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Corporate Power Allocation and Exercise in Zambia: The Enduring Authority of *Boxtel* and *Kasengele* and its Implication for Corporate Disclosure

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ABSTRACT

This article examines the legal, and regulatory framework for corporate power allocation and exercise in Zambia so as to establish whether or not the said framework provides sufficient incentives for effective corporate information disclosure. The central argument of this article is that, under the said framework, the overriding authority that shareholders wield over the affairs of the company without corresponding duties to the company is likely to compromise the quality of disclosure and increase agency costs for issuers. This argument is underscored by the view that, effective corporate disclosure is a means of reducing agency costs for listed issuers. The further argument is that, the high agency costs for listed issuers are likely to water down the efficacy of the current low correlation of African emerging markets with each other and developed markets to attract investors for international portfolio diversification. The study employs the doctrinal approach to examining the effectiveness of legal and regulatory rules. The main findings of the study were that: (a) The duty of the company to disclose material financial information on the periodic or continuous basis, is originally-vested in the directors by the Companies Act (b) Shareholders in Zambia wield overriding authority over the affairs of the company including the wishes of their nominees, and (c) using a sample of 14 LuSE-listed entities, out of a total of 24 listed entities, in some cases, shareholders interfere with the performance, by the directors, of the company's duty to disclose material information especially when it appears to be detrimental to the company, or by extension, to the shareholders.

Key words: Corporate, power, Allocation, Exercise, Disclosure, Emerging, Markets, Zambia.

INTRODUCTION

Agency costs sterilize disclosure while good corporate governance systems that control the agency conflict and reduce agency costs promote a good culture of disclosure. The establishment of systems that define how the autonomy of the two organs of a company—the Board of Directors, and the General Body of Members—will be achieved, monitored and promoted is sound corporate governance. Such systems are likely to enhance the quality of corporate disclosure. This article examines the legal and regulatory frameworks which govern the allocation and exercise of corporate power, and corporate disclosure inZambia, and other selected African emerging and pre-emerging markets so as to establish whether or not the said *frameworks* provide sufficient incentives for effective corporate governance and the reduction of agency costs.[1]

The central argument of this article is that, the allocation of the power of management to shareholders without a mechanism for ensuring accountability for the exercise of such power, or indeed fixing civil liability for any loss which may be caused to the company or third parties by the exercise of such exercise, is likely to increase agency costs for company issuers. This argument is underscored by the view that, effective corporate disclosure is a means of reducing agency costs for listed issuers.[2] The further argument is that, the high agency costs for listed issuers are likely to water down the efficacy of the current low correlation of African emerging markets with each other and developed markets to attract investors for international portfolio diversification. The article also argues that, failure to control for agency costs is likely to make

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listed company issuers and their securities unattractive to investors, and lower the liquidity of the securities.

Theories of Corporate Disclosure

There are three theories of disclosure regulation, namely:

- i) The cost of capital reduction theory;
- ii) The liquidity enhancement theory; and
- iii) The hydraulic theory.

The following subsections briefly consider these theories in turn. In discussing these theories some of legal arguments which have been made in this article for enhancing corporate disclosure will be elucidated. These theories will also explain some of the arguments which have been made in this article for the need to guard against externalities that may result from excessive disclosure.

Capital Cost Reduction Theory of Disclosure.

This theory holds that enhanced corporate disclosure directly reduces the cost of capital for issuers, and enhances firm value. This theory has its origin in Merton's 1987 model.[3] In Merton's model, some investors are at different levels of knowledge of the market. Some investors have full information while others have incomplete information. Particularly, those who have incomplete information are not aware of all the issuers which are participating in the economy. This results in incomplete risk sharing and market inefficiency. As the unknown issuers increase disclosure, they become known to the investors who possess incomplete information. The enhancement of disclosure by the previously unknown issuers increases the investor base. It also enhances risk sharing and reduces the cost of capital.[4] However, the Merton Model raises the question as to how the investor-base is actually priced in the equilibrium. There is also an off-shoot of this theory which is based on the estimation risk. This theory is premised on the estimation of the beta of a firm, and the determination of the role of information (disclosures) in the estimation.[5] Once these two aspects are ascertained, the informational aspects is then modelled as arising from a historical time-series of returns.[6] Two streams are then generated from the time series of returns, namely:

- i) The equal information stream—that is, a stream where the same historical series of returns is available to all firms in the economy; and
- ii) The unequal information stream—that is, a stream where some firms have longer time series of returns than others.

The results of the studies which were conducted by Barry and Brown,[7] and Coles et al,[8] show a lower beta for the better-informed securities holders in the unequal information stream than for the securities holders in the equal-information stream. However, these studies do not explain the differences in the betas in the category of the less-informed securities in the stream which has information asymmetry when compared to the equal-information stream. Also, these studies do not explain how firm-specific information could possibly influence the cost of capital in the stream which has information asymmetry. The other shortcoming is that this model suffers from inherent rigidity. Generally speaking, subject to the weaknesses which have been identified above, the results of these studies show that disclosure is likely to reduce the cost of capital for firms. Recent studies have attempted to tackle some of the question which have been raised above. Particularly, a study which was conducted by Lambert, Leuz and Varrencchia,[9] re-examines the relationship between estimation risk and the firm's cost of capital. This study adopts a more conventional information-economics approach which relates information signals to realized or future cash flows. This approach also allows for general informational changes. It also accommodates analyses of firm-specific information. The results of this study show that the co-variances of a firm's cash flows with the cash flows of other firms decreases as disclosure increases. This effect [unambiguously] moves the firm's

cost of capital closer to the risk-free-rate.[10]

One of the major reasons why issuers seek to raise capital in foreign markets is the lower cost of capital. Given the empirical relationship between better corporate disclosure and the lower cost of capital, issuers are likely to migrate to securities markets which have stringent regulatory rules and a proven record of effective enforcement of those rules. This argument is in line with the bonding theory which holds that, "issuers are likely to migrate to foreign markets if and only if the quality of regulatory rules and enforcement in those markets is better than that obtaining at home".[11]

Liquidity Enhancement Theory of Disclosure.

This theory is premised on the notion that information asymmetries among investors in securities markets lead to the problem of adverse selection. Adverse selection involves undue caution on the part of investors in deciding when to trade, who to trade with and how much trade to undertake. With information asymmetries, the uninformed or less informed investors are constantly troubled by the challenge of having to trade with informed or better informed investors. The primary fear of the uninformed or less informed investors is that, the informed or better informed investors would be willing to buy or sell their securities at a particular price simply because the price is lower or higher than what it would be had the unpublished price-sensitive information been made public.[12] Consequently, as a possible way of safeguarding their investment interests, the informed traders will have to increase or lower their bids and asks.[13] The upward and downward adjustments in the bids and asks fundamentally reflect the reality of the informational advantage that the informed or better informed investor have over the uninformed or less informed investors.[14] A possible way of vitiating the negative impact of such informational advantage is to introduce bid-and-ask spreads in secondary trading markets.[15] Informational advantages and disadvantages may increase or reduce the number and volume of securities a particular trader could buy or sell on any trading day. When the informed or better informed investors are willing to buy securities, they are potential liquidity buyers (demanders) while the uninformed or less informed ones are the potential liquidity sellers (suppliers). Since the liquidity suppliers are unwilling to sell or are only willing to sell a small portion of their securities positions, there will be excess demand in the market. This is likely to push the price upwards. Similarly, when the informed or better informed investors are willing to sell off their positions, they will be potential liquidity suppliers while the uninformed or less informed ones will be liquidity demanders. Since the liquidity demanders are altogether unwilling or are only willing to buy a small portion of securities positions supplied, there is likely to be excess supply. This phenomenon is likely to push the price downwards. And, the fluctuation in the prices of securities is likely to cause market volatility which is likely to lead to panic buying and selling, and aggravate volatility.[16] In turn, the attendant volatility is likely to lower the number of trades, and liquidity of the securities market.[17] A possible way of reducing the information asymmetries and adverse selection in securities markets, and increasing investor confidence and encouraging securities trading is to promote and enhance the quality of corporate disclosure.[18] Corporate disclosure enhances securities market liquidity in two ways, namely:[19]

- i) The enhanced flow of information into public domain makes it meaningless for traders to get privately informed. It also lowers the cost of the unpublished information which is of the same character as the already-disclosed information. This tends to reduce the number of trades which are tainted with information asymmetry; and
- ii) Certainty about the true state of the issuer, its business and securities means that investors will be free from adverse selection. They may be willing to take the other side of the transaction, readily. This is likely to increase the number orders (actual and potential), and enhances the depth and breadth of the market, an enhance the liquidity of the market.

Hydraulic Theory of Disclosure.

If undisclosed price-sensitive information which is in private possessed by some investors is valuable, the regulatory challenge to compel disclosure might be considerable. The issuers and investors who possess such information will only be willing to release the information if and only if the personal gains from disclosure outweigh the cost thereof.[20] This view attracts an argument for a legal, regulatory and institutional framework which is likely to ensure effective disclosure. Thus, effective and efficient regulatory rules which ensure compliance at minimum cost are likely to encourage disclosure by issuers and investors alike, since the low cost of compliance will be outweighed by the liquidity and low-cost-of-capital benefits that would come with the enhanced disclosure. Thus, the hydraulic theory of disclosure holds that, as disclosure rules impose costs on the targeted behaviour (non-disclosure), these rules will induce behavioural changes rather than increase information flow, as long as the targeted behaviour could be altered at a cost that is lower than the cost of disclosure.[21] However, where the cost of altering the targeted behavior is higher than the cost of disclosure—such as where the full costs of disclosure are either sufficiently low or sufficiently externalized, or where the alternative forms of behaviour are more costly—disclosure rules may have limited success in discouraging the undesirable behaviour.[22] However, where the costs of disclosure could be avoided at a much lower cost by replacing the targeted behavior with other behaviour, the effect is, at best, ambiguous.[23] Consequently, as a possible way of guarding against the externalities which may be caused by such uncertainty, and yield optimal regulatory results, the following regulatory measures are proposed, namely:

- i) Effective regulatory rules for the targeted behaviour;
- ii) Effective mechanism for the enforcement of the regulatory rules for the targeted behaviour;
- iii) An effective institutional framework which facilitates compliance with the regulatory rules at minimum cost;
- iv) Effective regulatory rules for other forms of behaviour that could possibly serve as substitutes for the primary (targeted) behaviour—corporate disclosure (substitute behaviour such as insider dealing);
- v) Effective enforcement of the regulatory rules for the possible substitute behaviour; and
- vi) That the regulatory rules for the possible substitute behaviour facilitate compliance at minimum cost.

The Two Types of Disclosure

The disclosure obligation of listed issuers can take two forms, namely the continuous form or the periodic form. Continuous disclosure can be defined as a statutory obligation of a listed issuer of securities to promptly disclose unpublished material information which relates to the issuer, its securities, business and other like matters as and when it becomes known to the officers of the issuer.[24] This obligation may be contrasted, in the Zambian context, with periodic disclosure which requires the preparation and filing of disclosure documents on a yearly basis.[25] In distinguishing continuous disclosure from periodic disclosure, Golding and Kalfus (2004) observe that:

[A] key distinction between periodic disclosure and continuous disclosure is that periodic disclosure is episodic and permits information to be refined and disclosure issues to be assessed over an appropriate period following the relevant closing date of the financial statement, while continuous disclosure is prompt, resulting in the need to make speedy disclosure decisions.[26]

BACKGROUND TO THE PROBLEM

The spirit and tenor of section 215 of the Zambian Companies Act 1994 (repealed) can be traced to Zambia's Independence Companies Act,[27] which statute borrowed so much from the English Companies Acts of 1929 and 1948, respectively.[28] The said Zambian provision was verbatim and seriatim the corresponding provisions of the said English statutes. Consequently, when the *Boxtel* case fell before the

Zambian Supreme Court for determination,[29] the English decisions which interpreted the corresponding provisions of the successive English Companies Acts served as persuasive authorities. Earlier English decisions had decided that shareholders could alter the decisions of the directors. [30] Consequently, the Zambian Supreme Court, in *Boxtel*, in determining whether or not it was competent for the shareholders to alter the prior decision of the directors, held that 'shareholders wield, as of right, overriding authority over the affairs of a company'. In keeping with international best practices (modern corporate governance practices), the English Courts abandoned the position which they had taken in *Isle of Wight Railway*, and decided that once the Companies Act or the articles of association vested power of management in the directors, they and they alone can perform that function (which would include the performance of the duty to disclose material corporate information on behalf of the company);[31] the shareholders can only interfere where the directors are unwilling to act, or where the existing board is dysfunctional. On the contrary, the Zambian Supreme Court has sustained the force of *Boxtel* by reaffirming it in *Kasengele*,[32] and subsequent cases.[33] The position of the Zambian Supreme Court on corporate power allocation and exercise is opposed to effective corporate governance which requires that the powers of the two organs of a company—the Board of Directors, and the body of Members—are clearly defined and exercisable only by the organ to which they are allocated.

Against the background to problem which has been given above, the statement of the problem which is under investigation may be phrased as follows:

Has the legal and regulatory framework which governs corporate power allocation and exercise, and corporate disclosure in Zambia provided adequate incentives for effective corporate governance and disclosure?

METHODOLOGY

This research falls into the qualitative research category. It focuses on answering specific questions which relate to the problem which is under investigation by using both primary and secondary data. The research is underpinned by a doctrinal approach to examining the effectiveness of the legal and regulatory framework which governs corporate power allocation and exercise, and corporate disclosure in Zambia. This method was used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used. Secondary sources such as journals and other written commentaries on primary sources were also used. A checklist of documentary sources was used, as well. As a possible way of avoiding subjectivity in the selection of documentary sources, the study employed non-probability sampling method—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not the legal and regulatory framework which governs the allocation and exercise of corporate power, and corporate disclosure provides adequate incentive for effective disclosure in Zambia. The study fleshes out some shortcomings in the said framework, and makes necessary proposals for remedial reform.

The research questions which were used are:

1. Does the law clearly define the organ which is responsible for the management of the affairs of the company, including corporate disclosure?
2. Does the law and policy allow the shareholders to alter the decisions of the directors?
3. Are the directors civilly liable to the company for any loss which the company may suffer as a result of the ill performance of their duties?
4. Are the shareholders liable to the company for any loss which may be caused to the company by the

exercise of the powers of the directors?

RESULTS.

The results of the study may be summarised in tabular form as follows:

Question	Findings	
	National Law	International Best Practice
1.Does the law clearly define the organ which is responsible for the management of the affairs of the company, including corporate disclosure?	YES	YES
2.Does the law and policy allow the shareholders to alter the decisions of the directors?	YES	NO
3.Are the directors civilly liable to the company for any loss which the company may suffer as a result of the ill performance of their duties?	YES	YES
4.Are the shareholders liable to the company for any loss which may be caused to the company by the exercise of the powers of the directors?	NO	NO

The Other Findings

Questionnaires were administered to the 14 entities which are currently listed on Zambia's Lusaka Securities Exchange (the LuSE).[34] On account of the sensitive nature of the subject, we shall withhold the identity and designation of the individuals to whom the questionnaires were administered. For the sake of clarity, we shall refer to the actual respondents as 'entities' in apparent reference to the companies they serve. All the Respondents—the entities—are subject to the statutory Periodic Disclosure, and Continuous Disclosure. In terms of the constitution of the Boards of Directors, 4 entities had directors who were also shareholders, while the other 10 had purely independent directors. Out of the 4 entities whose shareholders double up as directors,[35] the first Respondent has a Board which is dominated by Executive Directors (EDs) who are also shareholders.[36] The second, third and fourth Respondents have Boards which are dominated by independent EDs. The Board of the first Respondent, among the 4 entities whose boards are conflicted, has 6 EDs, 4 of which are also shareholders while 2 are independent. The Board of the second Respondent consists of 7 independent EDs, and 1 conflicted ED. The Board of the third Respondent consists of 3 independent EDs and 1 conflicted ED. The fourth Respondent, whose board is conflicted, has a Board which consists of 3 independent EDs and 2 conflicted EDs. The other 10 Respondents (the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth) have independent Boards partly because their shareholders are bodies corporate, and the regulatory framework in Zambia does not allow a body corporate to be appointed as director of a company.[37] The other reason is that these Respondents are of a view that an independent board reduces agency conflicts and enhances corporate governance and operational efficiency.[38]

Out of the 14 Respondents who were asked to state whether or not the shareholders of their company have, in the last five years, interfered with the performance, by the directors of the company on behalf of the company, of the duty of the company to disclosure material information on a periodic or continuous basis, 11 Respondents indicated that they had experienced such interference. At a general level, the results indicate that all the Respondents have experienced shareholder interference at least once in the last five years irrespective of the nature of the disclosure obligation. Out of the 14 Respondents, 5 indicated that they experienced more shareholder interference when the nature of the disclosure obligation was continuous. The other 9 Respondents indicated that they experienced shareholder interference regardless of the nature of the

disclosure obligation. Interestingly, the Respondent whose Board is dominated by shareholders indicated that it did not experience any shareholder interference with the performance of the disclosure obligation—whether periodic or continuous. This state of affairs could be explained by the possibility that the conflicted board whose membership is predominantly shareholder, endorses the wishes of the general body of members, so much so that, the decisions of the Board are, for all intent and purposes, the decisionsof the members. The general picture of the results is as indicated in the Appendix.

LEGAL AND REGULATORY CONSTRAINTS ON EFFECTIVE CORPORATE POWER ALLOCATION AND EXERCISE IN ZAMBIA

CORPORATE POWER ALLOCATION AND EXERCISE IN ZAMBIA.

Although in most African emerging and pre-emerging markets, the duty to disclose corporate information vests in directors,[39] shareholders wield overriding authority over the affairs of the company. This state of affairs presents an opportunity for the shareholders to interfere with the discharge of the disclosure obligation by directors. After all, under the shareholder primacy model such as this one which is in force in Zambia, the profits are maximized by directors for the benefit of shareholders who might have to protect their interests if those interests are threatened by disclosure. Once they interfere, shareholders might go as far as cherry-picking what kind of information is released to the public. They might also determine when the *disclosable information*[40] is released, and how much of it is released.

The relevant provisions of the Zambian legal framework provide as follows:

Zambian Companies Act 1994 *(repealed):*

215(1) Subject to this Act, the business of a company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and **may exercise all such powers of the company as are not, by this Act or the articles, required to be exercised by the company by resolution.**

Zambian Companies Act 2017 *(in force):*

86(1) Subject to this Act, the business of a company shall be managed by, or under the direction or supervision of, a board of directors who **may**—

(a) pay all expenses incurred in promoting and forming the company; and

(b) **exercise all such powers of the company as are not, by this Act or the articles, required to be exercised by the members**.[41]

131(1) **The shareholders of a company shall, exercise the powers reserved to shareholders as specified** in this Act or the articles—

(a) at a meeting of the shareholders; or

(b) in lieu of a meeting, by a resolution made in accordance with section 77.

(2) **A power reserved to shareholders shall be exercised by ordinary resolution, unless the articles or this Act specify otherwise.**

Although the general body of shareholders is mandated to exercise corporate power on behalf of the company, there is no corresponding stipulation of the duties that they owe to the company. Such duties are a necessary device for controlling agency costs. On the contrary, directors in Zambian companies in

discharging their managerial and executive responsibilities under sections 86 and 105 of the Companies Act 2017 owe the company the following duties, namely:

Fiduciary duties,[42] that is—

i) The duty to act in accordance with the provisions of the Companies Act and the articles of the company;[43]

ii) Exercise the managerial and executive power for the purpose for which it was conferred;[44]

iii) The duty to promote success of the company;[45]

iv) The duty to exercise independent judgment;[46]

v) The duty to disclose their remuneration, and information about their remuneration in financial statements of the company.[47]

- The duty to avoid conflict of interests;[48]
- The duty to turn down third party benefits;[49]
- The duty to disclose personal interest in proposed transactions with the company.[50]

Willful breach of the director's duties and responsibilities which have been enumerated above attracts the following sanctions, namely:

- i) Liability to pay compensation to the company;
- ii) Removal from office; and
- iii) Account to the company for any profits made as a result of the breach.[51]

The imposition of sanctions for breach of the director's duties obviously saves as a device for controlling agency costs. An argument is made that since the functions of shareholders are not accompanied by similar duties and sanctions, the exercise of directors' duties by shareholder is likely to increase agency costs for issuers. It is also argued that, the high agency costs are likely to tannish the reputation of the issuer and its securities in securities markets. Also, the poor reputation of the issuer and its securities in the securities markets is likely to lengthen the time for the disposal of the securities. And, the longer periods of disposing of such unattractive securities are likely to lower the liquidity of those assets. Also, it is submitted that such corporate governance practice is not good for international credit rating of the issuer company as they seek to cross-list in foreign markets.

What is distillable from sections 86(1) and 131(1) of the Zambian Companies Act 2017?

What is the correct import of sections 86(1) and 131(1) of the Zambian Companies Act 2017? The correct import of the said sections appears to be as follows:

- i) The articles of the company and the Companies Act together define the powers of the directors and the members as distinct organs of the company;
- ii) Directors cannot competently exercise the powers which are reserved for the shareholders;
- iii) Shareholders may exercise the powers which are reserved for them; and
- iv) Shareholders are not forbidden from exercising the powers which are reserved for directors (as directors have been expressly forbidden from exercising powers reserved for shareholders: See, Zambian Companies Act 2017, ss 86(1)(b), 131(1)).[52]
- v) As a corollary to (iii) and (iv) above, as far as the articles are concerned, certain powers may be shared by the directors and members as long as there are certain powers reserved for the members; and

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- vi) By necessary extension, the members may wield overriding power in those shared aspects.

Judicial Interpretation of Section 215(1) of the Zambian Companies Act 1994 (repealed).

Section 215(1) of the Zambian Companies Act 1994 *(repealed)* raised the question, as section 86(1) of the Zambian Companies Act 2017 does, whether or not shareholders could override the management decisions of directors of the company. The seminal case under the 1994 regime was the case of *John Kasengele v Zambia National Commercial Bank*.[53] In *Kasengele*, the Zambian Supreme Court held that "shareholders enjoy overriding authority over the affairs of the company". This holding was based on the ratio which was laid down much earlier in *van Boxel v Rosalyn Mary Kearney (a minor by Charles Kearney her father and next of kin),*[54] where the Court held that "shareholders enjoy as a matter of right, overriding authority over the affairs of the company".

The Economic Theory/Philosophy informing the Decision in Kasengele.

In economic theory, a company is treated as a possession of its members. It is not viewed as separate legal entity as the law sees it. This philosophy equates the general body of members (particularly, shareholders) to the company. Economic theory does not recognize directors of the company as agents of the company, either. Rather, the theory/philosophy views directors as agents of shareholders whose ultimate duty is the maximization of profits for the benefit of shareholders.[55] Here, 'agent' is not used in the legal sense, but rather in the economic sense, which is, "a person's actions or omissions (the agent) determine the welfare of another (called the principal).[56] This is the economic foundation for the shareholder entitlement "to override as of right". By this theory, all that the directors do in the management of the affairs of the company, should demonstrably be for the maximization of the interests of shareholders. And, by necessary implication, shareholders have or should have the overriding power to correct decisions of the directors.

CORPORATE GOVERNANCE MODELS.

Corporate governance is a broad term that describes the processes, customs, policies, laws and institutions that direct organisations and corporations in the way they act, administer and control their operations.[57] The phrase is easier to describe than define. Consequently, there is no universal definition of the phrase 'corporate governance'.[58] However, the G20/OECD definition seems to have commanded wide acceptance. The G20/OECD define corporate governance as:

A set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of a company are set, means of attaining those objectives and monitoring performance are determined.[59]

As a possible way of lighting up the course of the discussion in this section, it is imperative to discuss some of the models of corporate governance. There are three main models of corporate governance, namely:

- i) the shareholder primacy model—also known as the principal-agent model;
- ii) the director primacy model; and
- iii) the team production model.

The Shareholder Primacy Model.

The shareholder primacy model is sometimes referred to as the principal-agent model. This model asserts that maximizing share value is the ultimate goal of a firm.[60] Thus, under this model, improving corporate governance entails curtailing the power of the Board of Directors (the BoD), and maximizing shareholder power.[61] Also, director and executive incentives are tied to share value maximization.[62] This model

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therefore, views directors and executives of a company as agents of shareholders in whose sole interest they must act. As principals, shareholders reserve the right to correct, by any lawful means, the excesses (acts and omissions) of directors and executives. Thus, this model does not recognize a company as a separate legal entity capable of independent existence and owning own assets and venturing out into business. The company is viewed as a commercial vehicle through shareholders aim to maximize their wealth.

The Director Primacy Model.

The director primacy model runs counter to the notion of the shareholder primacy model. The former model is based on the concept of a corporation as an entity which is not owned by the shareholders, but exists independently as separate legal entity that is *sui generis*.[63] Under this model of corporate governance, the Board of Directors (BoD) is a mediating hierarch which is responsible for balancing the often competing interests of a variety of stakeholders.[64] And, although the BoD may owe a duty to shareholders, the directors are the ultimate decision makers whose ultimate duty is owed to the company.[65]

The Team Production Model.

The team production model of firm corporate governance, and not the principal-agent model, is the foundation of the director primacy model.[66] This model notes that effective operation of a corporation requires the combined input of two or more individuals or groups.[67] From this point of view, corporations are cooperative teams which are charged with the responsibility of not only creating wealth but also attending to different interests of stakeholders.[68] Team production also requires that the Board of Directors (BoD) reflects the interests of different stakeholders.[69]

***BOXTEL & KASENGELE* AND THE THREE MODELS OF CORPORATE GOVERNANCE.**

Boxtel and *Kasengele* identify with the shareholder primacy model of corporate governance as far as they clothe shareholder with overriding authority over the managerial and executive affairs of the company, as of right. By relegating the BoD to a lower hierarch of power, these decisions have entrenched the shareholder primacy model in Zambia.

Section 131(1) of the Zambian Companies Act 2017—A Step towards Director Primacy?

Before we launch to examine this aspect, it is imperative to note here that section 86 of the Zambian Companies Act 2017 is actually verbatim section 215 of the repealed Act of 1994. Therefore, standing alone, the new section 86 would not challenge the force of *Boxtel* and *Kasengele*. Therefore, the decisive question is whether or not section 131(1) of the Zambian Companies Act 2017 has added anything that suggests a move towards director primacy. The said section provides as follows:

131(1) The shareholders of a company shall, exercise the powers reserved to shareholders as specified in this Act or the articles.

As noted above, section 131(1) merely stipulates that "shareholders are entitled to exercise the powers which are reserved to them by the Act and articles". This is not the same thing as stating that "shareholders shall not exercise the powers which are reserved to directors", neither is it the same thing as stipulating that "shareholders shall exercise only those powers reserved to them by the Act or the articles".[70] The said section therefore, merely states source of the powers of shareholders. It also, by implication, tells us that, the scope of the powers of shareholders depends on the scope, tenor and spirit of those sources. Once ascertained, the scope of the powers of the shareholder will tell us what the shareholders can do as opposed to what they cannot do. This would imply that the sources of shareholders' powers might stipulate that the shareholders shall also have overriding authority over the exercise of directors' powers. By contrast, section

86(1)(b) categorically states that directors cannot competently exercise those powers which are reserved for shareholder, as follows:

86(1) Director of a company may—

(b) exercise all such powers of the company **as are not, by this Act or the articles, required to be exercised by the members**.

Since the BoD and the general body of shareholders are both organs of the company which are *sui generis*, and serve different purposes which are equally important to the operations of the company, an impression that, the absence of an express bar on the body of shareholders to interfere with managerial, supervisory and directive functions of the directors was deliberate Parliamentary intendment to make the BoD subservient to the former, emerges. It is therefore submitted that sections 86 and 131 as read together effectively re-entrench the shareholder primacy model of corporate governance in Zambia. Consequently, the said legislative provisions breathe yet another lease of life (force) into *Boxtel* and *Kasengele*.

CORPORATE POWER ALLOCATION: AN INTERNATIONAL COMPARATIVE ANALYSIS.

This subsection makes an international comparative analysis by examining corporate power allocation and treatment in the United Kingdom and the United States of America.

Corporate Power Allocation and Exercise in the United Kingdom.

Under English company law, a company operates through traditional organs, namely the Board of Directors and the general body of members. The day-to-day management of the affairs of a company is the responsibility of directors. The directors are also responsible for strategic and operational decisions of the company. The directors are also responsible for ensuring compliance with the statutory obligations of the company. In discharging these responsibilities, the directors of an English company owe the company the following duties:

i) Duty to act within their powers;[71]

ii) Duty to promote success of the company;[72]

iii) Duty to exercise independent judgment;[73]

iv) Duty to take reasonable care, skill and diligence;[74]

v) Duty to avoid conflict of interest;[75]

vi) Duty not to accept third party benefits;[76] and the

vii) Duty to declare interest in proposed transactions and arrangements.[77]

Since these general director duties are owed to the company and the company alone, and a breach of these duties attracts civil liability to the company—not to the members,[78] in form of compensation, restitution, damages and injunctions,[79] the members should not interfere with the performance of these duties. The members may, however, do the following, namely:

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i) Bring a derivative in the name of the company, and on behalf of the company and seek redress from the High Court for any loss which the company may suffer on account of breach of the duties of the directors; [80]

ii) In the event that members suffer personal loss as a result of a breach of duty by the directors, the members may sue the company as principal of the directors; and

iii) Vote out the erring directors at the Annual General Meeting.[81]

It would not be competent for the members to invoke their residue powers to straighten out the breaches of directors' duties because the residue powers are a form of default power. And, as such, the powers may be used only where there is proof that the BoD is unwilling to act or where the board is dysfunctional.

Corporate Power Allocation and Exercise in the United States of America.

In the U.S., corporate governance is premised on the director primacy model. For example, the Delaware General Corporation Law, provides that:

[T]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.[82]

In explaining the effect of sections 108 and 141 of the Delaware General Corporation Law, Judge Collins in *Manson v. Curtis*,[83] stated:

In corporate bodies, the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. All powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts.[84]

Therefore, in the United States, as is the case in the United Kingdom, the powers reserved for either organ of a company are the preserve of that particular organ. Thus, unlike in Zambia, the shareholders of a US company cannot interfere with the day-today decision making processes of a company. It is noteworthy here that section 141 of the Delaware Corporations Code substantially reflects the tenor and spirit (the import) of section 86(1)(b) of the Zambian Companies Act 2017. Therefore, an argument could be made that, on the authority of *Manson v Curtis*, section 86(1)(b) of the Zambian Companies Act 2017 standing alone, as section 215(1) did in the Companies Act 1994 *(repealed),* should be sufficient to entrench director primacy in Zambia. By the same token, *Boxtel* and *Kasengele* should not have been decided in the manner they were decided.

Corporate Power Allocation and Exercise in South Africa.

In South Africa, both the body of members and the board of directors are recognized as organs of a company. Thus, corporate power of a company is allocated to the members and the board of directors. The power of management and supervision of the business of the company is vested in the board subject to the provisions of the Memorandum of Incorporation of the company.[85] This implies that, the extent of the

directors' powers of management is spelt out in the Memorandum of Incorporation of the company. It also implies that, the body of members may,[86] if so empowered by the Memorandum of Incorporation, exercise the management powers of the company.[87] It further implies that, where the Memorandum of Incorporation expressly and exclusively vests the power of management in the directors, the shareholders cannot issue directions or instructions as to how the directors should exercise their powers, or altogether interfere with the exercise of those powers.[88] However, in the event that the board is unable to act or is unwilling to exercise their powers for the benefit of the company, the members may invoke their residual powers and exercise the requisite directors' powers.[89] In exercising the management powers of the company, directors owe to the company the following duties, namely:

i. The duty to act in good faith and for a proper purpose;[90]
ii. The duty to act in the best interest of the company;[91]
iii. The duty to avoid conflict of interest;
iv. The duty to act with a degree of care, skill and diligence that reasonably be expected of a person—

1. carrying out the same functions in relation to the company as those carried out by that director; and
2. having the general knowledge, skill and experience of that director.[92]

If the exercise of the directors' powers causes loss to the company or subjects the company to a judicial condemnation in damages and costs, the directors may assume liability to compensate the company for its loss.[93] However, there is no liability which attaches to any loss which may be caused to the company by shareholders' exercise of directors' powers. As observed earlier in article, the extension of the management responsibility to members without a mechanism for ensuring accountability or compensation for any loss that may be caused to the company by the exercise by members, of the management powers, is likely to increase agency costs. The high agency costs are likely to injure the reputation of the issuers and its securities in securities markets for failing to control for such costs. The unattractiveness of the issuer's securities is likely to lengthen the time of disposing of the securities on the listing exchange. Also, the longer periods of disposing of such unattractive assets are likely to lower their liquidity. And, as far as corporate disclosure is concerned, under such a scheme, members may have an interest in directing directors to altogether withhold or disclose only a portion of detrimental information. As a possible way of overcoming such a shortcoming in the legal and regulatory framework, necessary proposals have been made in section 1.5 below.

Corporate Power Allocation and Exercise in Nigeria.

Directors of a company which is incorporated or registered according to the laws of Nigeria primarily owe fiduciary duties to the company.[94] Where a director or directors undertake to act for a particular member or members, they owe their duties to the member(s) and to the company.[95] And, since their primary duty is owed to the company, it implies that where a duty to a particular member or members poses a potential conflict of interest, the directors should decline to act for and on behalf of that/those member(s). Further, any breach of directors' duty that causes loss to the company is enforceable by the company.[96] Corporate power in companies incorporated registered under the laws Nigeria is allocated members and directors. Thus, under Nigerian law, a company may act through the body of members or through the board of directors, or indeed agents of either organ.[97] The powers which is exercised by either organ, and the extent of those powers are, subject to the provisions of the Companies and Allied Matters Act, set out in the articles of association.[98] Although the power of management is expressly vested in the board of directors, [99] the members may direct or instruct the board on how to exercise their powers.[100] Once directed or instructed, the directors are to obey the directions or instruction of the members.[101] However, the articles of association may stipulate that the members shall not interfere with the exercise of directors' powers of management.[102] Such a safeguard of is little practical significance for the following reasons:

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i) A company is formed by two or more members, depending on the jurisdiction, who might have an interest in ensuring that the powers of the board of directors are exercised in the best interest of the members, who under shareholder primacy are regarded as the company; and

ii) The power of members to oversee the activities of the board of directors is the direct end of shareholder primacy which sees the board as the servant of the body of shareholders whose primary role is ensuring profit maximization for the benefit of the shareholders.

It is submitted that the Nigerian Companies and Allied Matters Act 1990 effectively entrenches shareholder primacy. Therefore, it could be argued that the power on the part of the shareholders to override the management decisions of the board of directors without attaching liability to mal-exercise of such powers is likely to compromise the quality of disclosure especially when disclosure is detrimental to the interests of the shareholders. Such an approach to corporate disclosure regulation is also likely to increase agency costs for listed issuers and make those issuers and their securities unattractive to investors. Also, the longer periods of disposing of the securities of such issuers are likely to lower the liquidity of those assets. And, further, the international portfolio diversification benefits that emerging markets like Nigeria, and pre-emerging markets like Zambia offer to developed market investors are unlikely to increase investor participation on account of high agency costs.

Corporate Power Allocation and Exercise in Kenya.

In Kenya, both the general body of members (shareholders) and the board of directors are organs of a company. The power of shareholders is exercised by resolution in general meetings.[103] The power of management vests in the board of directors,[104] subject to the provisions of the Companies Act or the articles of association.[105] In exercising their powers of management, directors owe the following common law and fiduciary duties to the company,[106] namely:

1. The duty to act in accordance with the company constitution and exercise their powers for the proper purpose;[107]
2. The duty to promote success of the company;[108]
3. The duty to exercise independent judgement;[109]
4. The duty to exercise reasonable care, skill and diligence having regard to—
5. i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions of director in relation to the company; and
6. ii) the general knowledge, skill and experience that the director actually has.[110]
7. The duty to avoid conflict of interest;[111]
8. The duty not to accept benefits from third parties.[112]

Any exercise of management powers by directors that causes loss to the company attracts civil liability to the company.[113] Although shareholder may, the articles providing, override the management decisions of the directors, both the Companies Act and the articles do not impose duties on shareholders, and attach civil liability to abuse of those powers. The lack of such guards is likely to incentivize abuse of management powers by shareholders. It is also likely to it is also likely to increase agency costs for the company, and tannish the reputation of the company and its securities in the securities market for failing to control for agency costs. The shareholders may also have an interest in suppressing detrimental information—a situation that is likely to compromise the quality of corporate disclosure and injure market efficiency.

FUNCTIONAL AUTONOMY BETWEEN SHAREHOLDERS AND THE BOARD OF DIRECTORS OF A COMPANY.

When a principal confers authority on an agent they do not normally restrict the agent's authority to act.[114] Thus, a principal may, in some instances contract on the basis that the agent should have exclusive authority in certain matters.[115] In the event that a principal grants exclusive authority to an agent, they may also confer the same competence on another/other agent(s).[116] The foregoing views anchor the argument that a company may through its constitution confer concurrent management competences on the BoD and the body of members. By extension, the said views may also ground the argument that the company may well, through its constitution, contract that, of the two bodies which exercise concurrent competences, the other is to have overriding authority over the other.[117] This extended notion seems to be the cradle of the Zambian shareholder primacy model. Of the two initial views, Gower and Davis observe that:

The choice between the two legal analyses affected very strongly the way in which the courts approached the interpretation of the provisions of the articles of particular companies. Until the end of the nineteenth century, it seemed to have been generally assumed that the proposition remained intact that the General Meeting [the body of members][118] was the supreme organ of the company and that the board of directors was merely an agent of the company SUBJECT to the control of the company in the general meeting. The implication of this was that shareholders could at any time through an ordinary resolution give the directors binding instructions as to how they were to exercise their management powers.[119]

The observation made by Gower and Davis above is expressed in the case of *Isle of Wight Railway v Tahourdin*.[120] In this case, the English Court of Appeal declined to grant an injunction to directors of a statutory company as they sought to restrain the holding of a general meeting which sought to reorganize the management of the company. In declining the injunction, Cotton L.J. stated:

It is a very strong thing indeed to restrain shareholders from holding a meeting of the company if such a meeting is the only way in which they can interfere if the majority of them think that the course taken by directors in any matter, intra vires of the powers of directors, is not for the benefit of the company.[121]

However, at the dawn of the twentieth century, the wind started blowing in the direction of good corporate governance. And, in the case of *Automatic Self-Cleaning Filter Syndicate Company v Cunninghame*,[122] the English Court of Appeal had occasion to put *Isle of Wight Railway* proposition in proper perspective with respect to the governance of corporations. The Court stated that:

The division of powers between the board of directors and the company in the general meeting depended, in the case of registered companies, entirely on the construction of the articles of association and that, where the powers had been vested in the Board, the General Meeting could not interfere their exercise…the articles in such a case constitute a contract by which members had agreed that "the directors and the directors alone, shall manage".[123]

Thus, since *Automatic Self-Cleaning Filters Syndicate Company*, it has long been settled in England that the powers which are reserved in the Companies Act or the articles to either organ is the preserve of that particular organ. The other organ cannot competently usurp the power which fall to the other, and any attempt to do so is null and void. This position was laid down the case of *John Shaw and Sons (Silford) Limited v Shaw*,[124] where the Court held that:

A company is an entity distinct alike from its shareholders and its directors. Some of its powers may according to its articles be exercised by directors, certain other powers may be reserved for the shareholders in general meetings. If the powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise the powers vested in the directors by the articles is by altering the articles or, by refusing to re-elect directors whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in

the directors, any more than the directors can usurp the powers vested by the articles in the general body of shareholders.[125]

Thus, in the United Kingdom, once directors make a certain managerial decision as they are empowered by the articles, shareholders cannot step in to overturn it simply because they are of the opinion that it is inimical to their personal interests. And as far as the duty to disclose material information is concerned, director primacy is likely to promote fairness in financial markets since shareholders are unlikely to permit the release of unfavourable financial forecasts from analysts, or a credit rating downgrade by credit rating agencies. Thus, an argument is made that self-interested shareholders are likely to overrule the release of certain unfavourable information to the market by directors if they are clothed with "overriding authority over the affairs of the company including managerial and executive aspects of the day-to-day operations of a company". The suppression of material information by directors on the command of shareholders is likely to promote the formation of false markets as securities increasingly get sold or bought at under or over-value. Securities which are sold or bought at an under or over-value are likely to generate litigation. Such litigation is not good for the liquidity of the underlying securities as long as they remain tied to litigation. Poor disclosure is also likely to hinder the growth of secondary trade in securities of the company since potential investors rely on efficient supply of material information for their investment decisions. Also, regulatory costs are likely to rise as the competent regulatory authorities step in to enforce breaches of disclosure obligations. It is therefore submitted that the poor corporate governance and disclosure that comes from shareholder primacy is likely to compromise the integrity of the market, dampen investor confidence, increase the cost of capital (as potential investors shun the company securities), compromise the allocation of capital, lead to market inefficiency, and inadequate market liquidity. As the G-20 and the OECD observe:

A strong disclosure regime that promotes real transparency is a pivotal feature of market-based monitoring of companies and is central to shareholders' ability to exercise their shareholder rights on an informed basis. Experience shows that disclosure can also be a powerful tool for influencing the behaviour of companies and for protecting investors. A strong disclosure regime can help to attract capital and maintain confidence in the capital markets. By contrast, weak disclosure and non-transparent practices can contribute to unethical behaviour and to a loss of market integrity at great cost, not just to the company and its shareholders but also to the economy as a whole. Shareholders and potential investors require access to regular, reliable and comparable information in sufficient detail for them to assess the stewardship of management, and make informed decisions about the valuation, ownership and voting of shares. Insufficient or unclear information may hamper the ability of the markets to function, increase the cost of capital and result in a poor allocation of resources.[126]

THE LEGAL JUSTIFICATION FOR DIRECTOR PRIMACY.

The following are the legal reasons underpinning director primacy, namely:

i) The general responsibility of the directors to manage or supervise the management of a company are derivative or original as opposed to delegated power or authority and as such can only be exercise by the statutory repository—the directors who, to borrow Justice Collins in *Manson*, are the true, perhaps worthy, agents of the company as far as the management of a company is concerned;

ii) The directors of a company are not agents of the shareholders for purposes of managing the affairs of the company. And as such, the shareholders cannot revoke or usurp that which they did not give—one can only give what they have, and take away only what they have given;[127]

iii) The basic principle of good corporate governance holds that 'he who is responsible must be accountable'.[128] The reverse side of this principle is that one cannot be held accountable if they are not responsible. Thus, there is not accountability without responsibility.[129] Similarly, good corporate governance will

dictate that only those organs which are accountable assume power and authority.[130] Similarly, in Kenya, South Africa, Nigeria, the United Kingdom, and the United States of America, the duties of directors are owed solely to the company.

When the Residual Powers of Shareholders may be Invoked to Exercise Directors' Powers.

It has been noted above that once the companies Act or the articles assign management powers of the company exclusively to directors, they and they alone may exercise such powers. However, a question may be asked, 'does this imply that, where the powers of management are vested in the directors by the articles with a bar on shareholder interference, and the directors are unwilling or are unable to exercise their powers, recourse must be had to reconstituting the board or instituting legal proceedings to compel them to act? Of this matter, Warrington J. observes in *Barron vs Potter*[131]:

If directors having certain powers are unable or unwilling to exercise them – are in fact a non-existent body for the purpose – there must be some power in the company to do itself that which under other circumstances would be otherwise done.[132]

Similarly, the Singaporean Supreme Court has observed that in cases where for some reason the board in unable or is unwilling to act having power to do so, the shareholders may use their residual powers to exercise the directors powers for the benefit of the company without having to reconstitute the board or commencing litigation so as to compel the directors to act.[133] It is therefore, submitted that, subject to inability for act or unwillingness to act, once the management powers are exclusively allocated to directors, they and only they may exercise such powers. And, as a possible way of ensuring effective allocation of corporate power, and sound corporate governance in issuers in African emerging and pre-emerging markets, the following provision is proposed:

X (a) The power allocated to members of the company shall not be exercised by the board of directors;

(b) The power allocated to the board of directors shall not be exercised by members save where the board is unable to or unwilling to exercise their powers.

An argument is made that the sound corporate governance that would result from effective enforcement of such a provision is likely to reduce agency conflict and promote quality disclosure. Theoretically, and empirically, full and frank disclosure, especially on a continuous basis, is likely to ensure the following benefits, namely:

i) reduced opportunities for insider trading;[134]

ii) transparency;

iii) market efficiency;[135]

iv) cheaper cost of capital;[136]

v) fairness; and

vi) market confidence.

These potential broad economic benefits and positive externalities may well justify regulation of disclosure. As Leuz and Wysocki argue:[137]

The mere existence of benefits from corporate disclosure is not sufficient economic justification mandating

these disclosures. In general, economic arguments in favour of regulation have to be based on externalities, [138] efficiency gains due to lower agency conflicts, or economy-wide cost saving.[139]

The Test for Breach of Directors' Duties.

Directors of a company must act *bonafide* in what, they, and not what the court may, consider to be in the interest of the company, and not for any collateral purpose.[140] The test that is applied to establish whether a/the director(s) has/have acted *bonafide* for the benefit of the company is as follows:[141]

i. is the transaction in question reasonably incidental to the carrying on of the business of the company?
ii. is it a transaction in good faith?
iii. could it be said to have been done for the benefit of the company, and to promote its success?

If the answers to these questions are in the affirmative, the director(s) has/have not abused their power, and vice versa if the answer to all or anyone of these questions is in the negative. What then is the meaning of ' *bonafide* in the interest of the company' for benefit purposes? This phrase has been interpreted to mean "in good faith for the benefit of the company as a whole".[142]

CONCLUSION

This article has examined the legal and regulatory frameworks which governs the allocation and exercise of corporate power, and corporate disclosure in Zambia, and selected African emerging and pre-emerging markets so as to establish whether or not the said *frameworks* provide sufficient incentives for effective corporate governance and the reduction of agency costs. The general conclusion which has been reached in this article is that, the said *frameworks* have not done so. In particular, it was noted that, the said *frameworks* entrench shareholder primacy, by which shareholders have overriding power over the management decisions of the directors. It was also noted that, although shareholders enjoy such overriding powers, only directors are actually liable to the company, and in some cases to third parties, for loss that the exercise of the powers of management may cause. The article has demonstrated that, by restricting the exercise of management powers to directors, and the resolution power to shareholders, and allowing the latter to exercise the powers of management only in circumstances where the former are unable to act or are unwilling to exercise those power, effective corporate governance may be achieved and agency costs reduced. Also, the article has demonstrated that the high agency costs for corporate issuers of securities are likely to tarnish the reputation of the issuer and its securities in securities markets. The other view is that effective corporate disclosure is a means of reducing agency costs for issuers. A central argument was made that, the high agency costs for issuers and lack of civil remedies as aforesaid are likely to water down the efficacy of the current low correlation of African emerging markets with each other and with developed markets to attract investors for international portfolio diversification.

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REFERENCES

1. Akerlof G. (1971). The Market for "Lemons": Quality Uncertainty and the Market Mechanism. The Quarterly Journal of Economics, 84, 488-500.

ISSN No. 2454-6186 | DOI: 10.47772/IJRISS |Volume VII Issue I January 2023

2. Armour, J., Hansmann, H. and Kraakman, R., (2009). Agency Problems, Legal Strategies and Enforcement. HAVARD, John M. Olin Centre for Law, Economics and Business.
3. Barry C. and Brown S. (1984). Differential Information and the Small Firm Effect. J. Fin Econ, 13, 283-294.
4. Barry C. & Brown S. (1985). Differential Information and Securities Market Equilibrium. J. Fin. & Quantitative Analysis, 20, 407-422.
5. Coffee C. J. (2010). Racing Towards the Top? The Impact of Cross-listings and Stock Market Competition on International Corporate Governance. Colum. L. R., 1757, 1770.
6. Coles J., Loewenstein U. & Suay J. (1995). On Equilibrium Pricing under Parameter Uncertainty. J. Fin & Quantitative Analysis, 30, 347-374.
7. Caroll, A. and Buchholtz, A.K., (2014). Business & Society: Ethics, Sustainability and Stakeholder Management. 9th edn, Boston: Cengage Learning
8. Davis, P.L. (ed), (2008). Gower and Davis Principles of Modern Company Law. 8th edn, London: Sweet & Maxwell
9. Diamond, D.W. & Verrecchia, R.E., (1991). Disclosure, Liquidity and Cost of Capital. Journal of Finance. 46
10. Easley D. & O’Hara M. (2004). Information and the Cost of Capital. J. Fin, 59, 1553-1583.
11. Glosten L.R. & Milgrom P.R. (1985). Bid, Ask, Transaction prices in a Specialist Market with Heterogeneously Informed Traders. J. Fin. Econ., 14, 71-100.
12. Golding, G. & Natalle Kalfus N. (2004). The Continuous Evolution of Australia’s Continuous Disclosure Laws. Company & Securities Law Journal. 22, 385-386.
13. Hughes J., Liu J. & Liu J. (2005). Information, Diversification and Cost of Capital. UCLA Working Paper.
14. Issacharoff S. & Pamela S. Karlan P.S. (1999). The Hydraulics of Campaign Finance Reform. TEX. L. REV, 77, 1705, 1713.
15. Khan, H., (2011). A Literature Review of Corporate Governance. International conference on E-business, Management and Economics. 25
16. King Report on Corporate Governance. (2010), (King Report 2010).
17. Lambert R., Leuz C. & Varrencchia R. (2006). Accounting Information, Disclosure and the Cost of Capital. Wharton School Working Paper Series;
18. Leuz, C. & Wysocki, P., (2006). Capital Markets Effects of Corporate Disclosures and Disclosure Regulation,
19. Mahoney, P.G., (1995). Mandatory Disclosure as a solution to Agency Costs. University of Chicago Law Review. 62, 1047.
20. Merton R.C. (1987). A Simple Model for Capital Market Equilibrium with Incomplete Information. J. Fin, 42, 483.
21. Mudashiru, A., (2014). Good Corporate Governance and Organisation. Performance: An Empirical Performance. International Journal of Humanities and Social Sciences. 4:7, 170.
22. P. Bartlett, R.P., (2015). Shareholder Wealth Maximization as Means to an End. Seattle University Law Rev. 38.
23. Samamba, L.T. (2018). The Zambian Continuous Disclosure Legal Regime—Adequate to Ensure Efficient Disclosure? Int’l J. Res. Soc. Sci. 8: 6, 128-157.
24. Verrecchia R.E. (2001). Essays on Disclosure. Journal of Accounting and Economics, 32, 97-180.
25. Wuyts G. (2007). Stock Market Liquidity: Determinants and Implications. Journal of Economic Management, LII:2, 279-316.
26. Yee K. (2006). Earnings Quality and the Equity Risk Premium: A Benchmark Model. Contemporary Accounting Research 1.

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APPENDIX

Questionnaire Results in Summary

Respondent		Size of Board and Constitution	Question: Have the shareholders interfered with the performance of the duties of the directors in the last 5 years?		Frequency: Nature of the Disclosure Obligation	
No.	Nature of Respondent		Nature of Duty: GD	DD	Periodic	Continuous
1	LuSE Listed	6M, 2I, and 4Con	Yes	Yes	No	No
2	LuSE Listed	8M, 7I, and 1Con	Yes	Yes	Yes, 2 times	Yes, 5 times
3	LuSE Listed	4M, 3I, and 1Con	Yes	Yes	Yes, Once	Yes, 3 times
4	LuSE Listed	5M, 3I, and 2Con	Yes	Yes	Yes, 3 times	Yes, 8 times
5	LuSE Listed	6M, 6I, and 0Con	Yes	Yes	No	Yes, 2 times
6	LuSE Listed	5M, 5I, and 0Con	Yes	Yes	No	Yes, 4 times
7	LuSE Listed	7M, 7I, and 0Con	No	No	No	No
8	LuSE Listed	5M, 5I, and 0Con	Yes	No	No	No
9	LuSE Listed	4M, 4I, and 0Con	Yes	Yes	Yes	Yes, 3 times
10	LuSE Listed	3M, 3I, and 0Con	Yes	Yes	Yes	Yes, once
11	LuSE Listed	2M, 2I, and 0Con	No	No	No	No
12	LuSE Listed	4M, 4I, and 0Con	Yes	Yes	Yes	Yes, 4 times
13	LuSE Listed	6M, 6I, and 0Con	No	Yes	Yes	Yes, 2 times
14	LuSE Listed	5M, 5I, and 0Con	Yes	Yes	Yes	No

NOTE:

I=Independent

Con=Conflicted

ED=Executive Director

GD=General Duty

DD=Disclosure Duty

M=Member

FOOT NOTES

[1] Parts V and VIII of this article examine how Zambia, Kenya, South Africa, Nigeria, the United Kingdom and the United States have managed to secure the independent operation of the two organs of a company—the board of directors and the general body of members.

[2] Mahoney, P.G., (1995). Mandatory Disclosure as a solution to Agency Costs. University of Chicago Law Review. 62, 1047.

[3] Merton R.C. (1987). A Simple Model for Capital Market Equilibrium with Incomplete Information. J. Fin, 42, 483.

[4] Easley and O'Hara observe that, although this effect may seem attainable for small firms, especially those who participate in over-the-counter (OTC) markets, it may not be of much use to large firms with a considerable investor and analyst base. Also, the knowledge that some investors do not know all the available stock may precipitate arbitrage: Easley D. & O'Hara M. (2004). Information and the Cost of Capital. J. Fin, 59, 1553-1583.

[5] Barry C. and Brown S. (1984). Differential Information and the Small Firm Effect. J. Fin Econ, 13, 283-294; Barry C. & Brown S. (1985). Differential Information and Securities Market Equilibrium. J. Fin. & Quantitative Analysis, 20, 407-422; Coles J., Loewenstein U. & Suay J. (1995). On Equilibrium Pricing under Parameter Uncertainty. J. Fin & Quantitative Analysis, 30, 347-374.

[6] ibid

[7] Barry C. and Brown S. (1985). Differential Information and Securities Market Equilibrium. J. Fin. & Quantitative Analysis, 20, 407-422.

[8] Coles J., Loewenstein U. & Suay J. (1995). On Equilibrium Pricing under Parameter Uncertainty. J. Fin & Quantitative Analysis, 30, 347-374.

[9] Lambert R., Leuz C. & Varrencchia R. (2006). Accounting Information, Disclosure and the Cost of Capital. Wharton School Working Paper Series; Other recent studies which have tackled the questions raised above are: Hughes J., Liu J. & Liu J. (2005). Information, Diversification and Cost of Capital. UCLA Working Paper; Yee K. (2006). Earnings Quality and the Equity Risk Premium: A Benchmark Model. Contemporary Accounting Research 1.

[10] The information effect is not diversifiable because it is present for all covariance variables with other firms. The only diversifiable variable, albeit in large economies where investor could possibly organize portfolios of many stocks, is the effect of the firm-specific variance. Consequently, the results of this study are consistent with the Capital Asset Pricing Model (CAPM).

[11] See, Coffee C. J. (2010). Racing Towards the Top? The Impact of Cross-listings and Stock Market Competition on International Corporate Governance. Colum. L. R., 1757, 1770.

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[12] Glosten L.R. & Milgrom P.R. (1985). Bid, Ask, Transaction prices in a Specialist Market with Heterogeneously Informed Traders. J. Fin. Econ., 14, 71-100.

[13] *ibid*.

[14] *ibid*.

[15] See, Akerlof G. (1971). The Market for "Lemons": Quality Uncertainty and the Market Mechanism. The Quarterly Journal of Economics, 84, 488-500.

[16] For a thorough discussion on the need for liquidity supply and demand for growth of stock market liquidity, and reduction of volatility, see, Wuyts G. (2007). Stock Market Liquidity: Determinants and Implications. Journal of Economic Management, LII:2, 279-316.

[17] *ibid*.

[18] Verrecchia R.E. (2001). Essays on Disclosure. Journal of Accounting and Economics, 32, 97-180.

[19] *ibid*.

[20] It should be recalled here that, insider trading laws expressly or implied impose a duty on investors who are in possession of unpublished price-sensitive information to either disclose it to the other party to a securities transaction or altogether refrain from trading. It is this duty to disclose or refrain that is imported here.

[21] "The name, "hydraulic theory," as well as the underlying concept, is attributed to the Issacharoff and Karlan: See, Samuel Issacharoff & Pamela S. Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 TEX. L. REV. 1705, 1713, (noting that regulation of campaign finance does not cause campaign contributions to "shrivel up and disappear" but instead merely diverts them elsewhere)": Manne (2007) at 485, fn 49.

[22] ibid

[23] *ibid*. For a discussion of the 'Hydraulic Theory of Executive Compensation Disclosure Regulation', see, Manne (2007) at 493-500.

[24] See also, Samamba, L.T. (2018). The Zambian Continuous Disclosure Legal Regime—Adequate to Ensure Efficient Disclosure? Int'l J. Res. Soc. Sci. 8: 6, 128-157.

[25] A company—public, private or other authorized forms of entities—is under an obligation to lodge with the Registrar an annual return within ninety days after the end of each financial year in the prescribed form: Zambian Companies Act 2017, s 270. A public company is under an obligation to lodge with the Registrar, together with the annual return, a certified copy of every financial statement, statement of comprehensive income, group accounts, directors' report and auditors' report sent to members and debenture holders since the last annual return was made: Zambian Securities Act 2017, s 273.

[26] Golding, G. & Natalle Kalfus N. (2004). The Continuous Evolution of Australia's Continuous Disclosure Laws. Company & Securities Law Journal. 22, 385-386.

[27] See, the then Chapter 686 of the Laws of Zambia; See also, ZMCA 1994, s 402.

[28] The English Companies Act 1948 consolidated the Companies Acts of 1929 and 1947, respectively. By

section 46 of the English Companies Act 1948, the power of management was vested in the directors.

[29] *van Boxel v Rosalyn Mary Kearney (a minor by Charles Kearney her father and next of kin),* (Supreme Court of Zambia Judgment No. 29 of 1987) [1987] ZMSC 34 (20 December 1987).

[30] See, *Isle of Wight Railway v Tahourdin* (1883) 25 Ch. D. 320 (C.A.).

[31] See, *Automatic Self-Cleaning Filter Syndicate Company v Cunninghame* [1906] 2 Ch 34 (CA); *John Shaw and Sons (Silford) Limited vs Shaw* [1935] 2 K.B. 113.

[32] *John Kasengele v Zambia National Commercial Bank* (Supreme Court of Zambia Judgment No. 11 of 2000) [2000] ZMSC 20 (15 May 2000).

[33] *Kasengele* was later followed in *Zambia Consolidated Copper Mines v Kangwa* (2002) Z.R. 109.

[34] Currently, 24 entities are listed on the Lusaka Securities Exchange.

[35] We shall refer to these entities as ‘entities whose Boards are conflicted’.

[36] We shall refer to such directors as ‘conflicted directors’.

[37] A Zambian can only appoint a natural person as director. Also, a director cannot hold shares in a company for which they are appointed as director unless the articles so provide: Zambian Companies Act 2017, s 92(1)(2)

[38] Institutional investment, and institutional membership seem to inspire some degree of independence, good corporate governance and accountability on the part of the board of directors: See, the comprehensive results in the Appendix.

[39] The duty rests on the issuer: See, ZMSA 2016, ss 75(1), 81(1). However, as alter egos of the company issuer, directors as management agents of the company, perform discharge the disclosure duty: See, Zambian Companies Act 2017 (ZMCA 2017), s 86(1); ZMSA 2016, s 81(1).

[40] Disclosable information here, denotes ‘information falling within the purview of the general disclosure or the continuous disclosure obligation imposed on issuers by the Financial Markets & Services/Capital Markets/Securities Acts.

[41] For general responsibilities of directors of Zambian companies see, ZMCA 2017, s 105

[42] ZMCA 2017, s 106

[43] ZMCA 2017, s 106(a)(i)

[44] ZMCA 2017, s 106(a)(ii)

[45] ZMCA 2017, s 106(b)

[46] ZMCA 2017, s 106(c)

[47] ZMCA 2017, s 106(d)

[48] ZMCA 2017, s 107. A director is conflicted if s/he has an interest in a transaction in which the company is a party, and the director (a) is a party to, or is likely to derive a material financial benefit from

the transaction (b) has a material financial interest in, or with another party to the transaction (c) is the parent, child or spouse of another party to, or person who is likely to derive a material financial benefit from the transaction; or (d) is otherwise directly or indirectly materially interested in the transaction. However, a director is not conflicted if the transaction relates to the company (a) giving security to a third party on the request of that third party who or which is not connected to the director; and (b) with respect to a debt or obligation of the company for which the director or another person has personally assumed responsibility in full or in part under a guarantee, indemnity or deposit of a security: ZMCA 2017, 108(1)(2).

[49] ZMCA 2017, s 109

[50] ZMCA 2017, s 110

[51] ZMCA 2017, s 120(1)(a)(b)(c)

[52] Note that section 131(1), does not add the words "as are not", as section 86(1)(b) does. This appears to raise the impression that, this was deliberate Parliamentary intendment to perpetuate shareholder supremacy and interference with the decisions of the Board of Directors, and effectively making the latter organ subservient to the former.

[53] (Supreme Court of Zambia Judgment No. 11 of 2000) [2000] ZMSC 20 (15 May 2000). *Kasengele* was later followed in *Zambia Consolidated Copper Mines v Kangwa* (2002) Z.R. 109.

[54] (Supreme Court of Zambia Judgment No. 29 of 1987) [1987] ZMSC 34 (20 December 1987)

[55] See, Robert. P. Bartlett, R.P., (2015). Shareholder Wealth Maximization as Means to an End. Seattle University Law Rev. 38, 255.

[56] Thus, the principal-agent concept in economics encompasses a wide range of circumstances that lawyers would not classify as 'principal and agent' relationship. Three generic agency problems arise in business firms. The first one involves the conflict between the owners of the firm and its managers. Here the owners are the principals while the managers are the agents. The second type involves the conflict between majority and minority shareholders. Here, the minority shareholders are the principals while the majority shareholders are the agents. The third types is the conflict between the firm and outsiders such as its creditors: See, Armour, J., Hansmann, H. and Kraakman, R., (2009). Agency Problems, Legal Strategies and Enforcement. HAVARD, John M. Olin Centre for Law, Economics and Business.

[57] Khan, H., (2011). A Literature Review of Corporate Governance. International conference on E-business, Management and Economics. 25, 1.

[58] Mudashiru, A., (2014). Good Corporate Governance and Organisation Performance: An Empirical Performance. International Journal of Humanities and Social Sciences. 4:7, 170; Aydemir, B., (2012). Corporate Governance. (Sodertorn University, Masters' Thesis 2012).

[59] G20/OECD REVISED PRINCIPLES OF CORPORATE GOVERNANCE 2015, at 9

[60] Caroll, A. and Buchholtz, A.K., (2014). Business & Society: Ethics, Sustainability and Stakeholder Management. 9th edn, Boston: Cengage Learning, at 119, (hereinafter, 'Caroll & Buchholtz (2014)').

[61] ibid

[62] ibid

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[63] *ibid*

[64] *ibid*

[65] *ibid*

[66] *ibid*

[67] *ibid*

[68] *ibid*

[69] *ibid*

[70] See, the brief discussion of the correct import of sections 86(1)(b) and 131(1) of the Zambian Companies Act 2017, under "What is distillable from sections 86(1)(b) and 131 of the Zambian Companies Act 2017".

[71] English Companies Act 2006, ss 170, 171

[72] English Companies Act 2006, ss 170, 172

[73] English Companies Act 2006, ss 170, 173

[74] English Companies Act 2006, ss 170, 174

[75] English Companies Act 2006, ss 170, 175

[76] English Companies Act 2006, ss 170, 176

[77] English Companies Act 2006, ss 170, 177

[78] English Companies Act 2006, s 170(1); *Sharp and others v Blank and others* [2015] EWHC 3220 for a reaffirmation of earlier common law on this issue, that unless where special arrangements exist, the duties of directors are owed to the company and not to shareholders whether as a general body or individually.

[79] English Companies Act 2006, s 178

[80] See, ZMCA 2017, ss 130, 131

[81] See, *John Shaw and Sons (Silford) Limited v Shaw* [1906] 2 Ch 34 (C.A.)

[82] See, Delaware Code Ann. Tit. 8, ss 108, 141.

[83] 223 N.Y. 313 (1918)

[84] *Manson v Curtis*, at 322-323

[85] South African Companies Act 2008, s 66(1), (hereinafter, 'the ZACA 2008').

[86] The corporate powers allocated to members are exercised by resolution in the general assembly: See, ZACA 2008, ss 57-65.

[87] See, *Letseng Diamonds Ltd vs JCI Ltd* (580/07) [2008] ZASCA 157 (27 November 2008).

[88] ibid

[89] See, section 3.5 below.

[90] ZACA 2008, s 76(3)(a).

[91] ZACA 2008, s 76(3)(b).

[92] ZACA 2008, s 76(3)(c)(i)(ii).

[93] ZACA 2008, s 77(1)(2)(3).

[94] Nigerian Companies and Allied Matters Act 1990, s 279(1), (hereinafter, 'the NCAMA 1990').

[95] NCAMA 1990, s 279(2)(a). This is a codification of *Percival v wright*. On the challenges of divided loyalty in such cases, see, Nelson D., 'Dilemma of Shareholders under the Nigerian Company Law' (2015) 37 Journal of Law, Policy and Globalization 89.

[96] NCAMA 1990, s 279(9).

[97] NCAMA 1990, s 63(1).

[98] NCAMA 1990, s 63(2).

[99] NCAMA 1990, s 63(3). This provision also states that directors cannot exercise the powers which are reserved for members. However, there is no such express bar on members in exercise of their powers, with respect to the powers allocated to directors. This is a reflection of the tenor and spirit of sections 86 and 131 of the Zambian Companies Act 2017, and deliberate entrenchment of shareholder primacy.

[100] NCAMA 1990, s 63(4).

[101] ibid. This is a reflection of the old English position as laid down in *Isle of Wight Railway vs Tahourdin* (1883) 2 Ch. D. 320 (CA).

[102] ibid

[103] Kenyan Companies Act 2015, ss 275-290, (hereinafter, 'KCA 2015').

[104] KCA 2015, s 34. Director, includes "any person occupying the position of director of a body corporate by whatever name called, including a shadow director": KCA 2015, s 3 (definition of 'director'). The traditional role of directors to manage the business and administer the affairs of the company was affirmed in *J.S.K. (Cargo) Ltd vs Kenya Airways Ltd* [2008] eKLR. In this case, the court stressed that in the performance of its management duties, the Board could elect one of their number as managing director to act for and on behalf as far as management of the company is concerned.

[105] Kenyan Companies Act 2015, Ch of the Laws of Kenya, (hereinafter, 'the KCA 2015').

[106] KCA 2015, s 140(1).

[107] KCA 2015, s 142(a)(b).

[108] KCA 2015, s 143.

[109] KCA 2015, s 144(1).

[110] KCA 2015, s 145(a)(b).

[111] KCA 2015, s 146.

[112] KCA 2015, s 147.

[113] KCA 2015, ss 148, 149.

[114] Davis, P.L. (ed), (2008). Gower and Davis Principles of Modern Company Law. 8th edn, London: Sweet & Maxwell, at 368, (hereinafter, 'Gower & Davis (2008)').

[115] ibid

[116] ibid

[117] Since the articles of association derive their validity of the Companies Act, a provision which is made in the articles to the effect that members will have overriding authority over the exercise of managerial powers will have no effect unless the Companies Act sanctions such a position. This view is rationalized by the position that where the article(s) is/are inconsistent with the provisions of the Companies Act, the article(s) shall be void to the extent of the inconsistency. This position appears to be the legal foundation for the argument that where the Companies Act confers powers of management in the directors, as most companies Acts which have embraced the Anglo-Saxon model do, only the directors can exercise those powers.

[118] Clarity the author's.

[119] Gower & Davis (2008) at 369, [78]

[120] (1883) 25 Ch. D. 320 (C.A.)

[121] *Isle of Wight Railway*, at 329

[122] [1906] 2 Ch 34 (C.A.)

[123] *Automatic Self-Cleaning Filter Syndicate Company*, at 44, per Cozens-Hardy L.J.

[124] [1935] 2 K.B. 113

[125] *Shaw v Shaw*, at 134

[126] G-20/OECD REVISED PRINCIPLES OF CORPORATE GOVERNANCE 2015, at 42

[127] This principle is the basis of the *nemo dat quod rule*, and the constitutional law principle that 'he that appoints has also the power to remove from office'.

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[128] See, King Report on Corporate Governance 2010 (King Report 2010).

[129] *ibid*

[130] *ibid*

[131] [1914] 1 Ch. 895.

[132] *Barron vs Potter*, at 903.

[133] *Chan Siew Lee v. TYC Investment Pty. Ltd.* [2015] 5 S.L.R. 409.

[134] See, Ch 6.

[135] Diamond, D.W. & Verrecchia, R.E., (1991). Disclosure, Liquidity and Cost of Capital. Journal of Finance. 46, 1325.

[136] *ibid*

[137] Leuz, C. & Wysocki, P., (2006). Capital Markets Effects of Corporate Disclosures and Disclosure Regulation, at 187, in The Task Force on the Modernization of Securities Regulation in Canada, 'Evolving Investor Protection' (2006), (hereinafter, 'Leuz & Wysocki (2006)').

[138] Externalities are external consequences of one party's action (in this case, actions of the regulatory authority, and the reaction of the regulated entities) on other parties within an economy. Whereas, positive externalities may lead to market success, negative externalities may lead to market failure. For example, effective regulation of disclosure especially continuous disclosure may lead to reduced incidences of insider trading, market efficiency, lower cost of capital and market confidence. This is likely to ensure market success, and as such, a positive externality. However, where the regulatory rules and institutions cannot generate the optimal level of regulation without attracting a corresponding increase in the cost of regulation, market participants will have to serve as regulatory price takers if they have continue participating in the market. The high regulatory price may act as non-tariff market entry barrier to small issuers and investors. It may also precipitate the exit of existing small participants and all large participants who consider the regulatory price economically unsustainable. This may lead to market failure, and as such, is a negative externality.

[139] Leuz & Wysocki (2006), at 187, [99]

[140] *Re Smith and Fawcett Ltd* [1942] Ch 304 (CA), at 306, per Lord Greene MR.

[141] *Re Lee Behrens & Co Ltd* [1932] 2 Ch 46, at 51.

[142] *Re Smith & Fawcett Ltd*, per Lord Green MR. This view was earlier applied in *Allen vs Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 (CA), per Lord Lindley. Thus, 'company as a whole', includes the interests of the company as a legal person, shareholders, creditors, directors, employees, and other stakeholders of the company. Therefore, the question becomes, 'could this transaction or decision, action or omission of directors be said to further the interests of the company, shareholders, creditors, directors, employees and stakeholders of the company'?