COMPARATIVE ANALYSIS OF THE LEGAL REGIME FOR THE DISQUALIFICATION OF DIRECTORS: NIGERIA AND UK COMPARED

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ABSTRACT

One of the drawbacks of the limited liability structure is that it encourages excessive risky behaviour. However, commercial risks have been considered to be the lifeblood of corporate activities,[1] and some directors have been known to take undue advantage of this owner-shielding doctrine to the detriment of the creditors who had hoped on recourse to the funds of the company for the satisfaction of the debts owed them. This behaviour calls for a proper safeguard for the creditors and the public, which would entail that those directors who have conducted themselves improperly in regards to the affairs of the ailing company shall be banned from further acting as directors. The purpose of this paper is to examine the laws as regards the disqualification of directors in Nigeria vis-à-vis the provisions of the extant United Kingdom laws.

1.0. INTRODUCTION

The disqualification of directors is essential to prevent the misuse of the company form. One of its major aims was to stop the emergence of "phoenix companies"[2] which are companies set up by the director of a very similar company which had ceased business due to extensive debts. These directors will jeopardize the undertakings of an ailing company, just to jump ship and incorporate a new corporation with similar business activity but with no liability to the creditors of the former company, which is an abuse of the limited liability structure.

While it is essentially clear that the disqualification is for the protection of the public from the hands of these directors, what may

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[1] Gower and Davies, *Principles of Modern Company Law* 8th ed. (Sweet and Maxwell, 2008).

[2] *Ibid*, at p. 246.

not be clear especially in the Nigerian reality is what may constitute effective protection for the public against these directors. Should the directors' activities as directors be barred, especially with respect to other companies? For how long should they be disqualified? Or for what period in the future will the directors continue to pose a danger to the public? Also, what type of machinery is to be put in place to ensure that these directors do not act, despite the disqualifications? And how is the public made aware of these disqualifications? To distil these issues, the extant laws of the UK and Nigeria are studied with the aim of comparing them to know which will better serve the end of good corporate governance.

This work is divided into five parts. The first part is the introduction which includes the definitions of certain terms. The second part examines the disqualification of directors in Nigeria and highlights the four forms of disqualification under Nigerian Law. The third part extensively explores disqualification under UK laws with a special focus on the UK Company Director Disqualification Act. The fourth part juxtaposes UK and Nigerian Laws as regards the disqualification of directors with the aim of discovering salient points which will best serve the main purpose for disqualification. The conclusion is the final part which includes recommendations for reforms.

1.1. Who is a Company Director?

A director is the *alter ego* of a company.[3] He is a corporate governor in charge of the affairs of a company. Directors of a company registered under the Companies and Allied Matters Act (CAMA) are persons duly appointed by the company to direct and manage the business of the company.[4]

Under section 567 of CAMA, "director" includes any person occupying the position of director by whatever name called; and includes any person in accordance with whose directions or instructions, the directors of the company are accustomed to act. By

[3] *Yalaju Amaye* v *AREC (*1990) NWLR (pt. 145) 422; (1990) 6SC 157.
[4] Companies and Allied Matters Act (CAMA) 1990, Cap. C20, Laws of the Federation of Nigeria, 2004, s. 244(1).

the same token, section 245(1) thereof states that without prejudice to the provisions of sections 244 and 250, and for the purposes of sections 253, 275 and 281 of CAMA, "director" shall include any person on whose instructions and directions the directors are accustomed to act.

1.2. Meaning of Disqualification

Generally, any person who is either (1) personally insolvent (2) an undischarged bankrupt, or (3) disqualified by a court order for implication in dishonesty or fraud punishable by imprisonment, may be disqualified from holding the office of a director.[5]

Hence, disqualification is a form of prohibition to deter the performance or continuous performance of something by reason of one's ineligibility.

2.0. DISQUALIFICATION OF DIRECTORS IN NIGERIA

While "disqualification" does not lend itself to a narrow or even exact definition, in this work, it is used in a broad sense to denote the legislated prohibition of individuals to manage corporations. Thus, in examining the disqualification of directors, four forms of disqualification in Nigeria have been identified and discussed herein: (1) Disqualification by a Regulator, (2) Disqualification by Court, (3) Disqualification on Application; and (4) Automatic Disqualification.

2.1. Disqualification by a Regulator

2.1.1 *By the Securities and Exchange Commission* (SEC)

The Investment and Securities Act 2007[6] repealed that of 1999. This Act establishes the Securities and Exchange Commission (SEC). The SEC plays a supervisory and regulatory role on the capital market.

[5] Business Dictionary, "Disqualification of Directors" available at http://www.businessdictionary.com/definition/disqualification-of-directors.html (accessed 27 August 2019).

[6] Investment and Securities Act (ISA) 2007, Cap. 124, Laws of the Federation of Nigeria, 2004.

Section 13 in Part II of the Act specifies the functions and powers of the Commission. It provides that the Commission shall be the apex regulatory organisation for the Nigeria Capital Market, having the power to exercise all the functions delineated in the Act. That section, amongst other powers outlined, provides that the Commission shall have the *power to disqualify*[7] persons considered unfit from being employed in any arm of the securities industry.[8]

The term "security industry" has been given a wider interpretation by the court in the case of *Olubunmi Oladapo Oni* v *Administrative Proceeding Committee of SEC*.[9] In that case, the appellant was disqualified from operating in the capital market and from holding a directorship position in any public company, pursuant to the power bestowed on SEC by section 13 of the ISA. The appellant contended that the power of SEC under section 13 of the ISA was limited to the disqualification of persons from capital market activities and securities business or dealing in securities and did not extend to the disqualification of a person from membership of the boards of companies; and that the power to regulate the appointment, removal and disqualification of directors or members of boards of companies had been conferred on the Corporate Affairs Commission under the relevant provisions of CAMA. In summary, he asserted that the SEC is not empowered to regulate the membership of companies. In dismissing his appeal, the court held that any corporate body whose stocks are quoted in the NSE and who issues stocks, shares and debenture, is part of the securities industry. Thus, SEC has a responsibility to protect the interest of investors in those stocks and the responsibility of SEC includes the power to check the activities of the directors of public companies. The court equally held that the provisions of CAMA do not take away from SEC the power to regulate the activities of companies and their boards Therefore, it is trite that SEC has the power to disqualify persons on the ground of unfitness.

[7] Emphasis is added.
[8] ISA, s. 13 (bb).
[9] (2014) NWLR (Part 1424) 334.

2.1.2. *By the Central Bank of Nigeria* (CBN)

The Banks and other Financial Institutions Act (BOFIA) confers on the Central Bank, all the powers and duties that are imposed by the Act.[10] Therefore, section 48 of the Act provides for the disqualification of certain individuals from the management of banks. It provides that no person shall be appointed, a director or an officer of a bank if he is of unsound mind or as a result of ill health, is incapable of carrying out his duties;[11] declared bankrupt or suspends payments or compounds with his creditors including his bankers;[12] or is convicted of any offence involving dishonesty or fraud;[13] or is guilty of serious misconduct in relation to his duties;[14] or in the case of a person possessed of professional qualification, is disqualified or suspended (otherwise than of his request) from practicing his profession in Nigeria by the order of any competent authority made in respect of him.[15]

While (a) and (b) of 48(2) act as automatic disqualification by operation of law subsection (c) and (d) of that section operate as a sort of bar; thus they are actions which entitles the Governor acting on the power conferred on him in this Act, to remove or bar the said director. Subsection (e) of that section functions equally as a disqualification; but only to the extent that such director may be reinstated after remedying the defect that so disqualifies him.
Subsection 3 of that section, precludes a person who has been a director of or directly concerned in the management of a bank which has been wound up by the Federal High Court from acting or continuing to act as a director of, or be directly concerned in the management of any other bank. However, this prohibition is mitigated by the fact that such persons may act with the express authority of the Governor.[16]

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[10] The Banks and other Financial Institutions Act (BOFIA), Cap. B3, Laws of the Federation of Nigeria, 2004, s. 1.
[11] *Ibid,* at s. 48 (2)(a).
[12] *Ibid*, at s. 48 (2)(b).
[13] *Ibid,* at s. 48 (2)(c).
[14] *Ibid*, at s. 48 (2)(d).
[15] *Ibid*, at s. 48 (2)(e).
[16] *Ibid*, at s. 48 (3).

That section equally disqualifies any person whose appointment with a bank has been terminated or who has been dismissed for reasons of fraud, dishonesty or conviction for an offence involving dishonesty or fraud. That section went ahead to point out that such person "shall"[17] not be employed by any bank in Nigeria.[18]

The CBN equally maintains a register of these persons who are disqualified under subsection 4 and thus the Act maintains that it shall not be a defence for any director, manager or officer of a bank to claim that he is not aware of the provisions of subsection (4) of this section, except he can prove that he had obtained prior clearance of such a person from the secretary of the Banker's (CBN) Committee who maintains a register of terminated, dismissed or convicted staff of banks on the ground of fraud or dishonesty.

Pursuant to this, the CBN equally issued a circular in this regard, where it outlined the need for prior CBN clearance of prospective employees of banks.[19] While this is a laudable apparatus and equally important for the disqualification regime, it seems exclusive and protective of the banking industry only, as such information may only be accessible by commercial banks who are intending to hire new staff. Therefore, it is suggested that the Commission emulates this trend. Although such information may be implied by virtue of the returns which the companies are obligated to file with the Corporate Affairs Commission (CAC), it is still important that such register be maintained by the Commission.

2.1.3. *By the Corporate Affairs Commission* (CAC)

Despite the wide powers of the Corporate Affairs Commission under CAMA, there is nowhere in the Act where the Commission is granted direct powers to disqualify an erring official or a director. At best, the

[17] Emphasis added.
[18] BOFIA, s. 48 (4).
[19] "The need for prior C.B.N clearance of prospective employees of Banks", Central Bank of Nigeria circular, 16th July 2004, available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.cbn.gov.ng/OUT/CIRCULARS/BSD/2004/BSD-03-2004.PDF&ved=2ahUKEwjK3s6jtObkAhWNbFAKHambCBQQFjAAegQIBxAC&usg=AOvVaw04spnJWZ4jNfiuS4W_gX8E (accessed 22 September 2019).

Commission is granted the power to investigate affairs of the company where the interests of the public/shareholders demands,[20] and to undertake such other activities as are necessary or expedient to give full effect to CAMA.[21] This has called for the recent outcry by stakeholders for the amendment of CAMA for a new regime, which will be in line with the practice in most company registries globally.[22]

2.2. Disqualification by the Court

There are two instances where the court may disqualify a person from acting as a Director. They are *Suo motu* (on its own) and on application.

2.2.1. *Suo Motu by the Court*:

CAMA provides for the restraint of fraudulent persons from becoming directors and thus gives the court (High Court included) power to unilaterally make an order that a person who is convicted of an offence in connection with the promotion, formation or management of a company, shall not be a director or in any way directly or indirectly concerned or take part in the management of a company for a specified period not exceeding 10 years.[23] This may raise a jurisdictional question, seeing that the Federal High Court has the sole jurisdiction to entertain matters arising from the operation of CAMA or regulating the operation of companies incorporated under CAMA.[24] However, CAMA s. 254(2) confers jurisdiction on the court where such person is convicted, as well the court which has jurisdiction to wind up companies, to make such disqualification order.

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[20] CAMA, s. 7 (1)(c).
[21] CAMA, s. 7 (1)(e).
[22] Premium Times news online, "CAC seeks legal powers to remove erring company directors", available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.premiumtimesng.com/news/top-news/136428-cac-seeks-legal-powers-to-remove-erring-company-directors.html&ved=2ahUKEwiF_5_X9azoAhVxs3EKHZrsAlcQFjAAegQIAAegQIAxAC&usg=AOvVaw24edMs8i75z3r4uSMMUJjN> (accessed 22 September 2019).
[23] CAMA, s. 254 1(a).
[24] Constitution of the Federal Republic of Nigeria (CFRN) (1999) (as amended), s. 251(1)(e).

The power of the court to disqualify on application will be discussed under a separate heading below.

2.2.2. Disqualification on Application to Court

Section 254 (b) provides that if it appears in the course of winding up that a person has been guilty of misfeasance (under section 507), whether or not he has been convicted,[25] or has been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company, the court shall make an order that that person shall not be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company for a specified period not exceeding 10 years.[26] Thus this presupposes that the company must be undergoing winding up. Hence it provides that an application for the making of an order under this section by the court having jurisdiction to wind up the company may be made by the official receiver, or by the liquidator of the company or by any person who is or has been a member or creditor of the company.[27] It is settled that the appointment of a receiver does not obviate the position and duties of the directors.[28] This is because the retention of the residual powers of the director is more in accordance with corporate governance as the company may not already be liquidated.[29] Thus, the receiver can also make such application that a director be disqualified in accordance with CAMA s. 254, when it appears upon his appointment or during winding up that the directors are guilty of the offences stated in that section. The liquidator is an officer of the court and appointed by the court[30] and thus is expected

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[25] CAMA, s. 254(1)(b)(i).
[26] *Ibid*, at s. 254(1)(b)(ii).
[27] *Ibid*, at s. 254(4).
[28] *Unibiz (Nig) Ltd* v *Commercial Bank Credit Lyonnais Nig Ltd* (2001) 7NWLR (Part 713) 534; *Intercontractors Nigeria Ltd* v *N.P.F.M.B* (1988) 4 SCNJ 154.
[29] O.M. Adefi, "Streamlining The Powers and Duties of a Receiver/Manager and Liquidator in the Organization of a Company: An Antidote for Corporate Governance", available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.ajol.info/index.php/naujilj/article/download/82385/72540&ved=2ahUKEwjmpfbu8ebkAhXNbVAKHcGoAg4QFjAAegQIAxAB&usg=AOvVaw0rOtx2IBCrdWP5UitFyxun> (accessed 22 September2019).
[30] CAMA s. 422(1)(5).

to be beholden to the court. Upon his appointment, all powers of the director shall cease.[31] It becomes clearer in CAMA s. 508, where not only can a liquidator apply for the disqualification of a director who is guilty of any offence in relation to the company, but can also, by virtue of that section, report the said matter to the Attorney General of the Federation for investigation. It is also settled law that members and creditors[32] are stakeholders in a company. Subsection 4 of section 254 CAMA solidifies that by enduing them with the right to bring an application for the making of such order by the court.

2.3. Automatic Disqualification

Automatic Disqualification is a process that does not require any active involvement of the court or the relevant corporate regulator.[33] They are briefly outlined below:

2.3.1. Bankruptcy and Insolvency

The law which generally disqualifies an insolvent person from acting as a director is targeted at precluding these set of people who have been so spectacularly unsuccessful in the management of their finances, from taking charge of other people's money.[34] Hence, CAMA disqualifies such individual from both acting as a director of a company upon his becoming insolvent and also goes further to restrict such person from acting as a director of another company. This shall be briefly distilled in the two groups for a clear understanding.

a. Current company

The office of the director must be vacated if the director becomes bankrupt or makes any arrangement or composition with his creditors[35]. This acts as an automatic disqualification by operation of

[31] CAMA, s. 422(9).
[32] CAMA ss. 303 and 310.
[33] J.J. Plessis and J.N. Koker, *Disqualification of Company Directors: Comparative Analysis of the Law in the UK, Australia, South-Africa, the US and Germany*, (Rutledge 711 Third Avenue: New York, 2017).
[34] *Supra* n 1, at p. 252.
[35] CAMA, s. 258(1)(b).

the law. CAMA even goes ahead to impose a criminal sanction upon default.

b. Another company

If an insolvent person acts as a director of, or directly or indirectly takes part in, or is concerned in the management of any company, that person will be guilty of an offence and liable on conviction to be fined or imprisoned for between six months and two years, or both.[36]

2.3.2. Share Qualification

Ordinarily, directors are not to provide financial resources for the company in terms of share ownership, however, share ownership of the directors, where applicable, assures the company that those who provide fund and those who manage the company are both stakeholders; which will reduce wastefulness. Hence, where provided for in the Articles, a director must have them, failure of which disqualifies him automatically by operation of the law.

Section 251 (3) provides that the office of a director of a company shall be vacated if the director does not within two months from the date of his appointment, obtain his share qualification.

While this qualification is mandatory under the Act, it is only applicable when the company inserts it inside their Articles and unless and until so fixed, no shareholding qualification shall be required.[37]

Therefore, the disqualification here takes effect immediately the director fails to hold such share qualification within the timeframe allowed (two months). The second limb of s. 251 (3) provides that even after the expiration of the two months and the director ceases at any time to hold his share qualification, he shall be vacated from office.

Thus, it seems clear that once a company's Articles provides for a share qualification of a director and a director fails to hold such shares

[36] CAMA, s. 253.
[37] CAMA, s. 251(1).

within the time frame of his resumption of office or anytime thereafter, such director shall stand disqualified as a director.[38]

2.3.3. Persons of Unsound Mind

Unsoundness of mind is a ground for the vacation of the office of the director under CAMA. As such a person who has become of unsound mind by inquisition cannot necessarily govern a body corporate. Persons who are not in full control of their mental faculty cannot by implication control or be in the helm of affairs of a company.[39] Some writers have equally identified expiration of tenure fixed by regulatory authorities as an event which will automatically vacate the director(s) from office.[40]

3.0. THE POSITION UNDER UK LAW

The UK has a robust body of statutes governing the disqualification of directors, which includes the Company Directors Disqualification Act (CDDA), 1986.[41] Generally, the scope of disqualification of directors under CDDA covers both acting in one's capacity as a director and also equally extends to "directly or indirectly taking part in promotion, formation or management of a company".[42] The disqualified person is denied access to limited liability and also prohibited from acting as an insolvency practitioner.[43] There are equally three different forms of directors' disqualification under the CDDA, and they are Automatic Disqualification, Disqualification by Court Order and Disqualification Undertakings.

3.1. Automatic Disqualification

In the case of an automatic disqualification, an individual is automatically disqualified from being a company director if the conditions of the pertinent statutory provision are met. The director

[38] CAMA, s. 258 (1)(a).
[39] CAMA, s. 258 (1)(b).
[40] C.S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Novena Publishers, 2010), pp. 356 – 357.
[41] Company Directors Disqualification Act (CDDA) 1986. Also, the Insolvency Act 2000.
[42] CDDA, s. 1(1) and A(1).
[43] *Ibid*, at ss. 1(1)(b) and 1A(1)(b).

is automatically disqualified from acting as the director of a company without the need for anyone to apply for a disqualification order and without the need for a court to make a disqualification order. They are discussed below:

3.1.1. Bankruptcy

The rule under bankruptcy is set to deter someone in financial difficulty from putting the undertaking of a company in jeopardy. The CDDA criminalizes it.[44] Hence, it is an automatic disqualification, not dependent on making any disqualification order by the court. There are also bankruptcy restrictions order and undertaking similar to that of directors, which put restrictions on a former bankrupt person's activities after his discharge from bankruptcy.[45] These prohibitions restricted acting in breach of a bankruptcy restriction order, however, this disqualification is not absolute as a bankrupt person may apply for leave to act in the management of a company, but not as an insolvency practitioner**.** Consequently, the bankrupt has a duty to show that he can safely be involved in the management of a company.

3.1.2. Age

Anyone under the age of 16 must not be appointed as a director of a company.[46] However, this disqualification does not affect the validity of an appointment that does not take effect until the person appointed attains the age of 16.

3.1.3. Auditors

The level of independence required for statutory auditors is such that any person cannot be both a director and an auditor at the same time. A person is not allowed to act as statutory auditor of a company if he/she is a director of the company.[47] Thus this equally acts as an automatic disqualification under the UK laws.

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[44] CDDA, s.11.
[45] Sch. 20, UK Enterprise Act, 2002.
[46] UK's Company Act (CA) 2006, s. 157(1).
[47] *Supra* n 33, at p. 49.

3.1.4. Failure to Pay under a County Court Administration Order

A person who fails to make any payment which they are required to make by virtue of an administration order under the *County Courts Act 1984* (UK) is not allowed to act as a director, liquidator, or directly or indirectly take part, or be concerned in the promotion, formation or the management of a company.[48]

3.2. Disqualification on Application

The grounds for disqualification on application can be divided into those which require that a court must disqualify a person (mandatory disqualification) and those where a court *may*[49] disqualify an individual (i.e. it has the discretion to decide whether or not to disqualify the person concerned).

3.2.1. Mandatory disqualification (on the ground of unfitness):

These are the grounds contained from sections 6 and 7 of the CDDA 1986. The court has separated this ground of unfitness into two main categories which are probity and competence. Only the Secretary of State (or the official receiver in most cases) can apply for disqualification on the grounds of unfitness and can do so if they think that "it is expedient in the public interest".[50]

a. *Probity:*

Probity simply translates to commercial morality.[51] On this ground, the court has frowned on directors who trade at the expenses of the creditors. This act is often perpetuated through the "Phoenix Company". In asserting his unfitness, the court looks at his responsibility in the company's insolvency. An example would be the

[48] CDDA, s. 12.
[49] Emphasis is added.
[50] CDDA, s. 7(1).
[51] *Supra* n 1, at p. 246.

general failure of the company to provide for goods and services paid for or entering into a contract at undervalue.[52]

Thus, if the directors of a financially troubled company were at the same time paying themselves salaries which were out of proportion to the company's trading success, the likelihood of disqualification order being made for unfitness increases.[53]

b. *Incompetence (Recklessness):*

This is as regards the director's recklessness with the conduct of the business of the company. The competence of the director is what is at issue here.

Thus, the delegation of the duties of directors without adequate supervision put in place to check the delegated power has been deemed a reckless act which makes a director unfit.[54]

Also, lack of experience, knowledge and understanding has disqualified a director for three years as seen in the case of *Re Rich borough furniture ltd*.[55] Hence, a director has a continuing duty to acquire and maintain sufficient knowledge and understanding of a company's business to enable them properly discharge their duties. Hence all directors should maintain a minimum level of knowledge.

This duty equally subsists on the area of the financial obligation of the company to file annual returns, keep proper accounting records. Thus, directors are to keep themselves abreast of both the financial position of the company and the company's compliance with reporting requirements of legislation affecting and relating to the company. Otherwise, he or she will not know what corrective action needs be taken, if any.[56]

Gower differentiated the standard of competence required here from the general duty of care owed by directors, by saying that to disqualify

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[52] This is synonymous to offences provided for in s. 506, CAMA; but it should however be noted that the provision of CAMA is not specifically exclusive or applicable to the Directors of the Company.
[53] *Secretary of State for Trade and Industry* v *Van Hengel* (1995) 1 B.C.L.C. 545.
[54] *Re Baring PLC (No. 5)* (2000) 1 B.C.L.C. 523, CA.
[55] (1996) 1 B.C.L.C. 507.
[56] *Re Fredart ltd* (1994) 2 B.C.L.C 340.

a director for unfitness, the court has required a "marked degree" of negligence, however, that there are no suggestions that a particular enhanced standard of care is to be applied to directors.[57] Thus a lower standard is required to deem a director in breach of his duty of care. He went further to say that if a disqualification order is given, if unfitness is found, two years disqualification is mandatory.

On the application for a disqualification order by the Secretary of State or the official receiver, the court must make a disqualification order for a minimum of two years and a maximum of 15 years if it is satisfied that the conduct of the person concerned makes them unfit to act as the director of a company.[58] The Secretary of State or the official receiver can require the liquidator, administrator or administrative receiver of a company, or the former liquidator, administrator or administrative receiver of a company to provide such information about any person's conduct as a director of the company and to produce and permit inspection of such books, papers and other documents relevant to that person's conduct as a director as may be reasonably required for determining whether to apply for a disqualification order.[59] If it appears to the "officer holder responsible under this section" (i.e. the official receiver, the liquidator, the administrator or the administrative receiver) that the conduct of a person who has in any way been a director of a company that has become insolvent while that person was a director (either taken alone or taken together with their conduct as a director of any other company or companies) makes them unfit to be concerned in the management of a company, the officeholder must report the matter to the Secretary of State.[60]

In practice, the person must then report to the Disqualification Unit as part of the Insolvency Service. The Secretary of State then considers the report, and if it appears to be in the public interest that a

[57] *Supra* n 1, at p. 249.
[58] CDDA, s. 6(4).
[59] CDDA, s. 7(4).
[60] CDDA, s. 7(3).

disqualification order is made, an application may be made by the Secretary of State or the court.[61]

It is important to note that a different way to disqualify a director on grounds of unfitness is provided in s. 8, CDDA. According to this provision, an application for a disqualification order against a person who is, or has been, a director or shadow director of a company may be made by the Secretary of State where the Secretary thinks it is expedient to apply following an inspection of the company under the provisions of the Companies Act (CA), 2006.[62] The maximum period of the disqualification order under this provision is 15 years.[63] Disqualification orders against a person can also be made against *de facto* directors.

3.2.2. Non-Mandatory Disqualification Grounds

a. Serious Offences:

The disqualification here is under the CDDA, s. 2 and it is based on a court order. It is also known as disqualification on conviction of an indictable offence and it is the second most common disqualification after unfit ground. It is important to note that this ground covers also non-directors as well as Receivers and Liquidators. Thus, concerning a serious offence, what counts is whether the person has been convicted of an offence. If there has been a conviction of an officer on indictable offence, the person[64] concerned with promotion, formation, management, liquidation or striking off of a company, receivership or management of its property, a disqualification order may be made. Usually, the convicting court makes an order to disqualify. However, when there has been no conviction, but the company is being wound up[65] and a person has been guilty of fraudulent trading or has been guilty as an officer of the company of any fraud concerning it or any

[61] CDDA, s. 7(1).
[62] CDDA, s. 8(1).
[63] CDDA, s. 8 (4).
[64] Emphasis added.
[65] Emphasis added.

breach of duty as an officer; the court having jurisdiction to wound up company may impose disqualification order.[66]

b. Disqualification in connection with civil liability for fraudulent/wrong trading

What is considered here is the action of the director immediately preceding the company's insolvency. This is distinguished from the unfitness ground where what is considered is the director's whole activity as a director that is in question. On the application of any person or its motion, a court may also make a disqualification order against a person if it makes a declaration under section 213 or 214 of the *Insolvency Act 1986* that this person is liable to make a contribution to a company's assets, based on fraudulent trading or wrongful trading.[67]

CDDA provides that the court may act on its own (whether an application is made or not).[68] There are some other orders the court may make under the Insolvency Act.[69] Thus this disqualification order can be made irrespective of the question of whether or not an application for such an order is made by any person. The maximum period of a disqualification order under this section is 15 years.

c. Failure to comply with reporting requirements:

These are usually summary offences. If an officer has been convicted of summary offence in connection with failure to file a document with or give notice of a fact to the Registrar, the convicting court may disqualify the director, if in the past five years he has had three convictions or default orders for non-compliance with the reporting requirement of the Company and Insolvency Act.

If there have been previous indictments, section 2 applies. If the director has been convicted on summary offence and the previous offences are indictments, the summary court will still disqualify, notwithstanding.

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[66] CDDA, s. 4.
[67] CDDA, s. 10(1).
[68] CDDA, s. 10.
[69] UK Insolvency Act, s. 213 – 214.

Where there has been no conviction, the Secretary of State and others stipulated in section 16, CDDA, may apply to the court to wind up the company, praying for disqualification of director on the ground of his persistent default to comply with reporting requirements of Companies and Insolvency Act.[70] The persistent default must be proven. The maximum disqualification here is five years since it is a summary offence.

3.3. Disqualification by Undertaking (Out-Of-Court Disqualification)

As an alternative to a disqualification order by a court, there is also the option to offer a disqualification undertaking.[71] The Secretary of State may accept a disqualification undertaking offered by a person the Secretary considers to be unfit per section 6(1) or section 8(1) of the CDDA, 1986, if it appears that it is expedient in the public interest that the Secretary should do so instead of applying for a disqualification order.[72] The undertaking has the same effect as a court order. The maximum period that may be specified in the disqualification undertaking is 15 years and the minimum period is two years. On the application of the person who is subject to a disqualification undertaking, the court may reduce the period for which the undertaking is to be in force or provide for it to cease to be in force.[73] The purpose of the undertaking is to increase the speed of disqualifications and to reduce the cost in clear cases. The Secretary of States is also obligated to include those disqualifications undertakings in the register of disqualified directors,[74] and indicate where leave is granted

4.0. NIGERIA AND UK LAWS JUXTAPOSED

Having examined the two jurisdictions, which are the subjects of this discourse, it becomes imperative to examine them side by side to ascertain which would better serve the public, (whom the

[70] CDDA, s. 3.
[71] CDDA, s. 1(A).
[72] CDDA, ss. 7(2A), 8(2A).
[73] CDDA, s. 8A.
[74] CDDA, s. 2A.

disqualification seems to set out to protect) and how to get about effecting this protection. In doing this, some of the relevant innovations in the UK laws will be elicited with the rationale behind this. This is aimed at suggesting what the legislature should avert their minds to, while coming up with a new law on disqualification.

4.1. The Body of Law Governing Disqualification

The UK operates a developed system of directors' disqualification. The rules are found in a separate Act and are therefore, at least in theory, easily accessible.

The CDDA has rich provisions on how directors of insolvent companies and those who have shown themselves unfit, shall be dealt with. It provides the scope of the disqualification order and several grounds for disqualification. It designated several thresholds of periods, depending on the act of the director, from 2-15 years.

A cursory look at Nigeria's present disqualification regimes, whose laws are dispersed and exists independent of one another. The Companies Act in Nigeria (CAMA) was promulgated during the Military regime in the early '90s to administer the affairs of the company and it made very few provisions regarding the disqualification or banning of Directors for their questionable characters and in areas where the court can make orders.

Other laws governing the disqualification of directors are found in statutes regulating different sectors (the ISA and BOFIA). However, these statutes only confer on their regulators power to disqualify directors from acting in their sectors.[75] The problem now becomes, when these regulators employ these sectorial laws to disqualify a director from acting, are those disqualifications effective enough to refrain a director from acting in another body corporate not related to the previous sector? The courts have to an extent intervened to give a wider interpretation. It would also seem that CAMA has

[75] Although the court in *Oni* v *APC*, *supra* n 9, at p. 334, have given a wider interpretation to the meaning of "disqualification from the securities industries", it is humbly submitted that these judicial interpretation be given a more vivid codification in the CAMA or distinct statute which shall deal specifically on disqualification of directors.

covered this area; where such disqualified persons who are banned from being directors or directly and indirectly take part in the management of a company. Thus, it is advocated that this decision be codified and most preferably, a wider statute that deals on the subject be enacted.

Thus, a body of law that administers the disqualification of directors will make for a more organised regime. It will make the laws that deal with the subject easily accessible under one law/statute; which will provide for the different infractions that would warrant for disqualification, as well as the scope. This, of course, will be without prejudice to the powers imbued on other sector's regulators to disqualify. Finally, such legislation should feature the much clamoured and needed power of the CAC to disqualify directors.

4.2. Disqualification Undertaking

Disqualification undertaking is a form of non-adjudicatory procedure which is also an innovation of the UK. Due to its cost and time efficiency, statistics have shown that the introduction of the disqualification undertaking through the Insolvency Act, 2000, in the UK significantly reduced the number of cases that are adjudicated by the courts. Now the majority of disqualifications (about 80 per cent) are made by way of disqualification undertakings.[76]

Disqualification undertakings provide some solutions to the complexity of the UK disqualification regime, which might explain significantly the disqualification of more people via undertakings than disqualification orders.

4.3. Unfitness Regime under CDDA

It is interesting to note that, whereas most jurisdictions list specific convictions, conduct and status matters as indicative of an individual's "unfitness" to manage corporations, the CDDA treats "unfitness" as an independent ground for disqualification.[77]

[76] *Supra* n 33, at p. 62.
[77] *Ibid,* at p. 23.

In the Nigerian instance, the only mention of unfitness is the provision in ISA which mentioned that SEC can disqualify persons *considered unfit*.[78] This is similar to what is obtainable in the UK, where if the court determines that the director in question is unfit to be concerned in the management of the company, the imposition of a disqualification order on that director is mandatory and the court will have no discretion to refuse the making of such an order. This is of particular interest since the most common way directors are disqualified currently is under section 6 of the CDDA, 1986, when a director's conduct "makes [them] unfit to be concerned in the management of a company".

In respect of recklessness under the unfitness ground, Gower pointed out that to disqualify a director for unfitness, a "marked degree of negligence ought to suffice.[79] CAMA merely provided for action in negligence for a Director who has failed to exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in a comparable circumstance.[80] This begs the question: what will be the remedy of the company when the negligence or recklessness and incompetence of a director is such that the company has been greatly prejudiced and on the brink of insolvency?

Under the unfitness regime, where the directors conduct as a whole, in respect of an ailing company, and his conduct as a director of any other company or companies is taken into account, the court has a duty to make a disqualification order. Noteworthy is the fact that these other companies may not have fallen into insolvency and there need not be any link between it and the ailing company[81] for the director's conduct concerning them to be taken into account.

There is nothing mentioned in CAMA about disqualification on the grounds of unfitness as obtainable in the UK, where the director's whole affair is considered. CAMA merely proscribed certain acts as seen from section 502-506 as well as other sections; which to ensure

[78] Emphasis added; s. 13(bb), ISA did not mention what conducts would make a person unfit to be employed in the security industry.
[79] *Supra* n 1.
[80] CAMA, s. 282.
[81] *Supra* n 1, at p. 243.

compliance, is followed by criminal liabilities. Thus, the only section that deals on mandatory disqualification is CAMA section 254, which provides for the disqualification of fraudulent persons. Interestingly, that section of CAMA is similar to section 2 of the UK's CDDA on disqualification on conviction of an indictable offence. However, under CDDA, it is a ground for non-mandatory disqualification order by the court. Unlike in CAMA where the word used is "shall" making it a mandatory ground for disqualification.[82]

Due to the role of a director as the alter ego of a company, it is important that separate legislation, similar to CDDA, be enacted in Nigeria for the disqualification of Directors. It is noted that in the UK, only a director can be disqualified under CDDA, s. 6, which provides for disqualification on ground of unfitness. Gower has this to say:

> It should be noted that section 6 does not permit the court to disqualify any person whose conduct seems to the court to make him or her unfit to be a director. Only directors (including de facto and shadow directors) may be disqualified… once the company has become insolvent, the director is liable to have the whole of his affairs or her conduct as director of that company scrutinized for evidence of unfitness.[83]

By so doing, directors of limited liability, for fear of his disqualification from being a director of one or more companies, will exercise restraint in all his affairs. It is submitted that in the context of directors' duties, standards are used to allow room for managerial discretion and innovation, but rules are used to reinforce standards if the probability of breach is high. [84]

This is what has informed the courts in the UK to insert the periods of disqualification from 2 to 15 years. The courts impose sanctions on directors for falling below the standards required by CDDA s. 6. The

[82] CDDA, s. 2 and CAMA, s. 254.
[83] *Supra* n 1, at p. 242.
[84] A. Cahn and D. Donald, *Comparative Company Law*, (Cambridge University Press: 2010), p. 333.

sanction is then calculated according to the seriousness of the director's lapses.[85]

4.4. Introduction of Leave to Act

In the UK's CDDA, the rigours of the prohibition imposed by the Act is mitigated by the introduction of leave, here the disqualified director may be given leave to act in particular cases. The application for leave is considered in the same action for disqualification. It has been argued that the leave should not be so wide as to undermine the purpose of the order. In *Re Britannia Homes Centre Ltd*,[86] leave was refused a director with history of insolvency who wished to incorporate a new company to carry on trading in the same line of business.

The leave often relates to the other company of which the applicant is already a director, which are trading successfully and whose future success is thought to be dependent on the continuous involvement of the applicant.

A perusal of CAMA reveals no such thing as leave to act, which may be a deadlock, especially for a director who also sits in the board of another company, once disqualified under CAMA s. 254 will be unable to act in other companies whom he sits in their board.

4.5. Register of Disqualification

This is also another innovation of the UK Legislation which is worthy of emulation. The CDDA provides that the Secretary of State should create a register of orders and undertaking.[87] The registrar should also include leaves given to persons who have been disqualified to act despite the disqualification.

It seems that this Register will act as a caveat to the general public who wishes to know the status of the directors of the company they wish to deal with.

The UK Company Act 2006 in section 1189 empowers the Secretary of State to make regulation about returns which company should make

[85] *Re Grayan Building Society Ltd.* (1995) Ch. 241.
[86] (2001) 2 B.C.L.C 63.
[87] CDDA, s. 18 and Company (Disqualification Orders) Regulation 2001.

to Registrar about the appointment of Directors and Secretary. Those returns may contain statements in relation to disqualified persons and that leave has been obtained (where applicable).

There are no such registers in Nigeria which one could easily refer to in other to know whether a director has been disqualified. This is not unconcerned with the fact that there is no law such as the UK's CDDA which governs this area of corporate existence and endeavour holistically in Nigeria.

4.6. Disqualification Order and Foreign Law

There seems to be a lacuna in the CDDA, where directors disqualified under a law of a jurisdiction outside the UK (which may be similar to disqualification under CDDA) may conveniently act as director in a company incorporated under UK domestic laws; and yet not be in breach of CDDA.

However, part 40 of the UK's Company Act of 2006, empowers the Secretary of State to apply the equivalent of a domestic rule (in the UK) to a person who under the foreign jurisdiction law is by reason of misconduct or unfitness, disqualified from acting in relation to the affairs of a company incorporated in that jurisdiction.

Such person may be prohibited either automatically (as a result of the foreign disqualification), by court order in UK or undertaking given by him to the Secretary of State,[88] from acting in relation to a company incorporated based on UK domestic legislation.

This provision may prove to be important in the Nigeria situation, especially where there seems to be no equivalent provision for where a director who has been disqualified outside Nigeria may try to act as one in Nigeria.

5.0. CONCLUSION

The legal regime of disqualification of directors seems to be the sufficient remedy to the abuse of the Limited liability structure by directors. The UK legislation seemed encompassing and robust. The UK system is not without its shortfalls as the system is very

[88] UK Company Act 2006, ss. 1183 – 1184.

complicated, regarding not only who has standing to apply for a disqualification order, but also the specific grounds on which an application can be brought to court. The distinction between discretionary disqualification and mandatory disqualification makes the system even more complex.[89]

It has even been argued that the protective benefit to creditors of the disqualification programme may in broad economic terms, be offset by a tendency to inhibit responsible risk-taking, to stigmatise and increase the fear of failure and also to harm promotion of an entrepreneurial society.[90] However, the innovations brought to bear in the UK disqualification regime as examined above (especially the "leave to act" and "disqualification undertaking") provides some solution to these complexities.

Thus, it is advised that Nigeria emulates the UK laws in this respect. A separate law which deals on this area of corporate existence is most desirable. The director's role as an alter ego of a company bestows him with responsibilities of immense proportions, hence the standard of care required of him should be high, one of which a marked degree of negligence will be met with a disqualification sanction. This can only be possible if such laws as CDDA are made available. This will in turn become an effective and crucial tool in the enforcement of director's standard of competence, as it will seek to disqualify a director for his contribution to the company's insolvency by reason of his recklessness.

A look at the Nigerian framework reveals nothing like leave of a disqualified director to act. However, BOFIA mentioned something similar to leave in s. 48(3) where it says that a director of a wound-up bank can only act with the express authority of the Governor. This innovation needs a wider and clearer representation in our laws. A distinct law on disqualification of directors should thus incorporate leave for the director to act in other companies where the director

[89] *Supra* n 33, at p. 68.
[90] Andrew Hicks, "Director Disqualification: can it deliver?", (2001) (2001) *Journal of Business Law*, pp. 433 – 460. Available at https://exeter.rl.talis.com/items/284B01B6-F5B4-843A-646D-9F233D39A7A8.html (accessed 7 June 2020).

acts. Since dual directorship is not prohibited under our laws, [91] a disqualified director who sits in a board or management of another company would have no remedy, and this will cause a deadlock in this other company, maybe even resulting to risks of cataclysmic proportions. However, it is advised that the leave be incorporated with adequate checks so as not to defeat the purpose of disqualification.

A new disqualification statute should emulate what is done in the banking sector where the Secretary of the Banker's (CBN) Committee maintains a register of terminated, dismissed and convicted staffs of banks on grounds of fraud and dishonesty. It is suggested that this laudable apparatus be adopted for an efficient disqualification regime**.** This will definitely be in line with best practices as seen in the UK with the Register of disqualified directors. This will serve as an effective caveat to the public as well as efficient safeguard.

Finally, there should be provisions in either our laws, or the ideal Disqualification law, for disqualification of a disqualified director of a foreign company incorporated abroad, who may want to take advantage of our laws to operate a phoenix company; as obtainable in the CDDA.

[91] CAMA, s. 281.