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BENCHMARKING CORPORATE GOVERNANCE PROVISIONS UNDER NIGERIAN COMPANY LAW

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Abstract

Good corporate governance practices have remained a mandatory prerequisite for proper regulations of companies. In a competitive global economy, an adequate regulatory framework to facilitate accountability, disclosure, and good business practices are indispensable. Consequently, company legislations are constantly evolving by incorporating internationally recognized corporate governance best practices. The objective of this study, therefore, is to determine the extent to which Nigerian Company law aligns with current global trends in corporate governance by benchmarking its provisions with the Company law of the United Kingdom (UK) and Ghana. To achieve the aforementioned objective, the doctrinal research approach was adopted to enable a critical content analysis of relevant laws. In addition, a comparative method was deployed to highlight the similarities and differences in the aforementioned laws. At the end of the study, we found that the provisions of the Companies and Allied Matters Act 2020 (the principal company law legislation in Nigeria) is similar in several respects to that of the UK and Ghana and also align with international best practices. We, therefore, conclude that the challenge to effective corporate governance in Nigeria is not due to the unavailability of laws or its inadequacy, but the need for effective enforcement.

Keywords: Corporate Governance, Companies, Global Best Practices, Benchmarking

1. Introduction:

Before the passing into law of the Companies and Allied Matters Act 2020(CAMA 2020), Nigeria had essentially been operating a body of company law that was replicated from its colonial era. The Companies Ordinance of 1912 was tailored after the English 1908 Companies (Consolidation) Act.¹ Subsequent company laws in Nigeria (1922, 1968, and 1990 Laws) were

¹ Wigwe CC, *Introduction to Company Law and Practice* (Mountcrest University Press 2016) 1

also modelled after the UK Company Law. After a 30-year reign of the CAMA 1990, the law became obsolete. Thus, it became imperative for the Nigerian Legislators to come up with more modern law. One that can satisfy the economic demands of investors and also align with international best standards. The foregoing aspiration led to the promulgation of the CAMA 2020.

Embarking on a comparative analysis of the Nigerian Company law and that of the UK is strategic. It will enable this study to ascertain the extent of the development of Nigeria's Company law since its independence from Britain. More so, the UK is a developed economy with a globally recognized standard of corporate governance practice. Thus, comparing the company law of Nigeria to the UK creates an opportunity for an international review of CAMA 2020.

Asides from geographical proximity, Nigeria and Ghana share similar colonial histories in that both countries were colonized by the British. These remarkably similar pasts, the resultant present occurrences of being members of the Commonwealth of Nations, as well as the novelty of their operating company laws, makes the comparative analysis of both countries' company laws an essential exercise. The Comparison with Ghana is to give a regional approach to measuring the corporate governance development in Nigeria.

2. Comparative Analysis between CAMA 2020 and the Companies Act 2006(UK)

2.1 Structure of the Legislation

The company law currently in operation in the United Kingdom is the Companies Act 2006 (CA 2006). The CA 2006 is largely made up of amendments and restatements of the provisions of the 1985 Companies Act and portions of the 1989 Companies Act. The CA 2006 is made up of 47 Parts comprising 1,300 sections and 16 Schedules. On the other hand, CAMA 2020 has 7 parts. Unlike the Parts of the UK CA 2006 which are assigned numbers, CAMA 2020 assigns letters to its Parts. Hence, while the CA 2006 is divided into Parts 1-47, CAMA 2020 comprises of Parts A-G. Between Parts A-G, CAMA 2020 has a total of 870 sections and 15 schedules.

Noting the differences in the structures of the two company laws is not merely for record purposes but to lay a foundation for understanding the scope of both company laws as legislation is divided into parts according to the subject matter. Mostly, the CAMA 2020 division of Parts A-G is intended to account for general provisions and specific provisions which are unique to the different types of business organizations that are recognized by law in the Nigerian jurisdiction. Part A and B provide generally for the Corporate Affairs Commission, and Incorporation of Companies, and Incidental Matters respectively. Part G provides for additional General provisions while Part C-F provides for specific business organizations. Part C provides for Limited Liability Partnerships, D Limited Partnerships, and E for Business Names (applicable to unincorporated entities doing business). Part F provides for Incorporated Trustees.

This is not the case with the UK CA 2006 which merely divides its provisions into parts according to various subject matter which affects companies generally. For example, Part 1 provides for General Introductory matters, Part 2 provides for Company Formation, Part 6 for the Company's Registered Office, Part 17 of CA 2006 provides for a Company's share capital, and Part 43 for Transparency Obligations and Related Matters and so on.

Looking at the structure of these two laws side by side in this light, the division system and structure adopted in CAMA 2020 are commendable. It provides clear-cut information about provisions that apply generally to businesses and distinguishes them from specific provisions which apply to a particular business type. Therefore, its table of contents acts as a useful directory in that one can easily locate the sections of the Act that concerns the particular type of business they are interested in getting information about. This is not the case with the UK CA 2006. For the UK Act, there is a need to thoroughly examine each provision to ascertain whether it is a general provision or one specific to a particular business organization or type.

6.2.2 Regulatory Body

Section 1 of CAMA 2020 establishes the Corporate Affairs Commission (CAC) and prescribes that CAC is the body designated to ensure compliance with the provisions of the Act.² On the other hand, the UK CA 2006 does not expressly prescribe a regulatory body. However, the office of the 'Secretary of State' and 'the Registrar' are empowered by the UK CA 2006 to perform

² Companies and Allied Matters Act (CAMA) 2020, s4(g)

functions parallel to CAMA's. While the UK CA 2006 clearly traces the authority of the Registrar to his appointment by the Secretary of State,³ there is no sufficient information regarding the office of the Secretary of State except multiple mentions in the CA 2006 of the powers exercisable by 'Secretary of State'.⁴

The Department of Business, Energy and Industrial Strategy (BEIS) is the governmental agency currently responsible for business in the UK.⁵ At the time the UK CA 2006 was enacted, the Department of Trade and Industry was the governmental agency in charge of business but it was replaced by Department for Innovation, Universities and Skills, and Department for Business, Enterprise, and Regulatory Reform in 2007.⁶ Department for Business, Enterprise, and Regulatory Reform was replaced by Department for Business, Innovation & Skills.⁷ BEIS replaced the Department for Business, Innovation and Skills (BIS) and the Department of Energy and Climate Change (DECC) in July 2016.⁸ None of these were mentioned in the CA 2006. It is worthy of note however that there is an office for the Secretary of State of the BEIS.⁹ Having the function of the BEIS in mind and taking into account its provision for the office of a persona known as the Secretary of State, it seems reasonable to conclude that the person of the 'Secretary of State' referred to in the UK CA 2006 is the Secretary of State of whatever governmental agency is currently responsible for business in the UK.

2.2 Corporate Governance Rules and Regulations

Sections 1269 and 1273 of the UK CA 2006 make provisions regarding corporate governance rules and regulations. In particular, Section 1273(2)-(4) take into account the enactment of regulations in the addendum to the UK CA 2006. This is commendable because the UK CA 2006 places certain key limitations on provisions to be included in any corporate governance code.

³ CAMA 2020, s1060(2)

⁴ Company Act of United Kingdom(CA) 2006, s19, s75-76, s486, s490, s893-894, s995, s1035, s1196, s1223-1224.

⁵ < <https://www.gov.uk/government/organisations/departments-for-business-energy-and-industrial-strategy/about#our-responsibilities> > accessed 14 October 2021

⁶ < <https://www.gov.uk/government/organisations/departments-for-trade-and-industry> > accessed 14 October 2021

⁷ < <https://www.gov.uk/government/organisations/departments-for-business-enterprise-and-regulatory-reform> > accessed 14 October 2021

⁸ < <https://www.gov.uk/government/organisations/departments-for-business-energy-and-industrial-strategy/about#who-we-are> > accessed 14 October 2021

⁹ < <https://www.gov.uk/government/organisations/departments-for-business-energy-and-industrial-strategy/about/our-governance> > accessed 14 October 2021

This ensures that corporate governance codes are complementary and not contradictory at any point with the provisions of the UK CA 2006.

There are no such provisions recognising supplementary corporate governance codes in Nigeria's CAMA 2020; although the Nigerian Corporate Governance Code 2018 (NCGC) is an existent body of regulations for corporate governance in Nigeria. Thus there are no limits or guidelines in CAMA on what should be provided for in codes of corporate governance seeing that both regulations apply to companies generally. However, CAMA is the principal regulation for companies in Nigeria hence its provisions takes precedence over any other.

2.3 Directors

Except for small companies, all companies incorporated in Nigeria are mandated to have at least two (2) directors.¹⁰ On the other hand, the UK CA 2006 mandates public companies to have at least two (2) directors¹¹ and private companies are to have at least one (1) director.¹² Both provisions are relatively similar but different in some respect. The similarity is that both laws allow for a single director board. However, they differ because under CAMA 2020, only small private companies are permitted to have a single director board, but under the UK CA 2006 these provision applies to all private companies.

Regarding the definition of the person of "director", Section 868(1) of 2020 refers to "director" to include any person who takes up the position of director regardless of the name he/she is called and any person by whose instructions, the directors of the company normally comply. This second definition is a reference to "shadow directors" expressly provided for in Section 270 of CAMA 2020. This is similar to the provisions of the UK CA 2006; in which Section 250 is a verbatim mirror of the first part of CAMA 2020.

Both the UK CA 2006 and CAMA 2020 are unified in exempting a person who gives professional advice to the directors from being referred to as a shadow director.¹³ However, the UK CA 2006 provides an additional exception to shadow directors by prohibiting parent

¹⁰ CAMA 2020, s271

¹¹ CA 2006, s154(2)

¹² CA 2006, s154(1)

¹³ CA 2006, s251(2); CAMA, s270(3)

companies from being regarded as shadow directors of their subsidiaries.¹⁴ The reasoning behind this exception is clearly stated. It states that the customary practice for subsidiaries to act according to the instructions of their parent companies does not mean that the parent company has become a director of the subsidiary company. This distinction is very commendable as it makes clear a matter that could easily become a subject for dispute and be brought before the courts. For example, in the case of *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*,¹⁵ such a matter was brought before the British courts for adjudication. The Nigerian CAMA 2020 does not make any such distinction; hence this is an area in which improvement is possible and recommended.

Regarding the duties of directors, it is worthy of note that apart from the company Acts, both the UK and Nigeria have other legislation prescribing duties and responsibilities of directors. For the UK, there are the Insolvency Act of 1986 and the Company Directors' Disqualification Act of 1986, among others. On the other hand, Nigeria operates the Federal Reporting Council of Nigeria Act¹⁶ (FRCN Act) and the FRCN National Code for Corporate Governance of 2018 (FRCN Code) among others. The inference to be drawn from this wide array of legislation is that the regulation of directors in companies is a crucial economic matter; as such both laws reflect this. Duties of directors in the UK CA 2006, as well as CAMA 2020, include the duties of directors to exercise powers for the purpose for which they are conferred, to act in the company's best interest, to exercise reasonable care, to avoid conflict of interests, and to declare interests in a proposed transaction. Directors are to exercise powers for the purpose for which they are conferred¹⁷ and are precluded from exceeding the scope of powers conferred upon them.

Regarding the directors' duty to act in the company's best interest,¹⁸ there is an emphasis on the fiduciary nature of the director which is the perspective of both the UK and Nigerian company laws. In *Okeowo v Migliore*,¹⁹ Aniogolu JSC emphasizes that the fiduciary duty means that directors must not act for their advantage but in the interests of the company. In expanding on the implications of this duty, Sheikh contends that the stipulation that directors must act according to

¹⁴ CA 2006, s251(3)

¹⁵ [1990] BCC 567

¹⁶ Act No 6 of 2011

¹⁷ CA 2006, s171(b); CAMA 2020, s305(5)

¹⁸ CA 2006, s172; CAMA 2020, s305(3)

¹⁹ (1979) 11 SC 87

that ‘director’s’, not a ‘court’s’, consideration of what is the best interests of the company as held in *Re Smith & Fawcett*.²⁰ This reflects the court’s desire to avoid interfering with the commercial judgment of directors.

In the director’s duty to exercise reasonable care,²¹ Romer J, in *Re City Equitable Fire Insurance Co Ltd*,²² clarifies that in the performance of his functions, a director does not need to exhibit a greater degree of skill than may be reasonably expected of a person of his knowledge and experience. Directors also have a duty to avoid conflict of interests²³ and to declare interests in a proposed transaction or else they will be liable to the company for any profits gotten from a transaction.²⁴ Lord Russell, in *Regal (Hastings) Ltd v Gulliver*,²⁵ stresses that a director that profits cannot escape the duty to account for profits made no matter how honest his participation in the transaction was. Lord Russell explains that this duty is attached to the mere fact that a profit was made.

Both laws also agree that persons who cease to become directors remain subject to a duty not to exploit company information that they have by virtue of their former positions as directors.²⁶ A general review of both laws reveals a unified perspective to the duties of directors for the most part. However, further examination shows that certain details exist in one law that are absent in the other. For instance, regarding the duty of directors to act for the company’s best interest,²⁷ CAMA emphasises that directors should consider the effect of the company’s operations on the environment of the community where it transacts. This stands as a cautionary measure to warn directors against acting in the company’s interest to the detriment of the locality’s environment. Having in mind the increasing corporate governance themes of corporate social responsibility and global concerns over environmental pollution as it contributes to climate change and global warming, this addendum in CAMA is highly commendable and UK lawmakers are enjoined to emulate it.

²⁰ (1887) 12 App Cas 589

²¹ CA 2006, s174; CAMA 2020, s308

²² [1925] Ch 407

²³ CA 2006, s175; CAMA 2020, s306

²⁴ CA 2006, s177; CAMA 2020, s306(6)

²⁵ [1942] 1 All ER 378

²⁶ CA 2006, 170(2)(a); CAMA 2020, s306(5)

²⁷ CA 2006, s172; CAMA 2020, s305(3)

On the other hand, the UK CA 2006 inputs a commendable addendum to the director's duty to avoid conflict of interests²⁸ which is absent in CAMA 2020. Section 175(1) of the UK CA 2006 specifies that a director may have direct or indirect interests which may cause conflict while Section 306 of CAMA 2020 refers solely to a director's personal interests which may lead to conflict of interest. The scope of the UK CA, Section 175(1) is illuminated by Sheikh when he posits that a director's duty to avoid conflict of interest is not just in his personal capacity alone but also in his professional capacity, where he may be serving as a director to two different companies.²⁹ This is not covered by CAMA 2020.

On the subject of appointment of directors, the minimum age at which a person is qualified for appointment as prescribed by the UK CA 2006 is 16 years³⁰ whereas CAMA 2020 maintains that any person under 18 years of age shall be disqualified from being a director.³¹ This is a worthy point of note especially for multi-national companies seeking to be incorporated in both of these jurisdictions. Regarding the removal of directors, both CAMA and the UK CA have identical provisions. Both laws prescribe the removal of directors by ordinary resolution and through a special notice.³²

2.4 Company Secretary

Both the CA and CAMA provide exemptions in the requirement of companies to have a company secretary. While the CA exempts private companies,³³ CAMA exempts only small companies.³⁴ The CA and CAMA have similar provisions regarding the qualification of a company secretary,³⁵ except for some addendum provided for in the UK law. Section 273(2)(d) of the UK CA 2006 stipulates that a person who holds another position in a company (other than a company secretary) that is regarded by the directors as capable of discharging the duties of a company secretary may be qualified to be so appointed. The addendum to the UK CA allows for more flexibility in the requirement for the appointment of a company secretary. This law also creates some laxity that is subject to abuse, considering the critical role of the company secretary

²⁸ CA 2006, s175; CAMA 2020, s306

²⁹ S Sheikh, *A Practical Guide to the Companies Act 2006* (Routledge-Cavendish 2008) 379

³⁰ CA 2006, s157(1)

³¹ CAMA 2020, s283(a)

³² CA 2006, s168(1)(2); CAMA 2020, s288(1)(2)

³³ CA 2006, s270(1)

³⁴ CAMA 2020, s330(1)

³⁵ CA 2006, s273; CAMA 2020, s332

in corporate governance. Lord Denning had deliberately reprised the legal community via his judgment in the case of *Panorama Development Ltd v Fidelis Furnishing Ltd*,³⁶ as far back as 1971, when he declared that a company secretary is a much more important person than he had been regarded in the past. He further stated that the company secretary now has a status of an officer of the company with extensive duties and responsibilities, thus, he can no longer be regarded as a mere clerk. If there is no specific evidence of experience or membership of a relevant body, then on what grounds can the directors conclusively judge the capability of a candidate?

2.5 Registration of Companies and its Legal Effect

The subject of the procedure for registration of a company and its effects are thoroughly covered by Sections 9-16 of the UK CA 2006 and Sections 36-42 of Nigeria's CAMA 2020. A comprehensive review of these sections reveals similarities in the registration process of companies in these jurisdictions. Firstly, the registration documents required by both laws are the company's memorandum of association, an application for registration, and a statement of compliance.³⁷ Secondly, both laws require companies limited by shares to deliver a statement of capital and initial shareholdings³⁸ and companies limited by guarantee to deliver a statement of guarantee.³⁹ Both laws also require companies to deliver a statement of their proposed directors.⁴⁰ The major difference is regarding the identity of the authority to whom these documents are to be submitted. This is an unavoidable difference as a result of the difference in the jurisdictions. While the UK CA 2006 prescribes the Registrar⁴¹ as the person to whom the documents for registration are to be submitted, CAMA recommends the Corporate Affairs Commission.⁴² Companies seeking to be incorporated in both the UK and Nigeria may enjoy the advantage of familiarity with the processes as a result of the highly similar nature of registration procedures in these jurisdictions.

³⁶ [1917] 2 QB 711

³⁷ CA 2006, s9(1); CAMA 2020, s36(1)

³⁸ CA 2006, s10(1)(2); CAMA 2020, s37(1)(2)

³⁹ CA 2006, s11(1); CAMA 2020, s38(1)

⁴⁰ CA 2006, s12(1); CAMA 2020, s39(1)

⁴¹ CA 2006, s9(1)

⁴² CAMA 2020, s36(1)

Regarding the effects of registration of companies, both laws agree that upon verification that all the stipulated requirements of the statute have been fulfilled, the issuing authority shall issue a certificate of incorporation.⁴³ This certificate of incorporation shall be conclusive evidence that a company has been appropriately registered under the statute.⁴⁴ In *ABC Plc. v Emostrate Ltd*,⁴⁵ the court stresses the importance of ‘certificate of incorporation as it states that it is only by its certificate of incorporation that the legal personality of a company can be ascertained where it is called to question. Other effects of registration commonly provided for in both laws are that the subscribers to the memorandum in addition to the other members of the company, shall be regarded as a body corporate.⁴⁶ This body corporate shall be capable of performing all the functions and acting with all the powers of an incorporated company.⁴⁷

Both English and Nigerian case law attest to the conference of a veil of incorporation upon a company as a result of its status upon incorporation. This was established in the case of *Salomon v Salomon*⁴⁸, as well as the judgment of Muhammad JSC in *Onuekwusi & ors. v The Registered Trustee of Christ Methodist Zion Church*.⁴⁹ It was decided in these cases that the implication of incorporation of a company is to confer upon that company the status of a legal entity that is a separate person distinct from its members. This is what is known in corporate law as the veil of incorporation. However, the UK CA and CAMA differ in their statutory prescriptions of the circumstances in which this corporate veil may be lifted.

In UK CA, the failure of a public company to obtain a trading certificate to do business will give rise to the liability for not just the company as a corporate entity, but for every officer of the company as an individual.⁵⁰ It also prescribes that promoters of a company, although acting on behalf of the company, will personally be liable for contracts made with third parties.⁵¹ This was illustrated in *Kelner v Baxter*⁵² where a promoter entered into a contract, on behalf of the pre-incorporated company, to purchase stock in the future business. Upon failure of the company to

⁴³ CA 2006, s15(1); CAMA 2020, s41(5)

⁴⁴ CA 2006, s15(4); CAMA 2020, s41(6)

⁴⁵ (1998) 2 NWLR Pt 356 19

⁴⁶ CA 2006, s16(2); CAMA 2020, s42

⁴⁷ CA 2006, s16(3); CAMA 2020, s42

⁴⁸ [1897] AC 22

⁴⁹ (2011) 2-3SC (Pt 1) 63

⁵⁰ CA 2006, s767

⁵¹ CA 2006, s51

⁵² (1886) LR 2 CP 174

pay for the stock post-incorporation, the court held that it is not the company but the promoters as individuals that would be liable for the breach of contract.

As earlier mentioned the circumstances for lifting the veil under CAMA is different. CAMA 2020 prescribes that where a public company trades below the statutory minimum of two (2) members for more than 6 months, every officer of the company is liable jointly and severally with the company.⁵³ Another ground for lifting the veil is where a company receives money via a loan for a specific purpose and with an intent to defraud by failing to apply that money for the purpose for which it was received. In the aforementioned circumstance it is the officers of the company that will be personally liable for the money received and not the company itself.⁵⁴ This was illustrated in *Igwem & Co Ltd v Igwebe*⁵⁵ where money was paid by the respondent through the Chairman and MD of the company to the company to build 2 houses and the company failed to complete the project, the court held that it was the Chairman/MD that would be liable for the refund of the funds received but not utilized for the project for which the company was contracted.

2.6 Meetings, Notices, and Resolutions

While CAMA prescribes 3 types of meetings that a public company may convene, the UK CA only provides for two (2) types of meetings. Both the UK CA and CAMA agree that companies should hold Annual General Meetings (AGM)⁵⁶ but the legislation differs in their prescription regarding the timelines for these meetings. CAMA maintains that all companies shall hold AGM once a year with not more than 15 months elapsing between the date of one company AGM and the next.⁵⁷ The only companies excepted from AGM in Nigeria are small companies or companies with a single shareholder.⁵⁸ On the other hand, the UK CA stipulates that a public company must hold its AGM within each period of 6 months, starting with the day after its accounting reference date,⁵⁹ but within 9 months for private trading companies.⁶⁰ Hence the UK

⁵³ CAMA 2020, s118

⁵⁴ CAMA 2020, s316

⁵⁵ (2010) All FWLR (Pt 540) 1291

⁵⁶ CA 2006, s336; CAMA 2020, s237(1)

⁵⁷ CAMA 2020, s237(1)

⁵⁸ Ibid.

⁵⁹ CA 2006, s336(1)

⁶⁰ CA 2006 s 336(1A)

CA 2006 unlike CAMA distinguishes between the timelines for a general meeting for public companies and those of private companies.

Another type of meeting which CAMA prescribes is the Extraordinary General Meeting(EGM)⁶¹ which may be convened at any time whereas the UK CA 2006 does not refer to ‘extraordinary general meetings’⁶² although it was previously provided for under Section 368 of the UK Companies Act, 1985. Instead, the other meetings the UK CA 2006 provides for is the general meeting which may be called by a director,⁶³ a member⁶⁴ or the court.⁶⁵ In practical terms these other general meetings serves the same purpose as the EGM under CAMA 2020. The reason for the foregoing assertion is that EGM under CAMA 2020 has been defined as any other general meeting held by a public company other than its AGM. More so, the EGM under CAMA 2020 may also be called by a director, a member, or the court.⁶⁶ Lastly, CAMA prescribes a statutory meeting which is a one-off meeting held within 6 months of a company’s incorporation.⁶⁷ There is no mention of this or any such equivalent in the UK CA.

Before meetings are called, a notice of that meeting is first sent out to members of the company informing them of its occurrence. While CAMA 2020 provides that notice for all types of general meetings must be sent out 21 days before the meeting,⁶⁸ the UK CA 2006 differentiates between the notice of meeting for private companies and those for public companies. For private companies, notice is required to be sent out at least 14 days before the meeting,⁶⁹ whereas for public companies, the length of notice for AGM is 21 days and for other types of meetings, it is 14 days.⁷⁰ Both legislations however stipulate that a standard notice of a meeting must specify the time, date, place and the general nature of the business to be transacted at the meeting.⁷¹ Also, both laws agree that every member,⁷² director⁷³, and person upon whom ownership of

⁶¹ CAMA 2020, s239(1)

⁶² C Wild and S Weinstein, *Smith and Keenan’s Company Law* (17th edn, Pearson 2016) 244

⁶³ CA 2006, s302

⁶⁴ CA 2006, s303

⁶⁵ CA 2006, s306

⁶⁶ CAMA 2020, s239(1) &(2), s247(1).

⁶⁷ CAMA 2020, s235(1)

⁶⁸ CAMA 2020, s241(1)

⁶⁹ CA 2006, s307(1)

⁷⁰ CA 2006, s307(2)

⁷¹ CA 2006, s311; CAMA 2020, s242(1)

⁷² CA 2006, s310(1); CAMA 2020, s243(1)(a)

⁷³ CA 2006, s310(1); CAMA 2020, s243(1)(c)

shares devolve because of death or bankruptcy of a member⁷⁴ are entitled to receive notice of meetings. However, only CAMA 2020 stipulates that the auditor, company secretary, and a representative of CAC, should be in attendance at AGMs of a public company, hence entitled to receive notice of meetings.⁷⁵

Both laws prescribe ordinary resolutions requiring a simple majority of votes⁷⁶ and special resolutions requiring a 75% or 3/4ths of the votes cast⁷⁷ as the two types of resolutions at company meetings.

3. Comparative Analysis Between CAMA 2020(Nigeria) and Companies Act 2019(Ghana)

3.1 Structure of the Legislation-

The Companies Act, 2019 (CA 2019) of Ghana was passed into law to replace the Companies Act, 1963. At that time, Nigeria was also in the process of introducing a new company law which was eventually signed into law on the 7th of August 2020. Ghana's CA is divided into 6 chapters numbered 1-6 with each Chapter divided into parts and overall, a total of 387 sections and 10 schedules. On the other hand, CAMA 2020 has 7 parts. CAMA 2020 comprises Parts A-G. Between Parts A-G, CAMA 2020 has a total of 870 sections and 15 schedules.

Comparing the structures of the two company laws is crucial to lay a foundation for understanding the scope of both company laws, as legislations are divided into parts according to the subject matter. Mostly, the CAMA 2020 division of Parts A-G accounts for general and specific provisions which are unique to the different types of business organizations that are recognized by law in the Nigerian jurisdiction. Part A and B provide generally for the CAC and Incorporation of Companies and Incidental Matters respectively. Part G provides for additional General provisions while Parts C-F provides for specific business organisations. Part C provides for Limited Liability Partnerships, Part D for Limited Partnerships, Part E for Business Names

⁷⁴ CA 2006, s310(2); CAMA 2020, s243(1)(b)

⁷⁵ CAMA 2020, s243(1)

⁷⁶ CA 2006, s282; CAMA 2020, s258(1)

⁷⁷ CA 2006, s283; CAMA 2020, s258(2)

(applicable to unincorporated entities doing business) and Part F provides for Incorporated Trustees.

Ghana's CA 2019 employs a similar method, in that it clearly differentiates between general and specific provisions. Part 2 of Ghana's CA 2019 accounts for general provisions under 'Provisions Applicable To All Companies'. Then specific provisions follow under subsequent parts. For example, Part 3- Additional Provisions Applicable to Private Companies Only, Part 4- Additional Provisions Applicable to Public Companies only, and so on.

Looking at the structure of these two laws side by side in this light, both are equally commendable in that they provide clear-cut information about provisions that apply generally to businesses and distinguish them from specific provisions which apply on a singular basis. Therefore, their tables of contents serve as user directories in that interested parties can easily locate the sections of the Act that concern the particular type of business they operate.

3.2 Regulatory Body-

For Nigeria, Section 1 of CAMA 2020 establishes the Corporate Affairs Commission (CAC) and it prescribes the CAC as the body designated to ensure compliance with the provisions of the Act.⁷⁸ On the other hand, the Ghanaian CA 2019 establishes the office of the Registrar of Companies (the Registrar) as the governing body of the Act.⁷⁹

Although the nomenclature differs, the structure of both governing bodies is remarkably similar. Both the CAC and the Registrar consist of a Chairman,⁸⁰ one representative each from the legal profession,⁸¹ the Securities and Exchange Commission,⁸² the accountancy profession,⁸³ the Ministry of Trade and Industry,⁸⁴ and from other relevant bodies in the countries.⁸⁵ The functions of both bodies are also similar. Both the CAC and the Registrar are in charge of evaluating documents and approving the registration and incorporation of companies.⁸⁶

⁷⁸ CAMA 2020, s4(g)

⁷⁹ CA 2019, s354

⁸⁰ CA 2019, s354(1)(a); CAMA 2020, s2(2)(a)

⁸¹ CA 2019, s354(1)(f); CAMA 2020, s2(2)(b)(ii)

⁸² CA 2019, s354(1)(d); CAMA 2020, s2(2)(b)(vii)

⁸³ CA 2019, s354(1)(h); CAMA 2020, s2(2)(b)(iii)

⁸⁴ CA 2019, s354(1)(c); CAMA 2020, s2(2)(b)(viii)

⁸⁵ CA 2019, s354(1)(b),(e),(g),(i); CAMA 2020, s2(2)(b)(iv)-(vi)

⁸⁶ CA 2019, s13-14; CAMA 2020, s36,41

3.3 The Ultra Vires Doctrine-

Any act which is ultra vires refers to an act of the company which is beyond the scope of power allowed or granted by a corporate charter or by the law.⁸⁷

Section 44(1) of CAMA 2020 expressly prohibits a company from carrying on business which has been expressly excluded by its memorandum and mandates companies to operate within the powers conferred upon them by their memorandum. In *Continental Chemist v Ifekandu*,⁸⁸ the respondent raised the defence that his non-performance of his contractual obligations was because the act stipulated by the appellant was ultra vires the company. The court agreed and held that the contract was void because it was ultra vires the company. However, CAMA 2020 provides an addendum on the application of the ultra vires doctrine in Section 44(3). The implication of Section 44(3) of CAMA 2020 is that no transaction of the company shall be declared invalid merely because it was not for the furtherance of an authorized business of the company. The position of CAMA 2020 may seem contradictory, it is however the position of this study that the legislators intentionally provided this addendum. This addendum is to prevent abuse of the ultra vires doctrine by companies who deliberately enter into transactions that are not authorized by their memorandum. By this provision of section 44(3) of CAMA 2020, companies are prevented from using the ultra vires provision of the law as an excuse to escape liability.

Similar to the provision of CAMA 2020, the Ghana's CA 2019 stipulates that even where the registered constitution of the company provides a restriction on the business which a company may enter into, the capacity of the company would still not be affected by that restriction;⁸⁹ thus excluding the ultra vires doctrine. However, the position of the Ghanaian law seem clearer and more straightforward than that of Nigerian law, as it excluded the application of the ultra vires doctrine in its law expressly.

⁸⁷ BA Garner, *Black's Law Dictionary* (9th edn, Thomson Reuters 2009) 1662, See also CA 1963, s24

⁸⁸ (1996) All NLR 1

⁸⁹ CA 2019, s19(2)

3.4 Directors-

Regarding the definition of “director”, Section 868(1) of CAMA 2020 refers to "director" to include any person who takes up the position of director regardless of the name he/she is called and any person by whose instructions, the directors of the company normally comply. The second definition is a reference to “shadow directors” which is expressly provided for in Section 270 of the Act. This is similar to the provisions of the CA 2019 which regards directors as not only those duly appointed thus, but also those on whose directions the directors are accustomed to act.⁹⁰ In Nigeria, except for small companies, all companies are mandated to have at least 2 directors.⁹¹ On the other hand, the CA 2019 of Ghana does not exempt any company from the compulsory requirement of 2 directors.⁹² However, both the Ghanaian CA and Nigeria’s CAMA stipulate sanctions for noncompliance with the provision of the law on the statutory minimum of directors for a specified time.⁹³

Concerning the appointment of directors, both Ghana’s CA 2019 and Nigeria’s CAMA 2020 maintain that any person under 18 years shall be disqualified from being a director.⁹⁴ Ghana’s CA 2019 makes reference to “infant” which is clarified in the First Schedule to the Act as a natural person who is below eighteen years or another age which has been stipulated by an enactment to be of full age for legal purposes. Another meeting point in the two laws is the provisions regarding three categories of appointment for directors namely: appointment of first directors,⁹⁵ subsequent appointment of directors⁹⁶, and appointment to fill casual vacancy.⁹⁷ Regarding the removal of directors, both CAMA and the CA are unified in prescribing that a director may be removed through an ordinary resolution by means of special notice.⁹⁸

For the duties of directors, both the Ghanaian CA 2019 and Nigeria’s CAMA 2020 includes the duties of directors to exercise powers for the purpose for which they are conferred and the duty to act in the company’s best interest. On the directors duty to exercise powers for the purpose for

⁹⁰ CA 2019, s170(1),(2)(b)

⁹¹ CAMA 2020, s271

⁹² CA 2019, s171(1)

⁹³ CA 2019, s171(2); CAMA 2020, s271(3)

⁹⁴ CA 2019, s173(1)(a); CAMA 2020, s283(a)

⁹⁵ CA 2019, s172(1); CAMA, s272

⁹⁶ CA 2019, s172(4); CAMA, s273

⁹⁷ CA 2019, s172(5); CAMA, s274(1),(2)

⁹⁸ CA 2019, s176; CAMA 2020, s288(1)(2)

which they are conferred⁹⁹ both laws precluded directors from exceeding the scope of powers conferred upon them. Regarding the duty to act in the company's best interest,¹⁰⁰ there is an emphasis on the fiduciary nature of the director which is the perspective of both the Ghanaian and Nigerian company laws. In *Okeowo v Migliore*,¹⁰¹ Aniogolu JSC emphasises that the fiduciary duty means that directors must not act for their personal advantage but in the interests of the company.

Both CAMA and the CA 2019 agree that directors should consider the effect of the company's operations on the environment of the community where it transacts business.¹⁰² This stands as a cautionary measure to warn directors against acting in the company's interest to the detriment of the locality's environment. Having in mind the increasing corporate governance themes of corporate social responsibility and global concerns over environmental pollution and how it contributes to climate change and global warming, this addendum in both laws is highly commendable.

In spite of the similarities of both laws with regards to the duty of directors, CAMA seems more comprehensive. CAMA 2020 prescribes the duty of directors to avoid conflict of interests and to declare interests in a proposed transaction¹⁰³ whereas the CA 2019 does not stipulate this duty. The implication is that directors may serve personal interests or make a profit from company transactions without liability.

3.5 Company Secretary

While CAMA 2020 make provisions for exemptions in the requirement of companies to have a company secretary,¹⁰⁴ the CA 2019 does not. Ghana's CA 2019 issues a general mandatory requirement for companies to have a company secretary. The provision of the Ghanaian law seem to align more with international best practice in this regard, considering the importance of the role of company secretary in ensuring good corporate governance¹⁰⁵ However, the CA and

⁹⁹ CA 2019, s190(3); CAMA 2020, s305(5)

¹⁰⁰ CA 2019, s190(2); CAMA 2020, s305(3)

¹⁰¹ (1979) 11 SC 87

¹⁰² CA 2019, s190(2); CAMA 2020, s305(3)

¹⁰³ CAMA 2020, s306(1)-(3)

¹⁰⁴ CAMA 2020, s330(1)

¹⁰⁵ CA 2019, s211(1)

CAMA have similar provisions regarding the qualification of a company secretary.¹⁰⁶ Both laws also permit a deputy secretary or a director of the company to act where the office of the company secretary is vacant.¹⁰⁷

3.6 Registration/Incorporation

While Ghana's CA 2019 refers to the process of legally licensing a company to carry on business in its jurisdiction as incorporation, Nigeria's CAMA 2020 refers to it as registration. These processes are thoroughly covered by Sections 12-17 of the Ghanaian CA 2006 and Sections 36-42 of Nigeria's CAMA 2020 respectively. The difference in terminology notwithstanding, a comprehensive review of both laws reveals similarities in the registration process of companies. Firstly, both laws require companies to submit an application for registration or incorporation.¹⁰⁸ Secondly, both laws require companies limited by shares to deliver a statement of capital and initial shareholdings¹⁰⁹ and companies limited by guarantee to deliver a statement of guarantee.¹¹⁰ Both laws also require companies to deliver a statement of their proposed directors.¹¹¹

The statement of compliance required by Section 36(1) of CAMA 2020 is not provided for in the CA 2019. This statement of compliance is an attestation by the applicant or his agents that the requirements of the Act regarding registration have been duly complied with and it may be accepted by the CAC as sufficient evidence of compliance.¹¹² The absence of this provision in the CA 2019 means that in all cases, applicants must go through the hectic process of providing numerous documents to establish compliance with the registration process, this is a huddle a statement of compliance would have prevented. Another difference in the two laws concerns the identity of the authority to whom these documents are to be submitted. This is an unavoidable difference as a result of the difference in the jurisdiction. While the Ghanaian CA 2019 prescribes the Registrar¹¹³ as the person to whom the documents for registration are to be

¹⁰⁶ CA 2019, s211(3); CAMA 2020, s332

¹⁰⁷ CA 2019, s211(7); CAMA 2020, s330(3)

¹⁰⁸ CA 2019, s13(1); CAMA 2020, s36(1)

¹⁰⁹ CA 2019, s13(n); CAMA 2020, s37(1)(2)

¹¹⁰ CA 2019, s13(o); CAMA 2020, s38(1)

¹¹¹ CA 2006, s13(g); CAMA 2020, s39(1)

¹¹² CAMA 2020, s40

¹¹³ CA 2019, s13(1)

submitted, CAMA recommends its Corporate Affairs Commission.¹¹⁴ It is the position of this study that though the terminology differs, CAC and registry could be used interchangeably since both have similar responsibilities.

Regarding the effects of registration of companies, both laws agree that upon verification that all the stipulated requirements of the statute have been fulfilled, the issuing authority with shall issue a certificate of incorporation.¹¹⁵ This certificate of incorporation shall be conclusive evidence that a company has been appropriately registered under the statute.¹¹⁶ In *ABC Plc v Emostrate Ltd*,¹¹⁷ the court stresses the importance of the document called ‘certificate of incorporation’ as it states that it is only by its certificate of incorporation that the legal personality of a company can be established in a situation where its legal personality is being called into question. Other effects of registration commonly provided for in the statutes are that the subscribers to the memorandum in addition to the other members of the company shall be regarded as a body corporate, capable of performing all the functions and acting with all the powers of an incorporated company.¹¹⁸

After embarking on a thorough review of the Nigerian company law vis a vis it’s African and global counterparts and the CAMA 2020 vis a vis the 1990 CAMA, the innovation of CAMA 2020 is commendable. This is because, in some aspects, its provisions are of a higher standard than the Ghanaian CA or the UK CA. However, there is still room for improvement seeing as the newly minted CAMA 2020 is a match for the UK company law which was enacted in 2006, about 14 years ago. The above review also reveals startling similarities in most aspects of the company laws compared. In fact, more similarities than differences are noticeable. This indicates that there is in a fact a general conception of an ideal standard for company law across various jurisdictions.

4. Conclusion

¹¹⁴ CAMA 2020, s36(1)

¹¹⁵ CA 2019, s14(1); CAMA 2020, s41(5)

¹¹⁶ CA 2006, s15; CAMA 2020, s41(6)

¹¹⁷ (1998) 2 NWLR (Pt 356) 19

¹¹⁸ CA 2006, s14(2); CAMA 2020, s42

The findings from the comparison between Nigeria Company and that of UK and Ghana reveals a lot of similarities in content and with only minor differences. This goes a long way to confirm that CAMA 2020 is indeed a modern law with many innovative provisions, similar to those found in Company law of developed Nations like the UK. Interestingly, CAMA has some provisions that should be emulated by UK legislators. For instance, the structure and arrangement of the CAMA 2020 which is similar to that of Ghana differ from that of UK 2006. The structure of the company law of Nigeria and Ghana has a more detailed and organized directory which facilitates easier sighting of relevant provisions of the law. More so, both laws clearly distinguish between provisions applicable generally to all business types and those applicable to specific business times unlike in the UK law.

It is however important to note that Nigeria also has a few lessons to learn from the UK Law, one of which is its recognition of the supplementary role of the UK Code of Corporate Governance 2018. There are no similar provisions in the Nigeria and Ghana law. In addition, the UK law stipulates a limit for the application of the UK Code so as to avoid instances of conflicting provisions. This is a laudable provision that Nigeria ought to emulate. It is also important to note that the UK Law is more flexible regarding board composition than Nigeria Law. It allows for a person that has attained 16 years to be appointed as director. In Nigeria, a minor cannot be appointed to the Board. Consequently, the UK law is more forward-looking in this regard and tends to align more with the global best practice where entrepreneurship is now encouraged amongst the younger populace. Instead of the outright prohibition of minors from directorship role by CAMA 2020, the law should have allowed the same but stipulated certain conditions for it. These conditions could be similar to those available in Section 106(2) CAMA 2020 for a minor's membership in a company.¹¹⁹

As earlier stated CAMA 2020 is a good law although not perfect. It has several innovative provisions that could be emulated by other developing as well as developed countries. It is however important to note that having a good law is not enough to secure good corporate governance practice, but only a starting point. Poor enforcement of a good law only makes the

¹¹⁹ CAMA 2020, s106(3) does not expressly prohibit the membership of minors in a company but however provides that such a minor will not be counted as a member for the purpose of determining the legal minimum number of members of a company,

law a replica of a paper tiger that cannot bite. Now that Nigeria has a company law comparable in standard with that of a developed nation like the UK, the Nigerian government through its regulatory bodies now needs to focus on ensuring effective enforcement of its provisions.