

Enhancing Shareholders Participation in Company Meetings in Nigeria through Application of Information Technology

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Abstract: *This paper critically examined the relevant provisions of the Nigerian Companies and Allied Matter Act, 2004 relating to company members meetings. It identified some provisions of the Act that undermined the participation of members in the administration and management of incorporated companies. As a way out, some of the advantages presented by the emerging information technology were explored and it was recognized that the use of such tools has the potential to expedite corporate action which could increase the effectiveness of members' rights to participate in the affairs of the company, thereby improve the standard of corporate governance. As a result, suggestions were made for some amendments in the Act with a view to embrace and facilitate the use by corporations of the current electronic forms of communication technology.*

I. Introduction

The law typically views a company as a fictional person, a legal person as opposed to a natural person. Under such a doctrine, a company enjoys many of the rights and obligations of a natural person in furtherance of its business. However, as a result of the artificial nature of a company, its active and directing will are sought in human person who are actually the directing mind and will of the company. The power and decision of a company is divided between its primary organs viz the shareholders in general meeting and the Board of Directors. Thus, a company functions and makes decisions through its board of directors and through its members in general meetings who both constitute the primary organs of authority.¹ The Act vests management and administration of a company in hand of the Board of Directors and the members in general meeting. Fundamental to the manner in which the organs act and make decisions is through company meetings where resolutions are taken. As such, most decisions that affect the company are taken at company meetings. These decisions are either that of the members in General Meeting or of the meeting of the Board of Directors. All members including non-assenting members and non-attending members are subject to the resolutions passed by the meetings. The focus of this paper is on meeting members.

3.2 Meetings of Members

Meetings of members are called general meetings. Such meetings are of vital importance in the working of a company. For, although the general powers of management of a company are vested in the Board of Directors, the resolutions of members on major issues have to be obtained in their general meetings. The shareholders that participate in a company risk their capital in doing so. They are the real owners of the company, and as such must be able to receive detailed and reliable accounts of the policies pursued by the company from the board of directors who is vested with the general powers of management of the company. Holding the members meeting not only affords the company an opportunity to inform the shareholders of its activities, achievements and plans, and to involve them in making decisions on the most significant company matters but also serve as a check upon the excesses of the board of directors, thereby exercising some measure of control over them. It has ultimate and residual powers where there is deadlock or disqualification on the board and power to make recommendations to the board in respect of action to be taken.²

There are various types of these meetings provided for by the Act viz: the statutory meeting, annual general meeting and extra ordinary general meeting. In addition to these types of meetings, sometimes a meeting of a particular class of shareholders may also be held such meetings are called "class meetings." For transacting legally binding business, the meeting must be validly held. A general meeting of members is said to be valid when it is properly convened and legally constituted such as when there is a proper person in the chair, requisite quorum is present and the provisions of the Act and the Articles are complied with.

Meeting of members is supposed to be an important protection to members who pooled their resources together. It ought to be a forum they are to come together to discuss and agree to issues brought before them by the professionals running the company or to resolve on issues that would change, enhance, halt or terminate the

¹ S. 63 Companies and Allied Matters Act, 2004

² Section 63(5) op cit

operations of the venture. However, what happens in practice regarding members meeting, particularly annual General Meeting (AGM) of most companies in Nigeria is ridicule. Even where meetings are held, the actual conduct of general meeting of shareholders, as it is currently practiced leaves a lot to be desired. These meetings are poorly attended by shareholders and most could not attend even if they wished because notice of the meetings are either not received or received late. As such, the few individuals who do attend are likely to be unrepresentative of the general body of the shareholders. As a result, annual general meetings have been described in some quarters as a mere “social events or an empty ritual.”³

II. Notice of Company Meetings

The starting point in convening every meeting is the giving of notice to every person entitled to receive it. Company meetings cannot be held unless a proper notice has been given. The notice of meeting constitutes a source of information for the members on the issues proposed to be resolved at the meeting. Its purpose is to convey information to members to enable them attend and vote in the exercise of their membership rights. Members are dependent on receiving notice of company meetings to be able to exercise their voting right effectively and make decisions of fundamental importance to the company. By attending, speaking and voting at company general meetings, members can hold management to account and help to improve standards of corporate governance.

For company meeting to be convened and held section 220 of the Act required due notice of the date, time and place to be given to the members either personally or by post to the member’s registered address at least twenty-one days before the meeting and where a notice is sent by post, service of the notice is deemed to be effected by properly addressing pre-paying and posting a letter containing the notice, and to have been effected in the case of notice of a meeting at the expiration of seven days after the letter containing the same is posted. That is the counting of 21 days begins from 7 days after the letter is posted excluding the day of posting.

In any other case at the time at which the letter would be delivered in the ordinary course of post.⁴ The biggest obstacles to effective participation by members in their company’s affairs include document not reaching voting decision makers. The existing provisions of the company law containing requirements as to the giving of Notice of Meeting place members at a disadvantage. In Nigeria, the postal system is so slow that correspondences take months to get to their destinations. Consequently, it is a common occurrence to find that shareholders, especially of public companies who are spread all over the country received notice of annual general meeting long after the date of the meeting or may not even receive it at all owing to the ineffectiveness of the postal services. Besides, given the inefficient nature of our postal system, thousands of notice could go astray because of the archaic paper based system used by companies. Foreign shareholders could also be disadvantaged by this service method as mailed notice of meetings may not get to these shareholders on time.

If shareholders’ voting rights are to be used effectively, shareholders obviously need access to clear and prompt company information. This is important to enable them have a constructive dialogue and increase their engagement with the company in which they hold shares. A crucial area in increasing the effectiveness of the shareholder’s right to vote is in terms of improving the quality and timeliness of information that gets out to shareholders before shareholders meeting.

The use of new information and communication technologies has grown rapidly over recent years which present great opportunities to enhance the immediacy and transparency of dialogue between company and shareholders. These developments were not anticipated at the time that the majority of the provisions in existing company Act were first put in place decades ago. The pace of changes in areas of the information technologies means that in a numbers of areas the present arrangements are holding back rather than facilitating competitiveness and embracing development. The current framework has as a result, become seriously outdated in key respects. In this perspective, the utility of the internet for rapid, wide and low-cost distribution of information should become an important tool for communications between company and shareholders.

From the above analysis, paper based notice of meeting through postal mail is the main method of communicating between companies and shareholders. In the present era of Internet, the world is often referred to as a “global village”. It is global because nations, cities, towns, villages and organizations are being linked up, giving opportunities for people to stay in their bedrooms and transact business and talk with people thousands of miles away. The craving for global linkage is the conscious effort for relevance in the scheme of things. The dynamism of the age is astronomical and it calls for sensitivity in order to remain in the flight of events. Thus, the only options left for nations and business organization are either to respond to the pressure or be overwhelmed by it. Given the inefficient nature of postal system in Nigeria, thousands of notice could go astray because of the archaic paper based system used by companies. Foreign shareholders could also be

³ Dr Ahmed Abdullahi: “The Company in a Changing Environment: *Gravitas Review of Business and Property Law*: Jan. 1990, Vol.3 No. 13 p.21 at 222

⁴ Section 220(2) *ibid*

disadvantaged by this service method as notice of meetings may not get to these shareholders on time. The fact suggests that a more efficient and timely method such as electronic notice may be necessary.

III. Specific Corporate Actions and the use of Information Technology

The foregoing discussion reveals an obvious fact: Meetings dominate the way in which companies do business and members are dependent on receiving notice of company meetings to be able to exercise their voting right effectively and make decisions of fundamental importance to the company.

If shareholders' voting rights are to be used effectively, shareholders must have right to receive timely notice of company meetings. However it is a common occurrence to find that shareholders, especially of public companies who are spread all over the country received notice of annual general meeting long after the date of the meeting or may not even receive it at all owing to the ineffectiveness of the postal services. Improving access to information is one thing; it is the lifeblood of investment decisions. One of the inventions of the 21st century is the introduction of the new Information Communication Technology. The innovative forms of the new information and communications technologies were not anticipated at the time the majority of the provisions in existing company law were first put in place decades ago. In the present day, Electronic-mail (e-mail) is being used as a quick and easy method of communication. E-mail, is a widely used Internet application that enables individuals or groups of individuals to quickly exchange messages, even if they are separated by long distances. E-mail software transfers the message across the Internet to the recipient's computer. The recipient uses an e-mail application to view the message and take it off for personal use. Because e-mail is a convenient and inexpensive form of communication, it has dramatically improved personal and business communications. Given the large number of registered members in many public companies, the cost savings could be substantial. With e-mail, notice of meetings can be sent to quite a number of persons and unlike a regular mail, the message is delivered simultaneously within minutes to anywhere in the world without long distance charges. Occasionally, network problems will delay a message for a few hours. If a message is not delivered, the system will usually tell you. The immediate apparent advantage of the emerging information technology to company meetings is the potential cost savings associated with e-mail. It does not require paper and it is easy to dispose of. It could also present great opportunities to enhance the immediacy and transparency of dialogue between companies and its members. Messages can be sent out to dozens or even thousands of people at once.

Clearly, the new electronic media can facilitate improved communication between the company and its members. In support of this view, Professor Elizabeth Boros⁵ observed in her paper, *The Online Corporation: Electronic Corporate Communication*⁶ that electronic dissemination of information enables more timely and comprehensive communication and may reduce the differentials that can exist between the information available to small investors in comparison with large institutional investors.

Many jurisdictions have already embraced electronic communication between company management and shareholders. In the United States, both Delaware Corporate Law and the Security Law permit electronic corporate-shareholder communication.⁷ In 1995, the SEC formally recognized that technology has opened important new channels of communication between shareholders and management, and issued an interpretative release promoting electronic corporate shareholder communication.⁸ Similarly, Germany has amended its Stock Corporation Act.⁹ Shareholders may be provided with meeting notices via e-mail. In United Kingdom, the Department of Trade was reported to be about to issue a statutory instrument order which would legitimize the use of electronic communications between shareholders and companies.¹⁰ This means that companies in UK will be allowed to send out company information by e-mail.

For Nigerian Companies to take advantages which the new information technology presents, it is the researcher's considered view that the Nigerian companies should have flexibility in their operations similar to their counterparts in other developed countries to enable them to compete on equal footing. In this perspective, it is utmost necessary that our Companies Act is suitably modified to fit into the new economic scenario by providing for e-mail notice for director and shareholder meetings as a supplement to paper notices required by the present Act in force for both directors and members' meeting. Indeed, it is in the researcher's view that the tremendous cost saving and timeliness of e-mail as opposed to printed and paper notices may be determinative for many companies to opt for sending notices of meeting via e-mail if the Act is amended to allow for electronic notices of company meetings. While there is still low ratio of people with internet access in Nigeria,

⁵ Prof. Theodor Baums "General Meetings in Listed Companies – New Challenges and Opportunities, December 2000, p. 6 – available at <http://www.oecd.org/dataoecd/16/15/1931816.pdf> - visited 16/1/2007

⁶ University of Melbourne, December, 1999

⁷ Del Gen. Corp Law, S. 212(c)

⁸ SEC – Use of Electronic Media for Delivery Purposes, SEC Act

⁹ Available at <http://www.oecd.org/dataoecd/16/15/1931816.pdf>

¹⁰ The draft of "The Companies Act 1995 (Electronic Communication) Order 2000: available at www.legislation.hmso.gov.uk/si/si2000/draft/20008674.htm

there are a number of government policies in place encouraging the use of the new information technology. The Minister of Science, for instance, has encouraged every one to try and own at least a computer in order to compete favourably in the fast growing information age. He reiterated the need for all Nigerians to own their personal computers by taking advantage of the Global Computer Consumer initiative launched by the Federal Government.¹¹ Another challenge likely to be faced is the issue of inadequate infrastructure on ground. As such, the will to go electronic has to be complimented by necessary infrastructure such as improvement in electricity supply.

Section 220(2) of the Act presumes that service of notice of meeting is effected at the expiration of seven days if postal mail is used. It is unknown if the same presumption would apply to an electronic notice if the Act is eventually modified. If not, a company likely would have to prove that a member actually received notice of the meeting. As such any amendment to allow for electronic mail should be wide enough to designate the time at which an electronic notice is deemed to have been sent and received.

While section 266(2) of the Act expressly requires written notice for directors' meeting section 220 does not explicitly specify written notice however written notice is required. Thus, it should be noted, that if notice is permitted to be electronically transmitted, issues will arise with respect to whether notice via the e-mail would satisfy the written notice requirement for the purposes of section 266(2) and 220 of the Act. It is reasonable to conclude that electronic notice would be sufficient. Some Court of Chancery cases lend support to the idea that notice can be given by means other than the mail. In *Bryan v. Western Pac. R. Corp.*¹² it was held inter-alia that "Ordinarily, the requirement of notice is met if the shareholders registered on the corporate books are given some appropriate form of notification." Similarly, in *Hall v. Trans-Lux Daylight Picture Screen Corp.*¹³ the court held inter alia "costs incurred in notifying stockholders of special meeting by publication instead of by mail, which was required under the bylaws, could properly be paid out of corporate funds".

Moreover, in another context, the United States District Court for the District of South Carolina in *Clyburn v. Allstate Ins. Co.*¹⁴ held "a computer disk mailed or delivered to an insurance agent could constitute "written notice" to an agent required in order to cancel a policy for non-payment of premiums. Thus, while the legal sufficiency of electronic notice has not been definitively adjudicated, it is reasonable to conclude that electronic notice would suffice.

IV. Conclusion

The existing provisions of the Companies and Allied Matters Act on company meetings impose a number of requirements which include the use of paper communication between the company and the shareholders. Some of these provisions as they stand today can no longer guarantee the intervention of shareholders in the affairs of their companies. Most shareholders cannot attend general meeting even if they wished because the paper based notices of company meetings commonly sent by post through the postal services do not get to most shareholders before the meeting. Thus, the few individual who do attend are likely to be unrepresentative of the general body of shareholders. With the impact of the new information technology, company meetings could be given a new lease of life if the law embraces the new information technology in some of its activities such as electronic mail as an added option to shareholders. This will enhance communication between the company and its shareholders thereby providing geographically unlimited means for many more shareholders to participate.

V. Recommendations

A crucial area in increasing the effectiveness of the shareholder's right to participate in the manner in which companies are run is in terms of improving the quality and timeliness of information that gets out to shareholders before shareholders. Thus, the utility of internet for rapid, wide and low-cost distribution of information should become an important tool for communication between company and shareholders. In consequence, to supplement the paper mailing, embrace and facilitate the use by corporations of current electronic forms of communication technology, Section 220 of the Act which stipulate that notices may be given personally or by sending same by post should be amended so that it provide that notice of meetings may be sent via e-mail to an addressed nominated by the members. Furthermore, since written notice is required, the recommended amendment should be wide enough to expressly acknowledge that a notice by electronic means is recognized as a written notice so that electronic delivery of the notice complies with the law and avoid any argument which might arise with respect to whether an electronic notice constitute a written notice.

¹¹ See Daily Trust, Monday Dec. 31, 2007, p. 15

¹² (1944) Ch 35 A 2d 909, 913

¹³ (1934) Ch. 171 A. 226

¹⁴ (1993) D.S.C. 826 F. Supp. 955, 956-57F

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