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In-depth analysis of criminal liabilities of company's directors under OHADA law: Difficulties in segregating personal liabilities from company's liabilities

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Abstract
OHADA Law makes provisions for director's liabilities and institutions to enforce laws in cases of violation though grossly insufficient. In spite of this, the paper holds that issues related to the liability of directors are very complicated. The relationship between the company and its directors is so intertwined and difficult to separate. Companies are artificial persons, thus its management is entrusted in the hands of directors whose activities at times clouds the minds and makes it difficult to segregate their personal liabilities from that of the company. Worrisomely, directors tend to hide behind the corporate veil in a bid to escape liabilities. It is on the strength of these uncertainties and cloud difficulties that this paper sets out to critically examine and presents a concise definition of offences that dispose directors' liabilities likewise sanctions. In connection with the above objectives, the researcher adopted an in-depth content analysis based on primary and secondary sources of data collection imperative to the study. The findings reveal that though the OHADA Law is innovative, more need to be done in succinctly establishing liabilities of directors as well as sanctions which have been left at the clemency of OHADA Member States. It is therefore recommended that more cohesive, explicit, and compelling provisions be adopted by OHADA legislators so as to put directors on their guard.

Keywords: Criminal liabilities, company directors, OHADA uniform acts, liabilities, company law

Introduction
Company Law is one of those areas of law in Cameroon which has just been unified [1]. The OHADA [2] Uniform Act [3] gives the management of the company the widest powers to act on behalf of the company [4]. The manner in which this power is been regulated to avoid excess use by company directors, and meet up with transparency and accountability has been the major worry of this paper. The paper opines that the directors must be prudent in exercising the control over the company as they may be personally liable for the acts committed while in the exercise of their duties. Criminal responsibility of corporate directors refers to responsibility which comes about as a result of the offences they commit in the course of exercising their duties which violates the legal norms put in place to regulate commercial activities. It is important to highlight here that OHADA Law does not recognise the criminal liability of companies, but it does recognise those emanating from the acts or omissions of the directors. More so, OHADA Law only outlines some of the criminal offences that company directors can commit as well as the sanctions that accompany such offences. The possibility of making company directors liable for their misdeeds can be said to constitute a step forward by the legislator in eradicating the opaque manner in which some

[1] Tabe Tabe, S., (2018), *Understanding OHADA Company Law in Cameroon*, Ultranet, Skylimit Outreach Printing Press, Cameroon, Bafoussam. P.1.

[2] Organisation pour l'Harmonisation en Afrique du Droit des Affaires, Loosely translated into English as "Organisation for the Harmonisation of Business Law in Africa". On the 17th of April 1993, countries of the franc zone met in Mauritius Island and signed the treaty of Port Louise creating OHADA. This entered into force on the 19th September 1995 in countries that ratified it.

[3] Hereinafter referred to as UA.

[4] Art. 121 and 329 -330 of OHADA Uniform Act on Commercial Companies and Economic Interest Groups, of 1st January 1998 as revised on 30th January 2014, hereinafter referred to as UA Relating to Companies or UACC or UACCEIG.

directors carry on the business of the company. Directors found guilty of any management misdeeds are likely to engage either their criminal or civil liability or both depending on the circumstances at hand. Liability as used here refers to the ability or state of being legally obligated or accountable and enforceable by civil or criminal punishment [5]. This definition is derived from the well-known principle that every person has to answer or be responsible for his or her actions [6].

The relationship between the company, a legally fictional entity, and its promoters or managers is so intertwined and difficult to separate. Companies are said to be artificial persons and their existence is based on legal fiction. Companies are not individual persons, but rather persons who have some form of relationship with individuals [7]. As a result, company management is entrusted in the hands of directors whose activities at times clouds the minds and makes it difficult to segregate their personal liabilities from that of the company. However, to surmount such difficulties, the law has made possibilities to pierce the corporate veil so as to clearly identify the personal liabilities of directors. Another difficulty this paper resolve is how to clearly identify who to be held liable when the corporate veil is pierced. This is made possible through the theory of directing minds of the company and the identification theory.

Under the OHADA Uniform Act on Commercial Companies and Economic Interest Groups [8], the concept of corporate entity of corporation have been recognized and accommodated. It provides in Article 98 that:

All companies shall have a legal personality with effect from the date of registration in the Trade and Personal Property Rights Register, except otherwise provided in this Uniform Act.

From this, we noticed that all registered companies in the OHADA system are attributed legal personality from the date of registration [9]. The separate personality of a company is a statutory privilege and it must be used for legitimate business purposes only. Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. The Court will break through the corporate shell and apply the principle/doctrine of what is called as "lifting of or piercing the corporate veil". Sometimes, however, that "veil" can be "pierced". This occurs when its directors have acted illegally or they have otherwise assumed personal liability for a certain debt or contract. Statutes form the basis of the concept of lifting the corporate veil under OHADA Law. Some of its provisions reveal that shareholders and directors may be held liable for company's debts or torts. Article 78 of the UACC is to the effect that:

Founding members, as well as the first directors, managers, managing directors or other initial members of the management organs of the company, shall be jointly and severally liable for torts arising either from the omission of a mandatory detail in the Articles of Association, or from the improper fulfilment of a prescribed formality in the formation of the company.

Therefore, OHADA Law embraces the doctrine of piercing the corporate veil [10] which aids in the identification of who to be held criminally liable in the face of any offence.

After establishing the possibilities of segregating liabilities of directors from Company's liabilities, it is eminent to discuss instances where the director can be criminally held liable for acts or omissions committed in the course of managing the affairs of the company. Quite a different legal question is raised when the relevant alleged offence is one which requires the prosecution to prove that the accused had the necessary *mens rea*. How can it be shown that a company had a criminal intent distinct from that of its directors? This difficulty will not arise when dealing with the criminal liabilities of directors because the *actus reus* and *mens rea* can easily be established.

Before the OHADA Uniform Acts, corporate criminal offences were dispersed in different legal instruments. The Act has the merit to have attempted a codification of the acts and omissions considered as criminal offences within the Company Law of the OHADA Zone. Article 5(2) of the Treaty creating OHADA indicates that Uniform Acts may contain criminal offences [11]. This is discretionary, meaning that they may not [12]. If they do not, it will be incumbent on the member states to provide them. The criminal provisions contained in the Uniform Acts are therefore a minimum and it is left on the member states to judge whether to improve upon them or not without however decriminalizing any provisions of the Uniform Acts [13]. This is one of the weaknesses raised in this paper.

The liability of company directors arises when the directors owe an obligation vis-à-vis the company or a third party but fail to perform the obligation, therefore causing the company or the third party prejudice [14]. Criminal liability of corporate directors can be engaged at different stages in the company's life. This will discussed at the level of formation of the company, during the operational phase of the company and offences relating to the dissolution of a company. Alongside the OHADA Uniform Acts, sanctions are provided by national legislations of the various member states in accordance with Article 5(2) of the OHADA Treaty. Article 5(2) of the Treaty gives the contracting states the power to determine sanctions for criminal offences

[5] Garner, B.A., (1999), *Black's Law Dictionary*, 7th Ed., West Group, St Paul Minn, P.980.

[6] *Ibid.* See also Section 1382 of the French Code Civil.

[7] Chapple, C., (2014), "*The Moral Responsibilities of Companies*", Palgrave Macmillan, London, UK, P1.

[8] Hereinafter referred to as UA Relating to Companies or UACC or UACCEIG.

[9] By Article 97 of the UACC, with the exception of sleeping partnerships (société en participation), all companies shall be registered in the trade and personal property rights register.

[10] Nguefack, Daonzeu G., (2019), "La Responsabilité Sociale des Entreprises dans l'Espace OHADA", Thèse de Doctorat en Droit des Affaires et de l'Entreprise, Université de Dschang.

[11] En effet, l'article 5 du traité OHADA voue à son alinéa 2 un sentiment d'institutionnalisation d'un droit pénal dans l'espace OHADA en disposant que: « *les actes uniformes peuvent inclure des dispositions d'incrimination pénale; les Etats parties s'engagent à déterminer les sanctions pénales encourues* ». See Aguemon Khaled., (2013), "*Réflexion sur l'abus en droit des sociétés dans l'espace OHADA: contribution du droit français",* sous la direction de - M. Franck Marmoz. - Lyon: Université Jean Moulin (Lyon 3), PP.174-175.

[12] Pefela, Gildas Nyugha., (2020), "An Appraisal of Criminal Liabilities for Business Offences under OHADA Law and the Penal Laws in Cameroon", *National Journal of Criminal Law, Volume 3, Issue 2.* Pp.17-21.

[13] Anoukaha, F., Nah Thomas F., Tabe Tabe S., (2010) *The Law Governing Commercial Companies in the OHADA Zone: A Comparative Study with Ghanaian and Nigerian Laws*, France, Juriscope.P81.

[14] Martor, B., Pilkington, P.N., Sellers, D.S., & Thouvenot, P.S. (2002), *Business Law in Africa: OHADA and the Harmonization Process*, London, GMB Publishing, P.69.

contained in the various Uniform Acts, which offences include those committed by company directors in the performance of duties. It is on the strength of this provision that Cameroon has been cited as an example in this write-up to demonstrate how contracting states have been able to determine and implement sanctions for criminal offences contained in the various OHADA Uniform Acts [15].

Criminal Liability during Company Formation

Company directors can be held criminally liable for offenses committed during the formation of the company. These offences among others include; publication of false facts, tender of false facts, fraudulent increase of the value of the contribution in kind, false declaration of the notary etc [16].

Publication of False Facts

Closely associated with the offence of sharing fictitious dividends when the company is already operating is the offence of publication of false facts during formation of the company. Publication of false facts is stipulated in Article 887 (4) of the OHADA UACC. This Article provides punishment for any person who in order to obtain subscriptions or payments, knowingly publishes names of persons falsely designated as being or expected to be linked to the company in any capacity whatsoever [17]. A reading of this article shows that for this offence to be committed, false facts have to be published with the objective to obtain subscription of payment. The mode of publication of these facts is therefore immaterial to the commission of the offence. Publication can take the form of notices published in the Trade and Personal Property Rights Register (TPPCR) [18] or in the official journals of the member states. In addition, publication is not restricted to any time and so can be invoked a long time after the untrue of false facts have been published [19] In Cameroon, this offence is punishable with an imprisonment term of from Two to Five years and a fine of from Five hundred thousand (500.000) to five million (5.000.000) franc CFA or with only one of these fines [20].

Section 89(1) of the Companies Ordinance of the 1958 Revised Law of the Federation of Nigeria [21] is to the effect that directors who publish any untrue statements aimed at misrepresenting the public shall incur punitive sanctions [22] Thus, under this Section, if a prospectus is issued containing any untrue statements any person who authorised the issue of such a prospectus will be found guilty of an offence liable for a term not exceeding two years and a fine not exceeding five hundred pounds or both such imprisonment and fine unless he could prove that such statement at the time of publication was immaterial or that he had reasonable believe that up to the time of issue of the prospectus, he believed that the statement was true [23].

Fraudulent Increase or Decrease of the Value of the Contribution in Kind

This is liability incurred as a result of the gross over-valuation or under-valuation of contribution in kind. Contribution towards the share capital of the company can either be in cash or in kind [24]. Contribution in kind assessors are usually appointed to evaluate whether or not the value of the in-kind contribution are up to the cash value of the other share. Due to an increase in business dishonesty, some contributions in kind assessors are seen to either over evaluate or under evaluate these contributions. To deter contribution in kind assessors from these malpractices, the Uniform Acts punishes whoever fraudulently causes a contribution in kind to be given an assessment which is above or below its real value [25]. To be regarded as an offence and thus punishable, there must be an attribution of a value that is above the real value of the contribution in kind and this attribute must be done recklessly or fraudulently [26].

False Declaration of the Notary

Founders and first members of management organs within the OHADA Zone are under an obligation to deposit with the TPPCR a declaration in which they describe all the actions carried out towards the regular formation of the company [27]. In the declaration, they are expected to affirm that such formation has been carried in conformity with the Uniform Acts [28]. Any notary who fails to follow or respect this procedure who does so fraudulently shall be punished. It shall be born in mind that a notary is a shadow director of the company [29] Article 887(1) of the UACC states that by the establishment of the material statement of subscription and payment or of the depository's certificate, whoever knowingly certifies as true and authentic subscriptions he knows are fictitious or declares that the funds which not have been placed definitely at the disposal of the company have been effectively paid, shall incur a punitive sanction [30] To be regarded as falsehood, the notary has to confirm the truth and authenticity of the subscription which he knows to be fictitious and the acceptance that funds which have not been placed definitely at the disposal of the company have been effectively placed. Punishment for this offence within the Cameroonian context is found in Article 5(a) of the 2003 Law with a fine of from five hundred thousand (500.000) to five million (5.000.000) franc CFA or with an imprisonment term of from three months to three years or both such imprisonment and fine [31].

[15] See the Cameroonian Law No 2003/008 of 10 July, 2003 and Senegalese Law No 98/22 of 26 March, 1998 as well as Law N°2016/007 of 12 July 2016 on the Penal Code of Cameroon.
[16] See article 887 of the UACC.
[17] Also see Tsopbeing, Marcel Williams., (2019), "L'ordre Public en Doit des Sociétés Commerciales de l'OHADA", Thèse de Doctorat en Droit Privé, Université de Dschang.
[18] Hereinafter referred to as TPPCR.
[19] Article 890 of the OHADA UACC.
[20] Article 18 Law N° 2003/008 of 10th July 2003, relating to the Repression of offences contained in certain Uniform Acts of OHADA, hereinafter referred to as "the 2003 Law".
[21] Companies Ordinance Cap 37 of the 1958 revised Laws of the Federation of Nigeria.
[22] This rule have been codified in England by Section 1250 of the 2006 C.A. Subsection one of this section punishes persons (including directors) who provide information they know to be misleading, false or deceptive to the public.
[23] For similar provisions under the French Law, see Section 10 of the 2006 French Act.
[24] See Article 37 of the UACC.
[25] Article 887 (4) of the UACC.
[26] Kojouo, Christian Valdano., (2019), "La Lutte Contre la Fraude en Droit des Sociétés Commerciales OHADA ", Thèse de Doctorat en Droit Privé, Université de Dschang.
[27] Article 76 of the OHADA UACC.
[28] *Ibid.*
[29] A shadow director is an individual who is not a named director but who nevertheless controls or directs to an extent the affairs of the company.
[30] Article 15(1) of the Law of 24th July 1987 in France contains similar provisions.
[31] See Article 5(a) Law N° 2003/008 of 10th July 2003, relating to the Repression of offences contained in certain Uniform Acts of OHADA

This offence is also found in Section 94(1) of the Companies Ordinance. In this Section, it is stated that a company with a share capital could not commence any business or exercise any borrowing powers except:

- In case where any share of the company has been offered to the public for subscription, shares held subject to the payment of the whole amount therefore in cash have been allotted to an amount not less than the minimum subscription;
- Every director of the company has paid to the company on each of the share taken or contacted to be taken by him, and for which he was liable to pay in cash, a proportion equal to the proportion payable on the application and allotment on the shares offered for public subscription or in the case of a company which did not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and
- There has been filed with the registrar a statutory declaration by the secretary of one of the directors, in the prescribed form that the aforesaid conditions have been complied with [32].

Acquisition of Shares through Fictitious Means

Apart from issuing shares before incorporation or after fraudulent incorporation, the founders and first managers of the company can also be found criminally liable if they acquire shares through fictitious means to meet up with their minimum capital [33] In fact, Article 887(1) of the Uniform Act provides that "whoever… certifies as true and authentic subscriptions he knows are fictitious or declares that the funds which have not been placed definitely at the disposal of the company have been effectively paid, shall incur a punitive sanction". Subsection (3) [34] and (4) [35] of the same Article also punishes persons who present as true subscriptions and payment which in reality do not exist. This is because the capital of the company is the only asset of the company that creditors can rely on for the settlement of claims should the company goes out of business.

Offences Relating to Public Call for Capital

Any chairman, director or general managers of companies who issue transferable securities offered to the public, without a notice being inserted in a newspaper empowered to publish; or fails to observe the requirements for publication or prospectuses or circulars, shall incur punitive sanction [36]. The same penalty shall be applicable to persons who act as an accessory in the transfer of transferable securities in violation of the provisions of this article [37].

[32] Section 94(1) of the Companies Ordinance Cap 37 of the 1958 revised Laws of the Federation of Nigeria.

[33] Section 761 (2) of the UACC.

[34] Article 887: The following shall face a criminal charge: 3°) those who knowingly, by fictitious subscription or payment or by publication of subscription or payments that do not exist or any other false facts, have obtained or attempted to obtain subscriptions or payments;

[35] Article 887: The following shall face a criminal charge: 4°) those who, knowingly, in order to initiate subscriptions or payments, have published the names of designated persons, untruthfully, as being or expected to be related to the company in any capacity; those who fraudulently, have allocated to a contribution in kind, a higher valuation than its real value.

[36] See Moho, Fopa Eric Aristide., (2014), "L'ordre Public en Doit Commercial de OHADA", Thèse de Doctorat en Droit Privé, Université de Dschang.

[37] Article 905 UACC.

Criminal Liability for Offences Committed During the Operational Phase of the Company

After the company has been properly formed, it has to go operational, that is, starts doing business in order to realise its objectives. It is during this stage of the company's life that most corporate crimes are committed. The offences committed at this stage can be conveniently group under three headings namely: Offences relating to management rules, convening meetings and control of the company. In other words, these are offences relating to the management and administration of companies.

Offences related to Management Rules

This offence relates to the day-to-day management of the company. As fiduciaries of the company, directors are called upon to manage the company in a way that it will benefit both the company and its shareholders. In other words, directors are expected to act in good faith and in the best interest of the company. Where directors fail to observe these management rules as laid down, they will be criminally liable. Some of these rules include: rules relating to the modification of capital, rules governing public calls for capital, use of company assets and sharing of dividends.

Modification of Capital of the Company

This is an offence that relates to the increase of capital or reduction of capital of the company. Directors at any time can request for the modification of the company's share capital so long as the company remains a going concern. The alteration of capital in the absence of any contrary provisions must be subjected to the rules of modification as laid down in the OHADA UA. The non-respect of these rules automatically commits the criminal liability of the directors. For example, during capital increase, any director, chairman of the board of directors, chairman and the managing directors, general manager, managing director or Assistant managing director of a Public Limited Company who on the occasion of an increase of capital issues shares or share denomination without due compliance with the preliminary formalities for an increase of capital shall incur punitive sanctions [38]. Under the Cameroon 2003 Law, this offence is punishable with an imprisonment term of from three months to three years or with a fine of from one hundred thousand (100.000) to one million (1.000.000) franc CFA.

The share capital of the company can as well be reduced. Any reduction of the company's capital made without respecting the equality of shareholders or without communicating the proposed reduction to auditors within the prescribed limit is sanctioned by the OHADA UA [39]. The punishment for this offence is an imprisonment term of from three months to three years and a fine of from one hundred thousand (100.000) to one million (1.000.000) franc CFA or with only one of these punishments [40].

The abusive use of Company Assets/credit of the company

Directors can use the assets of the company in an abusive manner. This occurs when they take advantage of the broad powers conferred on them to attain personal benefits at the

[38] Article 893 (2) of the UACC.

[39] Article 896 of the UACC.

[40] Article 14 of the 2003 Law.

expense of the company and its stakeholders [41]. By the provisions of Article 891 of the OHADA UA.

Any manager of a Private Limited Company, directors, Chairperson Managing Director, General Manager, Managing Director or assistant managing director who, in bad faith, use the assets or credit of the company in a way they know is against the interests of the company, for personal, material or moral ends, or in favour of another corporate body in which they have an interest directly or indirectly, shall be criminally liable [42].

It could be discerned from this provision that directors shall incur punitive sanctions where they use the property of the company in bad attainment of personal ends. Thus, to be sanctioned as a criminal offence, the wrongful intention to use the property and the act of actually using it must be established. Worthy of note is the fact that although this article refers to Private Limited Companies only, commentators have stated that it applies to Public Limited Companies just like to Private Limited Companies [43]. Abusive use of company assets can also be extended to include embezzlement of the company's property or using it in such a way that it was the director's personal property.

In compliance with Article 5(2) of the OHADA Treaty which gives member states powers to determine sanctions to be applicable to offences laid down by the UA, the Cameroonian 2003 Law punishes with the imprisonment term of from one to five years and with a fine of from two million (2.000.000) to twenty million (20.000.000) francs CFA any manager who in bad faith, uses the assets or credit of the company in a way they know to be against the interest of the company for their own personal material or moral ends or in favour of another corporate body in which they have an interest [44]. This offence is a serious one judging from the gravity and degree of the sanction meted out to directors/managers who breach this provision.

Under company law, the duties imposed on directors are put in place to prevent the directors from using their powers to achieve personal benefits. Thus, where directors act so as to confer a benefit for themselves, or on an outsider, or some to injure certain members of the company, or in disregard of their duties, they can be held to have acted in bad faith and not in the best interest of the company [45] and consequently will be liable.

Non Respect of Management Rules Relating to Sharing of Dividends and Publication of Summary Financial Statements

In any business, it is essential to have comprehensive, accurate and up-to-date financial information. The accounting records of the company must therefore explain the transactions of the company with reasonable accuracy at any time and the financial position of the company. These financial records are also to be published and presented to shareholders. This can be published in newspapers empowered to publish legal notices in member states. The purpose of the publication is to make the financial situation of the company known to third parties who have dealings with the company. As a result, they must be accurate. By virtue of Article 889 of the OHADA UACC, criminal responsibility lies where any company executive, in the absence of an inventory or by means of a fraudulent inventory share, fictitious dividends among shareholders or partners of the company. Also punitive sanctions shall be incurred by the executives who publish or present to shareholders or partners an inaccurate account of the year's transactions, the financial situation or the company's assets, with a view to concealing the true circumstances of the company [46].

To guard against the non-respect of this management rule, the OHADA UA punishes corporate directors who in the discharge of their duties present or publish any inaccurate annual summary financial statement for each fiscal year, not showing a true picture of the company's transactions for that year, its financial situation and that of the property with the view of hiding the company's true picture to its shareholders with an imprisonment term of from one to five years and a fine of from two million (2.000.000) to twenty million (20.000.000) francs CFA [47]. This punishment like that prescribed in Article 9 of the 2003 Law, seems to be more severe than the other sanctions provided by this law. Following the trend of events in the business world, this severe sanction can be regarded as an attempt by the Cameroonian legislator to avoid company failure through mismanagement which has become the order of the day.

Any corporate director who knowingly in the absence of any inventory or by means of any fraudulent inventory proceeds to share fictitious dividends is contravening management rules and shall therefore incur punitive sanctions [48]. The idea here is not the sharing of dividends but rather the sharing of fictitious dividend. Fictitious dividends as used here refer to dividend that does not correspond to the profit realized by the company at the moment of distribution. Fictitious dividends can come from the capital of the company, or from reserves paid in anticipation of future profits, while fictitious sharing can take the form of giving the shareholders not their due or giving some shareholders more dividends than they deserve and some less than what they deserve for no just reason.

Punishment for this offence is found in Article 7 of the 2003 Law with an imprisonment term of one to five years and a fine of from one million (1.000.000) to ten million (10.000.000) francs CFA or with one of these sanctions only [49].

Offences related to Convening Meetings

Corporate meetings of shareholders are expected to be called at least once during the company's fiscal year and in particular after six months at the close of the financial year. Every shareholder or partner of the company has the right to participate in these meeting [50]. The reason behind this meeting is that it constitutes the only forum whereby corporate directors are called upon to give an account of their stewardship to the shareholders as well as obtain their vote for the activities that they carried out for the past year. The power to call these meetings rests on the directors.

[41] Anoukaha, F., *et al.*, (2002), *op.cit.*, at P.268.
[42] See Article 891 UACC.
[43] Pougoue, P.G., Anoukaha, F., & Nguebou, T. J., (1998) *"Le Droit des Sociétés Commerciales et du GIE OHADA"*, Yaoundé, PUA. Pp. 129-130.
[44] Article 9 of the 2003 Law.
[45] Hicks, A. and Goo, H.S., (2008), *Cases and Materials on Company Law*, 6th Ed., Oxford: OUP. P.342.
[46] Article 890 UACC.
[47] Article 8 of the 2003 Law.
[48] Article 889 of the UACC.
[49] Article 7 of the 2003 Law.
[50] Article 892 of the UACC.

Where they fail to convene these meetings or violate laid down rules for convening such meetings or prevent some shareholders from attending these meetings, they shall be held liable [51]. This offence is punishable by Article 10 of the 2003 Law with an imprisonment term of from three months to two years or a fine of from fifty thousand (50.000) to one million (1.000.000) francs CFA [52]. However, for these sanctions to be meted out, it must be established that his actions were intentional. This means that mere negligence on the part of the director will not call for any criminal sanction. It is recommended that, where this causes injury to the shareholder concern, he or she should bring an action in torts against the director to recover damages.

Offences Relating to the Control of Companies

This offence consists of failure to appoint or convene auditors, likewise analysing the obstacle to control the company by the appointed auditors.

Offences Relating to Audit of Companies

Failure to appoint statutory auditors when this is required by law or failure to convene them to the general meeting of shareholders is an offence incurring punitive sanctions [53]. Also whoever, in his own name or as a member of an auditors company, knowingly accepts, performs or maintains the duties of an auditor, notwithstanding legal incompatibilities shall incur a punitive sanction [54]. Furthermore, any auditor who, either in his own name or as a member of an auditor's company, knowingly gives or confirms false information on the situation of the company or fails to reveal to the public prosecutor's office any offences which may have come to his knowledge, shall incur a punitive sanction [55]. Such actions will become time-barred three years from the date of the commission of the tort or from the date of its disclosure. However, where the action qualifies as is a crime; it shall only lapse after ten years. According to OHADA UA, the company's auditor and shareholders have the obligation to alert shareholders and the competent court.

Obstacle to Control the Company by the Auditors

The company's auditors play an important role in alerting the company in case of any suspicious facts. Indeed, alerting the company is the primary responsibility of the auditors, who are supposed to be engaged in the diligent examination of accountancy documents and reports of the company. Auditors also have the obligation to request from the management explanations for any inaccuracies and in such a case, an imminent response from the management is required within a month of receipt of such a letter to provide explanation of the situation and propose measures taken or to be taken to remedy the situation.

In the case where shareholders have been informed of the management's failure to provide information, shareholders can seize the competent court to appoint one or two experts. The latter would have the power to examine the managerial operations and submit a report.

Finally, any company executive or any person in the service of the company who knowingly, obstruct verifications or audit by auditors or refuse to communicate to them on the spot, all the documents needed for the performance of their duty, in particular all contracts, books, accounting documents and minutes registers, shall incur a punitive sanction [56].

Criminal Liability for Offences Committed When the Company Becomes Insolvent

Directors can be held liable for pre- insolvency transactions, simply due to the decisions they take (actions or omissions) that lead to the economic viability or not of their firms. This is demonstrated in their daily transactions doing company business. Under the OHADA Law, directors may be liable, either because of wrongful trading, fraudulent trading, or misfeasance, also called breach of fiduciary relationship. Wrongful trading is when directors, on becoming aware that an insolvent liquidation is likely, do not take adequate and necessary steps to minimize the potential losses of the company's creditors. For example, directors should cease trading and initiate insolvency proceedings [57].

Again, any manager of a Private Limited Company, directors, chairman and managing director, general manager, managing director who, in bad faith, use the assets or credit of the company in a way they know is against the interests of the company, for personal, material or moral ends, or in favour of another corporate body in which they have an interest directly or indirectly, shall incur a punitive sanction [58]. This punitive sanction is extensive to whomever knowingly, prevents a shareholder or a partner' from participating in a general meeting [59].

Directors shall be held liable for fraud, especially if it is as a result of their personal transaction which is of course deemed to be fraudulent. Directors can either be fraudulent in their dealings in the case a winding-up is already anticipated, or in the event of the numerous transactions between the company and creditors, as well as showing misconduct in the event of winding up. This can also apply in the case of falsification of the company's books and records. Alternatively, directors will be liable for fraud in the event of a material omission(s) from statements relating to company affairs, and lastly by the false representation made to creditors. The OHADA legislator relies on the UACC which states that, fraud is established, only when there is a willful and knowingly publication of the company's accounts. In order for directors to be held culpable of the offence of fraud, they must have acted intentionally and knowingly.

Although corporate directors are called upon to exercise care, skill and due diligence as well as to be transparent and accountable when managing the company for the benefit of the corporate entity as a whole, circumstances do crop up where the actions or management mistakes of these directors plunge the company into insolvency. During this

[51] *Ibid.* see also Sections 66(2), 67(11) and 72(6) of the Nigerian Companies Ordinance.
[52] Article 10 of the 2003 Law.
[53] Article 897 UACC.
[54] Article 898 UACC.
[55] Article 899 UACC.
[56] Article 900 UACC.
[57] See Goghoue, Tchomte E.M., (2019), La Problématique du Redressément Judiciaré des Enterprises dans l'Espace OHADA: Le Cas du Cameroun. Thèse de Doctorat en Droit Privé, Université de Dschang.
[58] Article 891 UACC.
[59] Article 892 UACC. This Article sanctions whomever knowingly, prevents a shareholder or a partner from participating in a general meeting.

period of insolvency, some directors usually act in a way that requires that they should be sanctioned criminally [60].

Also, in the case of Re Maidstone Building Provisions Ltd [61] and *Re Augustus Barnet & Sons Ltd*, [62] it was held that corporate directors who in the course of carrying on the business of the company acts in a fraudulent manner shall be held criminally liable for such act. This Common Law position has been adopted by the OHADA legislator in Article 233 of the Uniform Act on Collective Proceedings and Clearing-off Debts. The article punishes any director or directors who resort to fraudulent trading by fraudulently hiding the corporate body of debtors of sums of money that it does not owe either in entries or by public acts or commitments under private deed or in a balance sheet; or stipulating with a creditor on behalf of the corporate body, special benefits because of his vote during deliberations of the general body of creditors or who have concluded with a creditor a special agreement from which the creditor or creditors would enjoy a benefit to be borne by the assets of the corporate body, with effects from the date of the decision declaring cessation of payments [63]. In Cameroon, this offence of fraudulent trading is punishable by the imprisonment term of from five to ten years [64].

Conclusion and Recommendations

This research paper is of the opinion that the Uniform Acts with regards to responsibilities of company agents, has provisions that better protect persons dealing with a company. The Uniform Acts has extended liability by providing specific provisions that would arise in defined circumstances. This in a way fills up all the loopholes which the general provisions might have. Thus it provides better protection to third parties and shareholders who are persons dealing with a company. Also, even though the Uniform Acts has not been specific as to the nature of the sanction in situations of criminal responsibilities, it has made provisions for offences which could be committed throughout the lifespan of the company. This could be regarded as a great innovation

It is recommended that the most advisable way for directors to minimize their risk of liability is through risk management. This means that directors must always be mindful of risks, hence examine situations cautiously by thinking ahead of time with respect to potential consequences, actions and decisions. OHADA Law is of the opinion that risk should not be managed instinctively but rather prognostically. The OHADA Uniform Act of 24 March 2000 on the Organization and Harmonization of Accounts of Enterprises talks about the incrimination of directors who refuse to either publish the company inventory, the financial statements, the management report and the social report, annually [65].

In addition to these organs, the legislator, conscious of the fact that their desire to protect investment within the sub-region will not be complete if action is limited only to these structures, had also previewed certain sanctions for any eventual breach of duties by the directors. This, therefore, justifies the reason for the provisions of sanctions on directors for breach of duties as a means of ensuring compliance with good governance principles. These sanctions both civil and criminal are a clear indication of heading in the right direction to guarantee a secure legal business environment, which is the general objective of the OHADA Law. Effective implementation will favour director's efficiency, transparency and accountability which will instill confidence in the business arena. However, the applicability of the OHADA Law is not really uniform as the sanctions are left at the discretion of the member states to decide upon in their respective domestic laws.

The principle that OHADA provides a definition of what constitutes an illegal action, and the Member States provide sanctions is a dangerous approach [66]. Viewed with an 'eagle eye', this situation causes at least two major problems. First, the fact that each member country has the right to enact sanctions to infractions provided by OHADA makes it very difficult to understand the system as a whole. There will still be a problem of security and predictability. Investors and other stakeholders usually seek to know in advance what their remedies would be in case directors commit illegalities in the exercise of their functions. By not settling this issue at the OHADA level, the organization for harmonization of business law in Africa [67] has disregarded a very important area in which coordination is crucial. Also, leaving it up to each member country to determine the sanctions makes the Common Court of Justice's [68] role confusing, and weak in enforcing OHADA. The paper therefore strongly recommend a unified law that will have a general punitive sanction to Member States under a uniform OHADA Law applicable to all the signatories of the OHADA Treaty.

Regarding the applicability of the OHADA UA, The challenges to the Common Law jurist were legion from inception. The provisions of Article 42 of the treaty of 1993 [69], which stipulated that French was the official working language was abhorred [70]. Mercifully, the provision of the article was amended on the 17th day of October 2008 in Quebec, Canada. This amendment was to include French, English, Spanish and Portuguese as the working languages of OHADA [71]. However, the challenges are still poignant and compelling, in appreciation of the fact that the Acts prescribe modes of commencement which are alien to Common Law procedure. The absence of an accurate English translation of the OHADA text is the nightmare of Anglophone jurist [72]. Conscious of this discrepancy of the legal divide, legal unification concise laws have pre-

[60] Article 231 of the OHADA Uniform Act on Collective Proceedings and Clearing-off Debts (UACPCD).
[61] [1971].
[62] [1986] BCLC 170.
[63] See Article 233 of the Uniform Act on Collective Proceedings and Clearing-off Debts.
[64] Article 30 of the 2003 Law.
[65] See Article 8 of the 2003 Law.
[66] *Ibid.*
[67] Organization Pour L'Harmonisation en Afrique du Droit Des Affaires.
[68] The Common Court of Justice and Arbitration (CCJA) is the supranational, apex court of OHADA, an organization that currently covers seventeen countries in West and Central Africa. The seat of this court is in Abidjan, Côte d'Ivoire. It covers the Member States.
[69] See Article 42 of the OHADA Treaty.
[70] See Nelson Enonchong., (2007) "The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?", *Journal of African Law* Vol. 51, No. 1, Pp. 95-116.
71 See generally Anne Afong., (2019), *A Practitioner's Guide to the application of the OHADA Uniform Acts: Mortgages under the OHADA Uniform Acts*, 2nd Ed., Cradlelight Books, Buea-Cameroon.P.xvii.
[72] Nelson Enonchong., (2007), *loc.cit.* See also Justin Melong, (2013), « Implementation of Ohada laws in a bilingual and bijural context: Cameroon as a case in point », *Revue de l'ERSUMA: Droit des affaires - Pratique Professionnelle*, N° 2 - Mars 2013, *Etudes*. Pp. 55-75.

occupied the Cameroonian legislator [73] It is recommended that these salient issues be addressed by the OHADA Legislature and a proper translation of the code matching the French version of the text be adopted.

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