COMPARATIVE EVALUATION OF DIVISION OF POWERS BETWEEN BOARD OF DIRECTORS AND SHAREHOLDERS IN GENERAL MEETING: NIGERIA,GERMANY, FRANCE AND UNITED STATES.

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ABSTRACT

Constitutional provisions generally vest management power in the board of directors and courts have interpreted these provisions as establishing board supremacy in managing the company. In **John Shaw & Sons (Salford) Ltd v Shaw**[1], the English Court of Appeal stated that shareholders unhappy with the way that the board is exercising its management power should either change the allocation of power in the company's constitution or replace the directors. There are a number of legal obstacles to reallocating constitutional power, unless all that is desired is to give the general meeting a veto power. In contrast, the power to replace the board or some of the directors is more straightforward, but requires sufficient voting power and the will to use it, either directly or indirectly.

1.0 INTRODUCTION

The principle of division of powers aims at separating the ownership and control between the shareholders and directors in a company. Historically, the directors have been viewed merely as agents of the shareholders of the company with whose actions they were to comply with. Later, the law moved towards the decline of the powers of the shareholder thereby making both the shareholders and directors an integral part of the company and they both having substantial roles in handling the company's affairs. The division of power between the board of directors and the general meeting of members has been relatively settled in Anglo-Australian law since the decision of Lord Clauson in **Scott v Scott**[2] in 1943. This case considered the interpretation of the then default constitutional provision[3] regarding management of a company, which gave management power to the board of directors, subject to regulations passed by the general meeting. The Court read down the general meeting's power to interfere with board decisions by regulation and held that board power in this situation is paramount.

Since then – the default constitutional provisions have been changed in Australia and the United Kingdom to further entrench the management role of the board. In Australia there is no longer any mention of the general meeting in the replaceable rule in **S.198A** of the Corporations Act 2001

[1] (1935) 2 KB 113

[2] [1943] 1 All ER 582. See also Leigo v Berner [1976] 1 NSWLR 502; Breckland Group Holdings Ltd v London and Suffolk Properties Ltd (1988) 4 BCC 542.

[3] Companies Act 1929 c 23, sch I, Table A, art 71.

(Cth), which simply provides that the company is to be managed by or under the direction of the board. It went further to state that the Directors may exercise all the powers of the Company except any power that the Act or the Company's constitution (if any) requires the Company to exercise in general meeting. In the UK, Table A[4] does not go quite as far, in that it still refers to the possibility of the general meeting giving a direction to the board, but this must be done by special resolution.

What then are the options for shareholders who are unhappy with the management of companies in which they have invested? The Court of Appeal said in **John Shaw & Sons (Salford) Ltd v Shaw**[5] that shareholders unhappy with the board's exercise of management power should either alter the articles of the company (now constitution) or refuse to re-elect the directors of whose actions they disapprove.

This paper is going to discuss the powers granted to the Board of Directors by statutes and the Articles of Association of the Company and how to check these powers by the shareholders of the Company. The paper is also going to look at wherther the shareholders can intervene in the duties of the Board of Directors. What the shareholders should do in the vent that there is deadlock amongst the Board of Director in the interest of the Company. The division of power between the Board of Directors and the Shareholder will also be considered in other jurisdictions like the United States of America, Germany, France, Canada and India.

3.0 POWER(S) OF BOARD OF DIRECTORS

The directors of a company collectively constitute the Board of Directors through which they generally carry out such responsibilities as ensuring the effective management of the company and upholding the standards of good corporate governance. By the provisions of the Code of Corporate Governance for Public Companies in Nigeria issued by the Securities and Exchange Commission

[4] Companies (Model Articles) Regulations 2008 reg 4, sch 3, in relation to public companies limited by shares. (Schedules 1 and 2 make identical provision in relation to private companies limited respectively by shares and guarantee). These articles come into force on 1 October 2009, but essentially replicate Companies (Tables A to F) Regulations 1985 (SI 1985/805) reg 70.

[5] See note 1

(SEC Code), the Board has an important duty of protecting and enhancing shareholder value while guiding the company to meet its obligations.

The Board derives its powers from the company particularly as stated in the Articles of Association of the company. The directors constituting the Board therefore stand in a fiduciary relationship towards the company and must exercise a duty of care, skill and diligence in the discharge of their duties. By **S. 283(1)** CAMA,[6] directors are the trustees of the company as well as its agents. As part of their fiduciary duty, directors must exercise their powers for the purposes for which they were conferred and to benefit the company. Otherwise, they will be viewed as exceeding their powers and may therefore be liable accordingly.

The Board generally has the power to determine the company's vision and mission, to guide and set the pace for its operations and future development, determine and review company goals and policies, set the organizational structure, determine the corporate strategy as well as the business strategies and plans that support the corporate goal; and to determine the right caliber of persons to be employed to implement the company's strategies.

Under the SEC Code,[7] powers that may be exercised by a Board in the exercise of its duties include the formulation of policies and overseeing the management and conduct of the business, succession planning and the appointment, training, remuneration and replacement of board members and senior management, overseeing the effectiveness and adequacy of internal control systems, overseeing the maintenance of the company's communication and information dissemination policy, performance appraisal and compensation of board members and senior executives, ensuring effective communication with shareholders, ensuring the integrity of financial reports, ensuring that ethical standards are maintained, and ensuring compliance with the laws of Nigeria. As is usually the case, the Board can delegate its powers to the Managing Director and/or to certain committees but ultimately the Board remains responsible for the actions and decisions taken.

[6] Companies and Allied Matters Act, Cap 20, 2004
[7] Code of Corporate Governance 2016

4.0 CHECKING ABUSE OF POWER BY THE BOARD OF DIRECTORS

The Board of Directors has a responsibility of ensuring transparency and accountability in the management of a company. There have however been instances where members of the Board failed to carry out their responsibility in this regard. In 2001, Enron Corporation, an energy company in the United States of America saw its shares plummet from about $90 to less than $1 following the failure of the board of directors to address accounting and financial malpractices in the company. The company had created a chimerical reality by falsifying profits and hiding its losses to create an inaccurate appearance of financial buoyancy to shareholders. The energy company ultimately crumbled and filed for bankruptcy in November 2001, becoming the largest bankruptcy in American history. Another American company, WorldCom, which was at the time the world's second largest telecommunications company similarly filed for bankruptcy in 2002 after the disclosure of massive accounting irregularities and the failure of the Board to uphold corporate governance.

A number of companies have also crumbled in Nigeria due to the absence of checks on the powers of some directors and the complicity of members of the Board. Companies regularly cited to fall within this category are drawn from banking, insurance and the media sectors among others and include Intercontinental Bank, Oceanic Bank, BankPHB, Afribank, Spring Bank, Lion of Africa Insurance, Societe Generale Bank Nigeria, Mtel, Kaduna Textile Mills, Nigeria Airways, Concord Group, HITV and NEXT newspapers. In some instances, directors were alleged to be reckless with investors' funds, neglected due processes and took biased decisions. Such glaring abuse of power could only lead to the downfall of the company and many agree that Cadbury only managed to avoid a similar fate because the Board of Directors acted just in the nick of time.

In the case of Intercontinental Bank Plc which was a large financial services provider in West Africa as of December 2008 when the Shareholder's equity was valued at approximately NGN 261 billion but when a special audit of the commercial banks in Nigeria was done by the Central Bank, Intercontinental Bank Plc was found to be under-capitalized and badly managed due to issuance of unsecured loans by the Board of Directors. The above led to the acquisition of 75% of the shares in Intercontinental Bank by Access bank. In a more recent case of Diamond Bank Plc

which has also been merged with Access Bank Plc due to Non-Performing Loans granted by the Board of Directors.

As a remedy, directors need to set up monitoring and regulatory compliance units within their establishments and heed to the advice provided by such units on the different actions of the board. Directors are further encouraged to create an in-house audit unit or a system of accountability whereby the company's financial records are reviewed regularly.

Beyond promoting an auditing culture within the company, directors must equally be willing to subject themselves to other control measures within the company's structure. Directors may do well to be reminded that shareholders and other stakeholders may be able to alert industry regulators and approach the court under the right circumstances where abuse of powers subsist or persist.

5.0 SHAREHOLDERS INTERVENING WITH THE DUTIES OF DIRECTORS

The legal powers to act on behalf of the company is available to the board of directors and these powers are fused with that of the company and are not allowed to exercise any activity the company cannot perform.[8] They are subject to the restrictions that the company's constitution places on the company. A common situation where there might be an intervention of powers of the director by shareholders is in a case involving the use of the company name in litigation. This can be found in article 3 of the model articles for both private and public companies.[9] The decision to start or end a legal proceeding falls under the general powers of management of the company's business and these powers are reserved for the directors.

Although it has been expressed in the model articles, this area of law has been somewhat controversial. One of the leading cases here is **John Shaw & Sons Ltd v Shaw**,[10] where **Greer L. J** stated that "If powers of management are vested in the directors, they and they alone can exercise power." His decision here means that the directors exercised their powers properly and that the general meeting could not usurp this power. Critics of the rule of division of powers have considered the view of Judges in older cases such as **Marshall's Valve Gear Co Ltd v Manning**

[8] John Davies, A guide to directors' responsibilities under the Companies Act 2006, Certified Accountants Educational Trust, July 2007
[9] SI 2008 No. 2860 (C. 126)
[10] See note 1

Wardle and Co Ltd[11] where the members of the company made a claim in the company's name and the directors disagreed with their resolution and tried to strike out their claims but were not allowed. Based on the Companies Clause Consolidation Act 1845 governing statutory companies, Neville J concluded that the members had the power to make a claim in the company's name, with the aim of preventing directors from acting in a conflicting manner to the member's ordinary resolution.

Generally, where directors are suspected of having acted beyond their powers, only the company itself and not its Directors or Shareholders can approach a court to contest a wrong done to the company or ratify an irregular conduct. This principle was laid down in the landmark case of **Foss v. Harbottle**[12] but has been statutorily enshrined in Section 299 of CAMA.[13]

There are however some exceptions to this rule especially necessary where the Board having been the perpetrators of an abuse would clearly not approach the court, examples of these exceptions include: entering into illegal or ultra vires transactions; purporting to do by ordinary resolution any act which should be done by special resolution; and where the Directors are likely to derive a profit or benefit, or have profited or benefited from negligence or from breach of duty

Where a shareholders right has been violated and he intends to pursue an action in court, remedies available to such shareholders include the following: an order for injunction against the Director/ company, compensation and/ or damages in consideration of the loss suffered by the shareholder, restoration of the company's property, and rescission of the contract.

Pursuant to Section 262 of CAMA on the removal of directors which has been reiterated by the Supreme Court in **Bernard Longe v First Bank of Nigeria**[14], shareholders may also be able to remove directors at a general meeting by a special notice of a resolution for the removal of a director which will be followed by a representation by the concerned director. This might be called their most important power which is the fundamental right of the shareholders to dismiss the directors by an ordinary resolution. The purposes of these actions are to provide a guarantee that

[11] Marshall's Valve Gear Co Ltd v Manning. Wardle & CoLtd [1909] 1 Ch 267
[12] (1843) 67 ER 189
[13] See note 6
[14] (2010) 6 NWLR (Pt. 1189) 1

the shareholders can dismiss directors by an ordinary resolution and for the purpose of providing justice to the directors.

In **Bernard Longe v First Bank of Nigeria** case, the Managing Director of First Bank Plc was removed at a Board of Directors' meeting which he was not notified of. Mr, Bernard filed an action in court for declarations that the Board meeting held without notifying him was wrong. Also that any purported decisions reached at the meeting cannot be acted upon. The matter went all the way to the Supreme Court which eventually held that: ''The removal of the plaintiff as Managing Director/Chief Executive of the defendant without a notice to him to attend the meeting at which the decision was taken is a clear violation of Section 266(1) and (2) of the Companies and Allied Matters Act; and such violation must attract the penalty prescribed by law under Section 266(3). The said meeting is under the law invalid. I so pronounce it. I declare that the removal of the plaintiff is not in accordance with law. The plaintiff must be deemed to be still the Managing Director/Chief Executive of the defendant.''

The view that the shareholders can dismiss the director was supported in John Shaw case in the words of Greer LJ saying, "the only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or if opportunity arises under the articles, by refusing to re-elect the directors whose actions they disapprove."[15] This process requires a special notice given to the directors as an opportunity for them to defend their case to the general meeting. These powers are very important to the shareholders as this means they have an effective method of handling the companies polices and activities of company's directors.[16] This is necessary as it provides the directors with a good reason to serve the best interest of the company after they have been appointed.

When there is an issue to be brought before the court, can the shareholders make a suit? The answer to this question was settled by the Rule in Foss v Harbottle[17] and this leaves a negative answer subject to certain exceptions. The rule states that the court does not have the jurisdiction to

[15] See Note 1

[16] Farouk HI Cassim, The Division and Balance of Power between the Board of Directors and the Shareholders: The removal of Directors, Banking & Finance Law Review 29 B.F.L.R. p. 154

[17] See Note 12

interfere with the internal affairs of the company and in order to redress a wrong done to the company it should be brought by the company itself.[18] The rule makes provision for the directors or the majority shareholders at the expense of the interest of the minority shareholders. When the minority shareholder tries to bring a case to the court concerning wrongs done to the company, he is met with the defence that the company is the proper plaintiff or that it is a matter of internal management.[19] There are exceptions to the Rule in **Foss Case** and these rules were made to give the minority shareholders a chance to institute legal proceedings. The first exception to the rule is that of Ultra Vires and Illegality, where the act complained of is wholly ultra vires the company or association.[20]

In this situation, a shareholder can bring action to the court when an illegal or some ultra vires act occurs. The shareholder can take an action for a declaration or injunction to retrain the act in question, for himself or he could represent the other shareholders on his side of the argument. The second exception is that on Special Majorities, "Where the issue is such that it could not 'validly be done or sanctioned by a simple majority of the members…but only by some special majority".[21] In the case of Edwards v Halliwell,[22] the trade unions rule required a two-thirds of majority of the members to increase subscription but they purported to do it by ordinary resolution.

Jenkins L.J considered that a company in which its directors had broken the company's regulations by performing an act that requires validation by a special resolution without one will not be shielded by the rule in Foss v Harbottle.[23] In the decision in **Quin and Axtens, Ltd. V. Salmon**,[24] the rule in Foss was set aside, in this case the Article 80 provided that any resolution concerning the acquisition and letting of premises, should not be valid unless a notice has been given to each managing director. Salomon dissented from the decision of the directors but a simple majority of the shareholders passed a resolution confirming the decision. It was held

[18] Wedderburn, K.W., 1957. Shareholders' rights and the rule in Foss v. Harbottle. The Cambridge Law Review, 15(1), 195

[19] Griggs, Lynden (1993) The relationship of the rule in Foss v. Harbottle to the statutory remedies for minority shareholders. Research Master thesis, University of Tasmania. pp. 22

[20] Wedderburn, K.W, p.203

[21] Griggs, Lynden (1993) pp. 23

[22] (1960) 2 All ER 1064

[23] Wedderburn, K.W, p.207

[24] (1909) AC 442

that Salomon had the right to an injunction to restrain the directors and the company from acting in a contrary manner to the provisions of the article, on behalf of himself and other shareholders on his side.

The third exception to the rule is that of Personal rights, where" the personal and individual rights of membership of the plaintiff have been invaded," the Rule" has no application at all." The shareholders have right which are pulled out from the article of association and some of these rights are statutory which arise from the Act. In the case of **Edwards v Halliwell,**[25] the court established that every shareholder of the company had personal right to prevent adjustments in rates of contribution to the trade union and in the case of **Pender v Lushington**,[26] the articles enforced the right of shareholders to vote on company affairs, whether he votes in favour of the majority or minority, and an individual can sue in respect to this right. The last exception to the rule for consideration here is "Fraud" by those in control.

This involves actions carried out that amount to fraud which is usually done on the minority shareholders, which is caused usually by an abuse of power by the directors. The exception here has been made to protect the minority shareholders in which they can bring a minority shareholder action to the court on their behalf and on the behalf of other shareholders. Fraud can also constitute to what the general meeting cannot ratify. When a breach in fiduciary duties occurs, and cannot be ratified by the by the director it means that the director has acted in bad faith. If a negligent act by the wrongdoers is benefited from, the authorities have suggested that it can be viewed as fraud on the minority.[27]

6.0 BOARD IN DEADLOCK

Under certain circumstances the members can carry out the duties of the directors. A situation where the board of directors are in deadlock and unable to act, or when their meetings are inquorate. In the case of **Alexander Ward and Co. Ltd v Samyang Navigation Co. Ltd**,[28] this case established the principle of residual authorities "in the absence of an effective board"[29]. In this case the company articles stated that the company's business shall be managed by the directors

[25] See Note 22
[26] (1877) 6 Ch D 70
[27] Griggs, Lynden (ibid)
[28] (1975) 2 All ER 424
[29] D. D. Prentice, Jurisdiction of Shareholders' Meetings, The Modern Law Review, Vol. 40, No. 5 (Sep., 1977), pp.

"who may exercise all such powers of the company as are not by the Ordinance or by these articles required to be exercised by the company in general meeting". They argued that in the absence of directors, the company was incapable of taking legal action and this was rejected by the House of Lords. The principle of residual authority is important because it empowers the shareholders to make their own decision in place of the directors' decision. A similar decision to this was seen in the case of **Foster v Foster** and it was established there that for the reason of transacting business the members can act as agents of the company in the absence of directors.[30]

In the nineteenth century, there were the assumptions that the principle of residual authority in this area of law will be hard to defend but the more recent case of **Barron v Potter**[31] has removed all doubts.[32] In Baron, the company's business was at a standstill as a result of the failure of one of the directors to show up at work. The decision of **Warrington J** stated that in the absence of the ability of the directors to appoint a new director in the present case, the company's general meeting has the power to do so.

7.0 DIVISION OF POWERS BETWEEN BOARD OF DIRECTORS AND SHAREHOLDERS IN OTHER JURISDICTIONS

7.1 GERMANY

In Germany the two-tier system applies. Therefore, the managing administrative board is supervised by the supervisory board. Firstly, the supervisory board only had a supervising function, which has changed to a supervising and consultancy function. Recently, the role of the supervisory board has been strengthened due to amendments to the German Stock Corporation Act AktG) As a result, e.g. the possibility of the supervisory board to define transactions which are subjected to its agreement has changed into an obligation,[33] and the body has to hold meetings more frequently.

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[30] Foster v Foster [1916] 1 Ch 532
[31] (1914) 1 Ch 895
[32] L. S. Sealy, Company Law. Power of the General Meeting to Intervene, pp. 28
[33] § 111 Abs.4 S. 2 AktG

Therefore, the supervisory board is able to advice, to direct and to participate in management decisions. However, the enlargement of possibilities to supervise the administrative board leads to the problem of too much influence on the management of the company, as § 111 para.4 S. 1 AktG defines, that it is forbidden to transfer transaction of management to the supervisory board.

In addition, the German Corporate Governance Code, a collection of best practice rules and non-binding recommendations for the corporate governance of stock corporations, has a growing influence on how corporate governance is practised in Germany. It has been revised several times, most recently on 7 February 2017. The latest amendments require the management board to implement and to disclose main features of a compliance management system reflecting the company's risk situation.

Although the rules and recommendations set out in the Corporate Governance Code are not legally binding, the management board and the supervisory board must declare annually whether and to what extent the company complies with the Corporate Governance Code. To the extent it decides not to comply, the company must explain the reasons for the non-compliance (the 'comply or explain' principle). A deviation from a recommendation may be justified, for example, as being in the interests of good corporate governance.

The management board is responsible for managing the business of the stock corporation[34] and legally represents the corporation in relation to third parties. Under the statutory concept, all members of the management board manage and represent the corporation jointly. However, in practice, the rule is that the corporation is represented by each member of the management board acting individually or by two members of the management board acting jointly.

The supervisory board may only dismiss members of the management board for good cause. Good cause is, in particular, deemed to exist in the event of material breaches of duty. For example, a management board member's inability to properly discharge his or her duties (e.g., owing to long-lasting illness or a lack of required skills or knowledge) or where the general meeting has adopted a vote of no confidence and provided that the vote has not been adopted for apparently inappropriate reasons.

[34] § 76 Abs.4 S. 2 AktG

The supervisory board must consist of at least three members. The maximum number of supervisory board members permitted by law increases depending on the amount of the stock corporation's registered share capital to a maximum of nine members for stock corporations with a registered share capital of up to €1.5 million, to a maximum of 21[35] members for stock corporations with a registered share capital of more than €10 million. In any event, the total number of supervisory board members must be divisible by three.

Members of the supervisory board are generally elected by the shareholders' meeting.[36] The articles of incorporation may provide that certain shareholders or the respective holders of certain shares shall have a right to designate members of the supervisory board. Such designation rights may only be granted in respect of up to one-third of the number of members of the supervisory board to be elected by the shareholders.

The supervisory board is responsible for supervising and controlling the management of the stock corporation's business by the management board. To this end, the supervisory board is entitled to inspect the corporation's books and records and may, at any time, request the management board to report to it about the corporation's affairs.[37] The right to request reports from the management board extends to the corporation's legal and business relationships with affiliated companies as well as to the affairs of the corporation's affiliates if they could have a significant impact on the corporation.

The shareholders of a stock corporation, unlike shareholders of German limited companies, have no direct influence on the management board. They have no right to give instructions to the management board or to otherwise direct the management of the corporations. Their influence is limited to electing the members of the supervisory board, who in turn appoint and remove the members of the management board.

Since a shareholder representing a majority of the voting rights or the share capital of a corporation may *de facto* have a controlling influence on the stock corporation's management because of its

[35] § 95 Abs.4 S. 2 AktG
[36] § 101 Abs.4 S. 2 AktG
[37] § 111 Abs.4 S. 2 AktG

ability to elect and dismiss the shareholder representatives on the corporation's supervisory board, the Stock Corporation Act provides for a set of rules regarding the influence of controlling shareholders on a stock corporation's management and business: a controlling shareholder must compensate any disadvantage suffered by the corporation as a result of any exercises by the controlling shareholder of its influence. Any such disadvantage must be compensated, at the latest, by the end of the fiscal year during which it was caused.

The controlling shareholder may 'legalise' its influence on the stock corporation by concluding a domination agreement with the stock corporation. Once a domination agreement has been concluded, the Stock Corporation Act recognises the shareholder's right to give instructions to the management board. In order to become effective, the domination agreement – which for tax reasons is often concluded together with a profit transfer agreement under which the corporation must transfer all of its annual profits to the dominating shareholder – must be approved by the corporation's general meeting with a supermajority of at least 75 per cent of the share capital represented at the meeting. The controlling shareholder is obligated to compensate any loss incurred by the controlled company during the term of the domination agreement and to acquire, at a minority shareholder's request, that shareholder's shares against adequate compensation.

Certain decisions are reserved for the shareholders' meeting by statutory law. This includes the appointment of members of the supervisory board, the appropriation of distributable profits, the appointment of the auditor, the amendment of the articles of association, measures to increase or reduce the share capital or obligations to transfer significant assets of the company.

In addition, the shareholders' meeting must approve management decisions that could fundamentally affect the shareholders' rights and economic position, such as the sale or the hive-down of a business division into a subsidiary if the division contributes a significant portion of the corporation's revenue. Apart from these exceptional cases, the management board can make business decisions autonomously without the shareholders' consent. Accordingly, the Federal Court of Justice ruled that the management board can decide to delist the company from the stock exchange without the consent of the general meeting.

7.2 FRANCE

Shareholders of a *société anonyme* can choose between a unitary (single board of directors) or two-tiered (management board and supervisory board) board structure[38]. This guide only considers the rules applicable to *sociétés anonymes* with a board of directors because the vast majority of listed companies forming part of the SBF 120(French Stock market index) on Euronext Paris follow this structure (these rules are applicable, adjusted as necessary, to a *société anonyme* with a management board and supervisory board).

The management structure of the French company is mostly imposed by law with two options:

a. One-tier Structure: This occurs when the board of directors comprising of between three to eighteen directors are responsible for the overall business strategy of the company; ensures that the strategy is implemented; and undertakes the necessary controls and verification. The day-to-day management of the company is entrusted to the CEO who may also be the Chairman of the Board and his deputies.

b. Two-tier Structure: This comprises of the management board (of 1-5 members in private companies and 1-7 members in public companies) who manages the company and a supervisory board of three to eighteen members who oversees the actions of the management board.[39]

The board of directors is composed of natural persons or legal persons that must be represented by a permanent representative. The chairperson, the CEO and any deputy CEO(s) must be natural persons. Directors are appointed by an ordinary resolution of the shareholders' meeting. It is possible, following a vacancy created by the death or resignation of a director, for the board of directors to provisionally appoint a director whose appointment must be ratified by ordinary resolution of the next shareholders' general meeting. The chairperson is appointed by the board of directors from among the directors. The CEO is appointed by the board of directors and can be the

[38] Youssef Djehane; Corporate governance and Directors' duties in France assessed online @www.practicallaw.thomsonreuters.com on the 5th April 2019

[39] Leopold Cahen and Pascale Girard; France: Corporate Governace assessed online @www.iclg.com on the 5th April 2019

chairperson or any other natural person, whether director or not. The deputy CEO(s) are proposed by the CEO and nominated by the board of directors.[40]

Directors can be removed by ordinary resolution of the shareholders' meeting at any time for any reason. The chairperson can be removed by the board of directors at any time for any reason.
The directors and chairperson may be entitled to damages if their removal is deemed abusive.
The CEO (and, on the CEO's proposition, any deputy CEO(s)) can be removed by the board of directors at any time. If the removal is decided without just cause, the CEO (if not also the chairperson) and deputy CEO(s) may be entitled to damages. They may also be entitled to damages if their removal is deemed abusive. Severance packages can be granted if duly approved before their removal.

The board of directors collectively exercises its powers to determine the company's strategy and supervise its implementation subject to the powers expressly reserved to shareholders' meetings and the limits of the company's purpose. The CEO is invested with the widest powers to act in the name of the company. Those powers are, however, subject to the respect of the company's purpose and to the powers reserved to shareholders' meetings and to the board of directors.

Shareholders are not involved in the day-to-day management of the company. They have an indirect influence on the strategic decisions of the company since they appoint and dismiss the members of the board of directors. In a two-tier structured company, the shareholders appoints the members of the supervisory board while the management board members are appointed by the supervisory board. They therefore influence the decisions of the management board by determining those to be appointed as directors by the supervisory board.[41]

[40] See Note 38
[41] See Note 39

7.3 UNITED STATES OF AMERICA

In the United States of America, a unitary Board of Directors elected by the Shareholders and subject to the fiduciary duties, is charged with overseeing the Corporation's business and affairs. Accordingly, unlike in some jurisdictions where shareholders directly determine key business matters such as corporate strategy, dividend and share purchase policy, capital raising and material acquisition, the U.S model is director-centric, giving broad authority to the Board of Directors to exercise their business judgement on most matters and delegate day-to-day decision making to management.[42]

Therefore, under the U.S State Laws, it is generally not necessary to seek shareholder's approval of management decisions other than fundamental changes. Under most State Laws, shareholder approval is generally required to approve only relatively fundamental matters such as:

a. Amendment to the Corporation's charter.

b. Merger.

c. Sale of all or substantially all of the Corporation's assets.

Accordingly, in most cases including most assets sales and spinoff, absent of a special provisions on the Company's governing documents, shareholders do not have the right to vote or ratify management decisions.

Under the New York Stock Exchange (NYSE) and NASDAQ exchange rules, shareholder's approval maybe triggered by share issuance involving:

a. 20% or more of the common stock or voting power of an issuer.

b. A change of control (often in the context of finding a large acquisition); and

c. Issuance of certain related parties (subject in each case to certain limited exceptions)

[42] Sabastian Nile; USA: Corporate Governance assessed online @www.iclg.com on 5th April 2019

While shareholder's approval is not required for most business matters, shareholders will typically engage with the management teams of U.S Companies and in certain cases, with directors to provide input and perspective to be considered by the Board and management.

If shareholders are not satisfied with the Company's strategic direction, governance, operation or management, they may seek to change the composition of the Board of Directors (including nominating their own candidates) register dissatisfaction through their votes, submit shareholder's proposal (general precatory) to be voted on by shareholders, inspect corporate books and record for proper purposes, pursue litigation and/or apply public and private pressure.[43]

CONCLUSION

The lines between the division of the powers of the directors and the shareholders in UK, Nigeria, Germany, France and United States of America laws has been blurred and lacks a very sharp distinction. Unlike the United Kingdom, Nigeria and USA that has unitary board, Germany and France companies can either opt for the one-tier or two-tier company structure depending on the size of the company.

It is settled in all jurisdiction that the shareholders are not involved in the day-to-day running of the company but only has the power to remove the directors at either the Annual General Meetings or the Extra-General Meetings in the UK and Nigeria while shareholders in Germany and France (under the two-tier company structure) has indirect control of the business of the company through the Supervisory board who supervises the activities of the management board.

Shaw[44] offered shareholders unhappy with management two options: altering the constitutional arrangements to give themselves greater power, or replacing the directors with people more likely to act in accordance with their wishes.

The first option is fraught with legal uncertainty, unless shareholders are content merely to give themselves a power of veto over the particular matter. However, the power to propose an alteration

[43] See Note 42
[44] See Note 1

to the constitution means that shareholders can at least ensure that the subject of the alteration is debated.

In contrast, the second option is straightforward to exercise, and is merely a matter of having sufficient voting power and the will to exercise it. In listed companies, majority voting power generally resides with institutional shareholders, whose preferred mode of interaction with companies is usually behind closed doors rather than by a showdown at a meeting. Their voting power is therefore more likely to be exercised indirectly rather than directly. There are nevertheless instances of changes to board composition which have come about as a result of institutional influence, negotiated in the shadow of legal power.

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