,000 shares of GBP1 each. English CA 1862 required a minimum of 7 subscribers to the MEMART. The only shareholders in the company were the vendor, his wife, a daughter and four sons who subscribed for one GBP1 share each. In part payment of the purchase money debentures were issued to the vendor. 20,000 shares were also issued to him and paid for out of the purchase money. The vendor was appointed managing director.

…..Salomon v Salomon (1897)

- When a year later the company was wound up, it was found that if the amount realized from the assets of the company were to be, in first place, applied in payment of the debentures, there would be nothing left for the ordinary creditors.
- The liquidator, alleging that the company was a mere alias or agent of the vendor, claimed that the vendor was liable to indemnify the company against the claims of the ordinary creditors, and that no payment should be made on the debentures held by him until the ordinary creditors had been paid in full

…..Salomon v Salomon (1897)

- The trial court and Court of Appeal gave judgment against Salomon.
- At the House of Lords – Lord Halsbury – it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself.
- Lord Macnaghten – when the memo is duly signed and registered, the subscribers are a body corporate 'capable forthwith' of exercising all the functions of an incorporated company – company attains maturity at birth, no period of minority – no interval of incapacity.

…..Salomon v Salomon (1897)

Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

Lord Macnaghten

…… The Theory of Corporate Personality

- What this theory means is that on incorporation, the company acquires a personality separate and distinct from the shareholders; separates the company from the shareholders
- Separates ownership from management/control especially in public companies
- This is the dilemma of owners trying to influence corporate governance
- How can the owners influence the managers – directors?
- There are many Nigerian Cases re-stating this principle.

Provisions in CAMA

- Section 18 – right to form a company
- Section 20 – capacity of individuals to form a company
- Section 37 - Effect of Registration

As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

….. Provisions in CAMA

- Section 38(1) - Except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorised business or objects, **have all the powers of a natural person of full capacity**.
- Section 63 – Division of powers between general meeting and board of directors – a company shall act through its members in GM or BoD or through officers/agents (note: subsections (4) and (5))
- Section 64 – delegation to committees and managing director
- Section 65 – Acts of general meetings, board of directors, or of managing directors carried on in the usual way of business
- Section 66 – Acts of officers or agents are not acts of the company unless expressly or impliedly authorized or there is representation

….. Provisions in CAMA

- Sections 213-215 – General and Extraordinary General Meeting
- Sections 244 and 245 – Meaning of Directors/Shadow Directors
- Section 246 – Number of Directors
- Sections 247 and 248 – Appointment of first and subsequent directors
- Section 251 – Share qualification of directors
- Section 279 – Duties of Directors
- Section 280 – Conflict of Duties and Interest
- Section 282 – Duty of care and skill
- Section 283 – Legal position of directors – trustees and may be agents
- Sections 299-330 – Minorities Protection

Duties of Directors

- Who are directors?
- To whom do they owe duties?
- To what extent can the owners control or influence them?
- A company shall have all the powers of a natural person of full capacity
- Viscount – no mind of its own, and no body of its own but the alter ego
- Lord Denning likened a company to a human being – has brains and nerve centre; it has hands; directors are directing minds and will and controls what it does
- State of mind of directors is the state of mind of the company

…… Duties of Directors

- CAMA in sections 65 and 66 draw a line between acts of members in general meeting, board of directors and managing director carried out in the usual way of business of the company and acts of officers and agents of the company
- Acts of members, board of directors and managing directors are acts of the company
- Acts of officers or agents of the company are not deemed acts of the company unless duly authorized expressly impliedly or there is a representation as such unless there is actual knowledge of lack of authority

Shareholders' powers and rights

- Unfortunately, the powers and rights of shareholders are very limited and clearly delineated under CAMA
- Powers include:

❖Voting at general meeting, to re-elect directors, etc

❖Under section 63(5), members in GM may act in certain circumstances – directors unable to act, deadline, etc

❖Under section 213(2), in default of holding a GM, a member apply to the CAC to direct the calling of the meeting

❖Under section 215(2), shareholders representing at least 10% of the total voting rights can requisition an EGM

….. Shareholders' powers and rights

- ❖Under section 310, relief on the grounds of unfairly prejudicial and oppressive conduct
- Rights to
- ❖receive a copy of the Annual Report and Accounts,
- ❖attend and vote at GMs; reduce capital
- ❖remove directors from office under section 262 – note constraints – follow the procedure otherwise set aside
- ❖elect and re-elect directors
- ❖Matters requiring ordinary or special resolution – alteration of MEMART, conversion of companies, scheme of arrangement, etc

Codes of Corporate Governance

- There are various works on Corporate Governance but will use the OECD Principles of 2004 and the Nigerian Code of 2018
- Corporate Governance is a term that refers broadly to the rules, processes or laws by which businesses are operated, regulated and controlled
- Can refer to internal factors defined by the officers, stockbrokers or constitution of a corporation, as well as to external forces such as consumer groups, clients and government regulators

…Corporate Governance

- Good corporate governance helps to build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity thereby supporting stronger growth and more inclusive societies
- The OECD Principles and the Nigerian Code serve as international benchmark providing best practice
- There are several theories and models of Corporate Governance – agency (maximise shareholders wealth), transaction cost and stakeholder (satisfy key stakeholders – employers, investors, major creditors, customers, govt, general public etc) , etc

Relationship Between Board and Shareholders – Nigerian Code and OECD Principles

Nigerian Code on Corporate Governance

- Sections 11c and 51c of the Financial Reporting Council of Nigeria Act confer upon the Council, the powers to ensure good governance practices in the **public and private sectors** of the Nigerian economy and issue the Code
- Code is aimed at companies of varying sizes and complexities across the industries
- The Code is a key driver of corporate accountability and business prosperity

….Nigerian Code

- The approach of the Code is ‘Apply and Explain’ as opposed to ‘Apply or Explain’ or ‘Comply or Explain (UK)
- The Code consists of seven parts and twenty-eight principles
- Part C deals with Relationship with Shareholders – has three principles
- Principle 21 – stresses the importance of GMs for the engagement of shareholders to facilitate greater understanding; provides for opportunity for shareholders to exercise their ownership rights and express their views on any area of interest

....Nigerian Code

- Principle 22 deals with the establishment of a system of regular dialogue with shareholders to enable them to balance their needs, interest and expectations with the objectives of the company
- Principle 23 deals with equitable treatment of shareholders and the protection of their statutory and general rights, particularly the interest of minority shareholders, promote good governance
- What has this contributed to our discourse?

The OECD Principles

- The OECD Principles have become international benchmark for policy makers, investors, corporations and other stakeholders worldwide
- The Principles are non-binding but provide enough guidance for legislation
- Form the basis to evaluate and improve the legal, institutional and regulatory framework for corporate governance
- Main focus is public companies
- There are two Parts with six Principles each

….. The OECD Principles

- Part One, Principle II deals with the rights of shareholder and key ownership functions
- The main thrust is that corporate governance framework should protect and facilitate the exercise of shareholders' rights
- Part One, Principle III deals with the equitable treatment of shareholders, including minority and foreign shareholders
- All shareholders should have the opportunity to obtain effective redress for violation of their rights.

….. The OECD Principles

- Part two deals with Annotations to the Principles
- Principle II deals with the protection and facilitation of shareholders' rights
- The rights of shareholders to influence the company centres on certain fundamental issues – election of directors and auditors, amendments of MEMART, approval of distribution of profits
- Rights to vote at GMs, right to information, participate in decision-making – all these should be facilitated

….. The OECD Principles

- Principle III deals with equitable treatment of shareholders
- Minority shareholders should be protected from abusive actions by or in the interest of, controlling shareholders acting either directly or indirectly and should have effective means of redress
- Impediments to cross border voting should be eliminated
- Insider trading and abusive self-dealing should be prohibited
- Members of the board and key executives should disclose material interest in any transaction or matter affecting the company
- Again, what will this contribute to our discourse?

Realities v Best Practices

- Section 63(4) of CAMA provides thus: **Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in general meeting: Provided that the directors acted in good faith and with due diligence.**

✓DISCOs and GENCOs – incorporated under the provisions of CAMA

✓Shareholding Structure – BPE and MOFI

✓On privatization, 60% of the shares sold while FGN owns 40%

✓FGN tries to influence the management of the companies

Business Transacted at AGM

Section 214 of CAMA provides thus:

All businesses transacted at annual general meetings shall be deemed special business, except declaring a dividend, the presentation of the financial statements and the reports of the directors and auditors, the election of directors in the place of those retiring, the appointment, and the fixing of the remuneration of the auditors and the appointment of the members of the audit committee, which shall be ordinary business.

How can owners influence these – ordinary or special business?

African Development Bank

- The AfDB is controlled by a Board of Executive Directors, made up of representatives of its member countries.
- Has 81 Member countries
- The voting power on the Board is split according to the size of each member's share, currently 60%-40% between African (or "regional") countries and “non-regional” member countries (“donors”) but there is element of veto –even when all African countries vote in support, at least two non-African countries are required to pass a resolution
- After the Ethics Committee had cleared the President, the US Government demanded an independent investigation

AfDB – 20th Largest Countries by Voting Powers

Rank	Country	Voting Powers (% of Total)
	World	100.000
1	Nigeria	9.281
2	United States	6.563
3	Japan	5.494
4	Egypt	5.379
5	South Africa	4.871
6	Algeria	4.209
7	Germany	4.127
8	Canada	3.802
9	France	3.760
10	Côte d'Ivoire	3.687
11	Libya	3.683
12	Morocco	3.498
13	Italy	2.428
14	Ghana	2.137
15	Zimbabwe	2.052
16	United Kingdom	1.689
17	Ethiopia	1.587
18	Sweden	1.553
19	Switzerland	1.474
20	Kenya	1.430

Realities v Best Practices - Arsenals at the Disposal of Shareholders

- Shareholders Agreement
- Voting Rights including demand for poll
- Shareholders Association
- Institutional Shareholders
- Corporate Shareholders
- Small and Large Private Shareholders
- Attendance of General Meetings
- Use of Regulators (CAC, SEC,), lobbying

.....Best Practices

- Despite the provisions in section 63(4) of CAMA, section 279(4) of CAMA provides thus:

  The matters to which the director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members.

- Similarly although there is no duty to promote the success of the company in Nigeria as we have in **section 172(1) of the English CA, 2006**, a director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and have regard to the stakeholder theory.
- Attention to sustainability issues – environment, health, safety, social, etc ensure successful long term business performance

.....Best Practices

- See also
- Section 279(3) of *CAMA* - *A* director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances.
- Section 282(1) of *CAMA* - Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests of the company, and shall exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances.

Concluding Remarks

- Shareholders are the owners of the company
- Directors are the managers and controllers of the company
- The registration, management and regulation of a company are controlled by CAMA
- CAMA vests enormous powers on the directors to the detriment of the shareholders who have limited powers and rights
- The MEMART, Codes and Regulators also impose obligations on both parties

……Concluding Remarks

- Essentially the directors are concerned with their remuneration while the shareholders are interested in growth and maximization of their investment
- The Directors should recognize that although their legal duties are to the company, the shareholders are the owners
- The Directors shall at all times act in the best interests of the company so as to preserve its assets and promote the purposes for which the company was formed
- Generally only the institutional shareholders have the time, resources and understanding to monitor the performance of the companies and activities of the boards

……Concluding Remarks

- Despite the provisions in CAMA and the Codes, the reality is that the shareholders are at the mercy of the directors – depending on whether it is a private or public company
- At all times, the directors of public companies should realise that the shareholders are the owners of the business and therefore their welfare should be uppermost in their minds.
- Directors should exercise their powers and discharge their duties honestly, in good faith and also exercise their degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances.
- As much as possible the shareholders should exercise all the powers and rights fully to check the directors
- Thank you for your attention.

THE END