ANALYSIS THE LEVEL OF EFFECTIVENESS OF ARTICLES ASSOCIATION AS THE COMPANY'S CONSTITUTION IN REGULATING THE CONDUCT AND RELATIONSHIP OF DIRECTORS AND SHAREHOLDERS. (NIGERIA, SOUTH AFRICA AND UNITED KINGDOM).

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Introduction

The Article of Association is the document that contains the rules for the internal management of the company. It is the principal document that must be filed alongside the memorandum of

Association. It is the statute of the company and it amplifies the memorandum and provides for the internal management rules of the company.[1] The trust of the write up is to examine the meaning, legal effect and the effectiveness of the Articles of Association as the Company's Constitution in regulating the conduct of directors and shareholders in Nigeria and United Kingdom.

Meaning of A Company

A company is often asserted has no strictly legal meaning, the term implies an association of a number of persons for some common object or objects purely for economic reasons, which is for profit or gain. The Black's Law Dictionary, define a company as a corporation or, less commonly, an association, partnership or union that carries on a commercial or industrial enterprise, a corporation, partnership, association, joint stock company, trust fund or organized group of persons whether incorporated or not and (in official capacity) any receiver, trustee in bankruptcy, or similar official or liquidating agent for any of the foregoing.[2]

Meaning of Articles of Association

The article of association of a company is the domestic regulations of the company and governs its internal administration. It determines how the powers conferred on the company by the memorandum of association shall be exercised. Also, the articles of association regulate the right of the member of the company interse (among themselves) and determine the manner in which the business of the company shall be conducted. The articles deal with such matters as the appointment, removal and powers of directors, general meetings of the company, the voting rights of members, the transfer of shares, and dividends. The article must be printed (not typewritten) and divided into paragraphs numbered consecutively. It must be signed by each person who subscribed to the memorandum and the signature must be attested, though one witness for all the subscribers' signatures is enough.[3]

Historical Position of Articles of Association at Common Law

The company as an entity constituted by persons who are its members and officers ordinarily needs regulations to guide its activities. Such regulations are generally referred to as the

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[1] Ife dayo Akomolede, "*Fundamentals of Nigerian Company Law*" (2008) Niyank Print and Publications (Nigeria Publishers) pg. 22 assessed on 7th August, 2019

[2] Dr. Agbonika John Musa, et al, "*The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria"* (2014) Vol. 28 www.iiste.orgpdf assessed on 7th August, 2019

[3] *Ibid at footnote 2*

company's constitution. The company's constitution regulates, among others, the relationships between the company, its members and officers. It bears the status of a contract which does not necessarily arise from the actual consensus of the members. It is a contract created by law and binds persons who are not necessarily parties to it. No member can recile from the provisions of the constitution by relying on any of those general defences such as mistake, misrepresentation, duress or undue influence, that would vitiate the consensus required to constitute ordinary contract.[4] The contract could be altered by a special majority of the members even against the wishes of the minority of the contracting members, and cannot be rectified on ground of mistake. The consideration of the effect which the contents of the company's constitution, as public document, would have on third parties who are not privy to the making of the constitution, seemingly informs the judicial approach in dealing with this subject matter. In Evans v Chapman (1902) 86 LT 381 at 382, the court was requested to rectify the constitution to correct clerical error, Joyce J in declining to exercise that judicial power, said: I do not see my way to make the order asked for. No doubt a blunder was made in drafting the articles, but that can be rectified under the provisions of the Companies Act, 1862, S.50, and is the proper way of doing it that is, by passing a special resolution to alter the articles. With reference to the jurisdiction to rectify such a document, on the materials before me and as at present advised, I am of opinion that the general jurisdiction of the court to rectify instruments has no application to a document of this kind, which has only a statutory effect, and can only be rectified by statutory authority. This decision received a unanimous approval of the UK Court of Appeal in Scott v Frank F. Scott (1940) 3 All ER 508 at 516, where Luxmore LJ drawing a distinction between the rectification of a private contract and the company's constitution, said: It is quite true that, in the case of the rectification of a document, such as a deed inter parties, or a deed poll, the order for rectification does not order an alteration of the document, but merely directs that it be made to accord with the form in which it ought originally to have been executed. This cannot be the case with regard to the memorandum and articles of association of a company, for it is the document in its actual form which is delivered to the registrar and is retained and registered by him, and it is that form, and no other, which constitutes the charter of the company and becomes binding on it and its members. The essence of this statutory contract is to bridge the gap arising from the transition

[4] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtusinterpress.orgpdf> assessed on 11th August, 2019

from companies created by the deed of settlement (which was usually endorsed by all the members) to those created by mere registration which was first witnessed under the UK Joint Stock Companies Act of 1844. New members could join companies created by registration by obtaining the company's shares either by a transfer from existing members or from the company itself. Those new members who would not have signed the registered contract contained in the deed of settlement must also be bound by the terms of the contract. This could only be attained by the force of legislation. Company's constitution featured for the first time as statutory document in the UK Joint Stock Companies Act of 1856. The 1856 Act created two of such documents known as the memorandum and articles of association respectively. Successive UK Companies legislation has continued to adopt that trend until recently when the memorandum started witnessing a diminishing status. South Africa has merged both constitutional documents under the old law and presently refers to them simply as the Memorandum of Incorporation. However, in Nigeria, both the memorandum and the articles still enjoy equal importance. The determination of the scope and enforceability of the contract contained in the constitution have continued to witness discombobulated judicial and academic opinions. The legislative interventions in the respective jurisdictions have seemingly resulted in a significant shift, bordering on clarity, from the complex and economically worded provisions of the earlier statutes. This might lead to the abatement of some aspects of the debated issues, but the inherent inadequacies in some of the provisions may not guarantee any level of consistency in dealing with some of the issues in the near future.[5]

The memorandum is the most fundamental document as is reflected in the case of Guiness v. Land Corp. of Ireland (1882,22Ch.D,349), where it was held that if there is any conflict between the terms of the memorandum and the articles, those of the memorandum shall prevail and by statutory provisions such as the Companies Act of 1985, section 125 which makes it possible to entrench rights by writing them into the memorandum with a prohibition or restriction on their alteration. Whilst the memorandum proclaims the world the external aspects of its constitution, the articles are concerned with matters of internal organization which are primarily of interest to

[5] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

its own members and officers for example the procedure for paying the subscription price for shares, and directors meetings, the appointment, removal of, remuneration of directors and the payment of dividends.[6]

Thus, the articles determined how the power conferred on a company by the memorandum of association shall be exercised. The court in Ashbury Railway Carriage & Iron Co Ltd v. Riche (1875CR,7HL653), held that the memorandum is at it was, the area beyond when the actors of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit. In Ashbury v. Watson (1885,CH.D476), it was held that the articles are subordinate to the memorandum in the sense that they cannot confer wider powers than the memorandum and any alteration to the articles which conflicts with the memorandum is void to the extent of the conflict. The articles cannot be resulted to, to fill in gap in the memorandum in respect of any matter which by law is required to be in the memorandum. The courts regard articles as commercial documents and apply a liberal construction to them. Jenkins in Homes v. Keyes (1959,Ch199 at 215,CA,) described their approach to wit that the articles of association of a company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible in the language of the articles, in preference to a result which would or might prove unworkable.[7]

Form and Content of an Article of Association In Nigeria

The form and contents of articles of association as stated in the Nigeria Companies and Allied Matters Act 2004, unveils the form and contents of articles of association of a public company having a share capital, a private company having a share capital, a company limited by guarantee and an unlimited company with such additions, omissions or altercations as may be required in the circumstance. In the case of a company limited by guarantee, the articles of association shall state the number of members with which the company proposed to be registered for the purpose of enabling the commission to determine the fee payable registration.(Companies and Allied

[6] Dr. Agbonika John Musa, et al, "*The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria"* (2014) Vol. 28< www.iiste.orgpdf> assessed on 7th August, 2019

[7] *ibid*

Matters Act,2004).[8]

Thus the articles of association shall;

(a) be printed and

(b) be divided into paragraphs numbered consequently; and

(c) be signed by each subscriber to the memorandum of association in the presence of last one witness who shall attest. The article shall have a stamp as if they were contained in a deed.

Legal Effects Of Articles Of Association At Common Law

The legislation on company's constitution in different jurisdictions have consistently, but differently, embodied provisions reflecting the various relationships among persons involved in the conduct of the company's affairs such as members/shareholders, directors/officers and the company itself. Those relationships are usually generally depicted contractually without laying down rules of enforcement. Thus the debate on the contractual effect of the company's constitution has continued to revolve around the extent and the enforceability of the contract created by the constitution. Successive companies' legislation in jurisdictions under consideration have attempted to narrow down the level of disagreement by introducing different words and phrases to ensure some level of clarity and certainty on the legislative intent. The extent of those innovations or improvements could be appreciated by comparing the expressions employed in the extant provisions with those they immediately replaced.[9] For instance, S14(1) of the UK Companies Act of 1985 provides as follows:

Subject to the provisions of this Act, the articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenant on the part of each member to observe all the provisions of the articles.

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[8] Dr. Agbonika John Musa, et al, "*The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria"* (2014) Vol. 28 www.iiste.orgpdf assessed on 7th August, 2019

[9] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

The first controversy raised by this provision relates to the parties to the contract contained in the constitution. The law says that the articles bind the company and its members, but is silent on the signing and sealing of the articles by the company in the same manner as the members are deemed to have done. This would naturally raise the question as to why the company, a juristic person, should be bound by a contract which it is not deemed to have signed and sealed in the same manner as the members. Hence Mellish LJ in Re Tavarone Mining Co, Pritchard's case (1873) LR 8 Ch App 956 at 960 (CA), while pronouncing on the scope of the contract created by the earlier version of that provision as contained in the Joint Stock Companies Act of 1856, stated that "the articles of association are simply a contract as between the shareholders inter se in respect of their rights as shareholders." But there is also every reason to doubt whether that is what is intended by the legislature. The constitution is the document of the company and the company is the only constant figure in the making and implementation of the constitution. It would as such be absurd to exclude the company from the effect arising from the application of the constitution. Thus, the courts have, after that initial prevarications, by sheer exhibition of pragmatism, filled the gap in that provision. This was evident in the judgment of Stirling J in Wood v Odessa Waterworks Co (1889) 42 ChD 636 at 642 (Ch) where the judge held that "the articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other." Farwell LJ in Quin and Axtens Ltd v Salmon (1909) 1 Ch 311 at 318 (CA) approved of Stirling J's expatiation of the contractual scope of the constitution as the true statement of the law. This aspect of the debate is now fairly addressed under s 33(1) of the UK Companies Act 2006 which provides as follows:

The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions. The provision, which enjoys the qualities of precision and brevity, captures the scope of the contract contained in the constitution. It is a contract between the company and its members, and contract between the members inter se[10]. The concise statutory restatement of the law eases the burden which the courts have borne over the years in searching for an ideal

[10] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

interpretation of the successive provisions in this regard. The reform in the United Kingdom company's legislation is attributed to the initiative of Lord Wedderburn of Charlton whose writings on, and criticisms of, the old law have rattled the judiciary and sparked quality discussions in the academic circle.

The UK Companies Act reform did not address other arms of the controversy relating to the capacity in which a member could enforce the contractual rights in the constitution, and the ancillary question as to whether a member qua member can enforce every provision of the constitution The courts have in the majority of the cases construed the contractual provisions of the constitution as restricted to those relating to the relationships of members in their capacity as members. Any rights conferred on a member in any other capacity other than that of a member is seen by the courts as 'outsider' rights. Such 'outsider' rights are not enforceable under the statutory contract contained in the constitution. This judicial approach was precisely captured by Astbury J in Hickman v Kent or Romney Marsh Sheep-Breeders Association (1915) 1 Ch 881at 897as follows:

An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contract between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such person and the company, and the subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article.[11]

Lord Wedderburn expressed doubts on the accuracy of some aspects of these decisions. He buttressed his stance with the House of Lords decision in Quin and Axtens Ltd v Salmon in which Salmon sued as a member to enforce a provision in the constitution of the company which conferred right on him as a director. The House of Lords affirmed the decision of the Court of Appeal granting an injunction against the company and its directors preventing them from acting

[11] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

contrary to the provisions of the constitution. Wedderburn, drawing an inference from that decision, said:

The proposition is that a member can compel the company not to depart from the contract with him under the articles, even if that means indirectly the enforcement of "outsider" rights vested either in third parties or himself, so long as, but only so long as, he sues qua member and not qua "outsider".

Wedderburn's proposition is at least clear on the fact that a member's right of action lies in his capacity as a member and not as an 'outsider'. This lies in his observation that "Salmon sued as a shareholder to protect a right personal to him, but common to all the members. Hence the representative action." It is not in dispute that the primary purpose of Salmon's action in that case was not to enforce his 'outsider' right (a right conferred on him as a director) the enforcement of which was merely incidental ('indirectly' as stated by Wedderburn) to the primary cause of action which is the breach of the provisions of the company's constitution. But whether a member can, in the light of the modern statutory provisions strengthening the company's right of action and only concessionarily creating room for members through the device of derivative action, successfully maintain such an action is doubtful. An injury which is common to all the members and arising from a breach of the company's constitution, is an injury to the company which only the company could seek redress or a member through the procedure of derivative action.[12]

Lord Wedderburn did not, however, address the issue as to the propriety or otherwise of treating the directors as outsiders to a contract statutorily created by the company's constitution. Professor Gower believes that this is an anomaly as in most cases the law treats the directors as "insiders' which members as such are not. The directors, both individually and collectively, navigate the corporateship in the exercise of their powers of corporate governance. A good number of them know the company from its origin and played different roles in bringing the company into existence. Some of them were involved as promoters in the preparation of the

[12] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

company's constitution and as such familiar with the company's operation from inception. They are trustees of the company's assets and powers, hence the law imposes on them fiduciary duties and duties of care and skill demanding from them the exhibition of due diligence in the conduct of the company's affairs. Individual members of the company, in their capacity as such, are mere investors whose interests are mostly financial bordering on the expected returns on their investments. They rarely get involved in the company's operations and sparingly attend company's meetings. There is thus a strong case for the directors to be treated as insiders to the statutory contracts. Although there are a few instances in which the courts have alluded to the existence of, and upheld the contractual relationships between the company and the directors under the constitution, the fact that the majority of the cases have treated the directors as outsiders is inconsistent with the preeminent position of the directors in the corporate scheme. While the UK parliament failed to address this issue in 2006 Companies Act, Nigeria and South Africa have commendably done so.[13] At common law, the articles when registered bound the company and the share holders to the same extent as if each shareholder had subscribed his name and affixed his seal thereto or otherwise executed the same. Thus it constitutes a contract between the company and each member and each member in his capacity as member is bound to the company by the provisions in the article. All monies payable by any member shall be a debt due from him to the company.

In England and Wales, it shall have the nature of a specialty debt. It means that there exists a statutory contract resulting thereto. That it constitutes a contract between the company and its members and the company's business must be conducted in consonance with their articles of association.[14] In Hickman v. Romney Mash Sheep Breeders,(1938,CH,708) the articles provided for the reference of disputes between members and the company to arbitration in the first instance. Hickman a member brought an action against the company in court, the company applied to the court for a stay of proceedings on the ground that Hickman was bound by the agreement contained in the articles. The court ordered a stay of the action on the ground that

[13] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

[14] Dr. Agbonika John Musa, et al, "*The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria"* (2014) Vol. 28 www.iiste.orgpdf assessed on 7th August, 2019

members are bound to observe the provisions of the articles in their transactions with the company.

Secondly the articles are by reason of case law a contract between the members themselves. Thus one member can sue another if that other fails to observe a provision in the articles, there is no need to call upon the company to sue. In Rayfield v. Hands (1876,134D88), the articles of a private company provided by article that every member who intents to transfer his shares shall inform the directors who will take the said shares equally between them at a fair value. The plaintiff held 725 fully paid shares of $1 each and he asked the defendants, the three directors of the company to buy them but they refused. He brought this action to sue upon the contract created by the articles without joining the company. It was held that the directors were bound to take the shares.

Thirdly no right given by the articles to a msember in a capacity than that of member for instance, as Solicitors can be enforced against the company. The articles is seen as a contract not with outsiders but merely with the members in respect of their rights as members. However a provision in the article can become part of a contract between the company and a member or outsider in the following ways:-

(a) Where there exist an express contract and a provision in the article expressly incorporated into the contract by a provision therein.

(b) Where a provision in the articles is incorporated by implication arising out of the conduct of the parties, or where an express contract between the parties is silent on a particular aspect. In the case of a director, the length of his appointment, in such a case reference may be made to the articles to fill the gap, if it contains a relevant provision.[15]

Again the article do not perse constitute an enforceable contract between a company and an outsider. Outsider means a person who is not a member or a member acting in a capacity other than that of a member. Any right claimed by an outsider, must be conferred by a separate contract or relationship outside the articles.

However in Swabey v. Post Darwin Gold Mining Co. (1970,NWLR,PT.145,SC422), the courts were prepared to imply an extrinsic contract of service upon the terms of the article. A clause

[15] Dr. Agbonika John Musa, et al, "*The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria"* (2014) Vol. 28 www.iiste.orgpdf assessed on 7th August, 2019

providing for exclusion, if in the original article will be regarded as falling within the contract and the rules of natural justices will not necessarily be implied.

The Legal Effects Of An Article Of Association Under The Nigerian Companies & Allied Matters Act, 2004.

In Yalaju Amaye v. A.R.E.C.(1994,NWLR,PT.357), the court held that a memorandum and articles of the company bind the company and the managing director for the documents constitute a contract between them. In the same case, Karibi white further stated that the power to appoint a director can only be exercised where there is an enabling provision in the articles. The court in Omenka v. Morison Ind Corp.(2001,12NWLR PT.729), held that a director of a company can be removed from office. The mode of removing a director may however be spelt but in the articles of association concerned. In the absence of such provision in the articles of association, a resort may be had to the Companies and Allied Matters Act.

To further buttress the import of an article of association on a company, the removal of a director of a company not in accordance with the memo and articles of association of a company is illegal. In the wordings of section 41(1): Subject to the provision of the act, the memorandum and articles of association when registered shall have the effect of a contract under seal between the company and it's members and officers and between the members and officers themselves whereby they agree to observe and perform the provision of the memorandum and articles as altered from time to time in so far as may relate to the company, members or officer as such.[16]

Section 41 (3) provides that where the memorandum or articles shall be enforceable by that person notwithstanding that he is not a member or officer of the company. The rationale for this provision perhaps is to protect persons who set up a company and call upon other persons to manage it for and on their behalf.

Section 41(4) provides that in any action by any member or officer to enforce any obligation owed under the memorandum or articles to him and any other member or officer, such member or officer may, if any other member or officer is affected, by the alleged breach of such obligation with his consent, sue in a representative capacity on behalf of himself and all other

[16] Dr. Agbonika John Musa, et al, "*The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria"* (2014) Vol. 28 www.iiste.orgpdf assessed on 7th August, 2019

members or officers who may be affected other than any who are defendants and the provisions of part ix of this act shall apply.

This section in effect expressly allows any member or officer to initiate proceedings in a representative capacity as a means of restraining corporate irregularities. To appreciate S. 41 of the Companies and Allied Matters Act 2004, it is pertinent to note the fact that it replaced S. 16 of the 1968 Companies Act and in the words of Lord Greene in Beatle v Beattle Ltd, it has been "the subject of considerable controversy in the past and it may well be that there will be considerable controversy about in future,". One of the enviable innovations in section 41 is the fact that "officers" are being bound by the articles of association and section 650 defines officers to include a director, manager or secretary. From this definition it means cases decided on directors at common law would be decided differently today meaning that they do not have to rely on a separate and independent contract of service before they can enforce their rights. They can rely on section 41 of the Companies and Allied Matters Act 2004, since by virtue of the definition of an officer under section 650, directors are included. So directors can now be bound for contracts entered into by them. But one who sues as a solicitor as the case of Eley v Positive Life Assurance ltd, would be regarded as an outsider. The question is will a solicitor come within the purview of section 650 of the Companies And Allied Matters Act, 2004? This shows that a solicitor may be included in the definition section; but the danger in the approach is that it offends another rule of interpretation of statues- expression unions est exclusion i.e. mention of certain things means the exclusion of all other things not mentioned. And also section 650 of the Companies and Allied Matters, Act 2004, is supposed to be treated as being open-ended, so as to include categories of persons not contemplated as officers.[17]

Critique Of The Effect Of The Company's Constitution In Nigeria, United Kingdom And South Africa

The Nigerian Companies and Allied Matters Act 2004 (CAMA) provides in s 41(1) as follows: Subject to the provisions of this Act, the articles, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members

[17] Dr. Agbonika John Musa, et al, "*The Legal Effects of Articles of Association of a Company: Perspectives on Corporate Governance in Nigeria"* (2014) Vol. 28 www.iiste.orgpdf assessed on 7th August, 2019

and officers themselves whereby they agree to observe and perform the provisions of the articles, as altered from time to time in so far as they relate to the company, members, or officers as such.[18] The South African Companies Act of 2008 moved a step further in bringing in more contracting parties within the provision. Section 15(6) of the Act provides as follows: A company's Memorandum of Incorporation, and any rules of the company, are binding -

(a) between the company and each shareholder;

(b) between or among the shareholders of the company; and

(c) between the company and -

(i) each director or prescribed officer of the company; or

(ii) any other person serving the company as a member of the audit committee or as a member of a committee of the board, in the exercise of their respective functions within the company.

The explicitness of the South African provision has not, however, spared it from criticism. The argument is that the absence of the word 'contract' in describing the relationships between the parties as set down in the provision could create some doubts as to the nature of the relationships envisaged by the statute. Although the inclusion of the word 'contract' would have guaranteed greater clarity of the parliamentary intention, the absence of such word does not, however, seem to have done any harm to the provision. The words 'binding' and 'between' as used in the provision significantly point to the parliamentary intention which is the creation of contractual obligation.

In both Nigeria and South Africa, directors are no longer 'outsiders' to the contract contained in the company's constitution. Thus, they could in their capacity as directors enforce the provisions of the constitution conferring rights on them in that capacity in the same manner as any obligations imposed on them by the constitution could be enforced by the company against them. The reference to 'officer' in the provisions of both jurisdictions respectively takes the capacity of the contracting parties beyond that of the directors and could include the managers, secretary and even solicitors of the company. Cases such as Eley v Positive Government Security Life Assurance Co Ltd and Browne v La Trinidad which failed under the old English statute (and are

[18] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

very likely to attain the same result under the present UK Companies Act) because the actions were respectively initiated in capacities other than that of member, would most certainly be decided differently under the present laws of Nigeria and South Africa respectively.

The realisation that the statutory contract embodied in the company's constitution is, among others, a contract between members inter se, ordinarily suggests that a member could in that capacity sue every other member to compel compliance with the provisions of the constitution. The judicial position, however, suggests that the right of action by a member should be exercised through the company. Lord Herschell in Welton v Saffery emphasised that the right conferred on a member by the constitution can only be enforced through the company or through the liquidator representing the company. In Rayfield v Hands Vaisey J was disposed to allowing a direct personal action by a shareholder against the others but not without a caution where he said: I am encouraged, not I hope unreasonably, to find in this case a contract similarly formed between a member and member-directors in relation to their holdings of the company's shares in its articles. The conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership.[19]

The decision was influenced by the size of the company and the perceived personal relationships that prevailed among the members of the company which invokes the intervention of equity where the conduct of some members is seen as being unfair to others. It is thus an exceptional situation restricted to the peculiarities of the case, and may not be applied in a general commercial relationship among members of a company. This judicial approach to the enforcement of the statutory contract by shareholders is rooted in the unwillingness of the courts to interfere in matters of internal management of the company. James LJ in MacDougall v Gardiner said:

Nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal,

[19] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

oppressive, or fraudulent unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company, if the company really desire it.

There is substance in classifying shareholders dispute as internal dispute, but to suggest that such disputes, where they arise, cannot be subject of litigation between shareholders inter se defeats the essence of the statutory contract as embodied in the company's constitution. Any dispute between shareholders that boarders on illegality, oppression, fraud or ultra vires should rightly be litigated through the company, as in those circumstances the company as a juristic person is directly affected. But it is not every dispute between shareholders that bear such characteristics. Rayfield v Hands is a good example where the dispute borders on the refusal of the directors/members to take a transfer of shares from a member as provided in the company's constitution. There was no illegality, oppression, fraud or ultra vires in the refusal to take a transfer of shares but a simple breach of contract. It would be absurd in such an instance to insist that the right of an aggrieved member could only be vindicated through the company. In Union Music Ltd v Watson Peter Gibson LJ suggested that the statutory contract which is binding between members inter se cannot be treated differently from the shareholders' agreement where he said:

In this context it is to be borne in mind that by section 14(1) of the Act 1985 Companies Act, the memorandum and articles bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and articles. For my part, I have difficulty in seeing how an agreement constituted by the statutory deeming provision is to be treated in any way differently from an express agreement, such as a shareholders' agreement, containing a quorum provision. Both have effect as contractual agreements as between the shareholders.[20]

[20] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

Lord Davey had in Welton v Saffery accepted that individual shareholders may deal with their own interests by contract in such a way as they may think fit, and that "such contracts, whether made by all or some only of the shareholders, would create personal obligations, exceptio personalis against themselves only." In Russell v Northern Bank Development Corp Ltd and Others Lord Jauncey of Tullichettle explained Lord Davey's decision as an acceptance that shareholders may lawfully agree inter se to exercise their voting rights in a manner which, if it were dictated by the articles, and were thereby binding on the company, would be unlawful. His Lordship, while according judicial validity to the shareholders' agreement in that case, said: "this agreement is purely personal to the shareholders who executed it and as I have already remarked does not purport to bind future shareholders. It is, in my view, just such a private agreement as was envisaged by Lord Davey in Welton v Saffery".

The point made here is that the courts duly recognise the similarity between the shareholders contract as contained in the company's constitution and the shareholders' agreement. They also uphold the enforceability of the latter as between shareholders. Why not accord the same judicial force to the former? The House of Lords' decision in Russell indicates that the inclusion of the company in the shareholders' agreement could render such an agreement unenforceable. Insisting therefore that the contract between shareholders inter se as contained in the constitution can only be enforced by the shareholders through the company is prejudicial to the shareholders[21].

Conclusion

The articles of association remain one of the main organs of a company and it binds the company, the members and the members qua members and as such its import in the existence of a company remains immeasurable. The statutory provision on the effect of the company's constitution under the UK Companies Act of 2006 has now, in line with the trend in Nigeria, and lately South Africa, cleared up the doubt relating to the parties to the contract contained in the company's constitution. This is now explicit the contract is created between the members interse, and between the members and the company. The UK Companies Act, however, failed in a material

[21] Anthony O. Robert, "Revisiting the Contractual Effect of the Company's Constitution in Corporate Operations" (2016) Vol. 13 Issue 4 <www.virtuinterpress.orgpdf> assessed on 11th August, 2019

respect in this reform in that the Act still treats the directors as ‘outsiders’ to the contract contained in the constitution. Thus, under the existing provision in the UK statute, the directors are still constrained; they cannot enforce any provisions in the constitution giving them rights in their capacity as directors in the same manner as members could enforce such provisions. The important position occupied by the directors in the corporate operations contradicts the position of the law in treating them as outsiders. On the other, hand the law recognises the vital role of the directors by imposing on them fiduciary duties and demanding of them extra diligence in the discharge of their responsibilities to the company. Members as such, are investors, interested mainly on the returns on their investments. Their actions in most cases are informed by individual interests. While not suggesting that there is anything wrong in the law that protects members’ rights of membership in the company, the exclusion of the directors from enjoying similar protection in the corporate scheme is hard to justify. Nigeria and South Africa have now extended both the benefits and obligations arising from the statutory contracts contained in the constitution to the directors and other officers of the company.