OHADA

Key innovations of the revised Uniform Act of 30 January 2014

OHADA

Organization for the Harmonization of Business Law in Africa

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Formation and functioning of commercial companies: general rules

1. Following on from the 1993 Treaty on the Harmonization of Business Law in Africa, the Uniform Act relating to Commercial Companies and Economic Interest Groups was adopted on 17 April 1997. All of the Contracting States to the Treaty are subject to this Act, which was revised on 30 January 2014. This means that these States have adopted the same legal framework which governs the internal organization of companies and their relationship with third parties[1]. Consequently, companies established in the Contracting States to the Treaty are all identical in that they have the same "OHADA" nationality.

2. Although this concept of nationality was outlined in the original 1997 Treaty, certain implicit provisions that were ambiguous have now been explicitly outlined or reformulated in the Uniform Act. The Act now includes provisions for information technologies that contribute towards the smooth running of companies. More specifically, as regards the terms and conditions for the formation and functioning of commercial companies, this document summarizes the various changes stipulated in the revised Uniform Act.

Capacity to be partner: overview

Explicit reference to national provisions

3. In Article 7, the Uniform Act redefines the capacity to be a partner to exclude any natural person or corporate body subject to any prohibition, incapacity or incompatibility.

This new formulation explicitly suggests that Contracting States should refer back to national law to assess whether or not the prohibition, incapacity or incompatibility in relation to the capacity to be a partner is stipulated in a statutory provision or regulation. This revision removes the ambiguity that existed in the previous version that referred only implicitly to national law.

Prohibition of spouses from being partners in a company confirmed

4. The Act prohibits spouses from being partners in a company in which they will be indefinitely or jointly and severally liable for the company's debts (such as a private company). Note that the revised Uniform Act replaces the term "A husband and wife" in Article 9 with "Spouses" . This change, open to discussion, will in all likelihood have no impact in practice.

Simplified provisions of the Articles of Association

Establishing the Articles of Association by notarial deed or any other instrument that ensures legal validity: now a default rule

5. Article 10 of the Uniform Act now offers each Contracting State the power to waive the previous requirement that the Articles of Association must be established by a notarial deed or any other instrument that ensures legal validity. In other words, each Contracting State can decide to waive this requirement or make it optional.

In practice, however, national legislations currently tend to require that a private agreement be registered with a notary.

Giving original copies of the Articles of Association to each partner now optional

6. Article 11 of the Uniform Act no longer requires that an original copy of the Articles of Association on plain unheaded paper shall be given systematically to each partner. While private companies, sleeping partnerships and private limited companies will still be required to provide each partner with an original copy, other forms of company will only be required to provide an original copy of the Articles of Association to partners that make a formal request to receive one.

Mandatory information regarding the contribution in the form of services

7. Based on full legal recognition of the services contributed (see below), the OHADA legislator has added the

[1] J., Malherbe; Y., de Cordt; P., Lambrecht; P., Malherbe, *Droit des sociétés-Précis*, Brussels, Bruylant, 2006, p. 1062.

following to the mandatory information that must be provided in the Articles of Association: "the identity of contributors of services, the nature and value of the contribution made by each of them, the number and value of the shares handed over in exchange for each contribution" (Article 13, paragraph 8).

Extension of the company's duration

Option to request a special representative

8. The Act stipulates that the partners shall be consulted at least one year before the date of expiry of the company to decide whether or not to extend the duration of the company. If management does not set up this consultation, the partners can take legal measures.

Whereas previously they could ask the president of the competent court to help solve this problem, they must now ask the court directly. This change has been included in all of the provisions of the revised Uniform Act. As stipulated in the revised Act, the court can now assign a special representative rather than a legal representative.

Full legal recognition of the contribution in the form of services

9. The revised Uniform Act gives full legal recognition to the contribution in the form of services. The previous Act limited the contribution in the form of services to a supply of labour without specifying the applicable legal regime. It is currently defined as the contribution of technical or professional knowledge or services.

Article 50-1 of the Act confirms that such contributions apply to all forms of company apart from public limited companies.

From now on, the Articles of Association will describe the contribution in the form of services and outline the terms and conditions for payment. Although not contributing to the formation of social capital, the contribution in the form of services will result in shares being allocated that confer voting rights and a right to a share of the company's profits and net assets.

Notwithstanding certain details, the full legal recognition of the contribution in the form of services encourages entrepreneurship. Look at the example of the young entrepreneur from Brazzaville who invented the first African tablet computer. By making a contribution in the form of services, people with ideas or an invention can gain the backing of investors while enjoying the status of partner. These new provisions could herald the beginning of the "OHADA start-up" era.

10. Nevertheless, although the shares given to a partner in return for the contribution in the form of services can confer as much as twenty-five per cent of voting rights and the obligation to share in the company's losses, they can neither be sold nor passed on to someone else. They are denied a face value, which has two implications for contributors in the form of services:

First, they are assumed to have an unfailing sense of *affectio societatis* (a genuine spirit of cooperation)[2].

Second, if the company was formed for a duration of ninety-nine years, the obligation to share in the company's debts would represent a near-perpetual commitment.

Surprising restriction on partner rights

11. Article 53-4 of the revised Uniform Act has replaced "the right to participate in and vote on the collective decisions of the partners" with "the right to participate in votes", which surprisingly appears to restrict the participation of partners at general meetings to their right to vote alone. In practice, however, this change is unlikely to have much of an impact on the debates that are held during the general meetings.

Changes to provisions relating to public calls for capital

12. In the interests of greater clarity, the legislator has reformulated Articles 81 to 83 defining public calls for capital. Two definitions merit particular attention.

[2] For more information, see G., Karhahunga and C., Verdebout, "*L'OHADA comme vecteur de la bancarisation : le cas de la République Démocratique du Congo*", *in Investissement, financement et normalisation comptable dans l'espace OHADA - Quelles leçons pour la gouvernance économique et financière ?*, Laval University conference publications (8-9 May 2013); Paris, L'Harmattan, 2014.

13. Article 81-1 now outlines a definition by negation of share offers to the public by stipulating that the following offers of transferable securities are beyond the provision's scope:

- total amount in the Contracting States is less than 50,000,000 CFA francs calculated over a 12-month period;
- reserved exclusively for qualified investors acting on their own behalf, or for fewer than 100 natural or legal persons acting on their own behalf, excluding qualified investors, per regional stock market in the Contracting States, or for Contracting States that are not members of a market of this kind, per Contracting State.

14. Article 81-2 then goes on to provide an appropriate definition of a qualified investor for the application of the provisions relating to public calls for capital as follows: "*a person or entity with the skills and resources required to weigh up the risks inherent in transactions involving financial instruments...*".

Role of the constituent general meeting strengthened

15. Article 101 of the revised Uniform Act states that a company shall be deemed to be formed from the date of signature of its Articles of Association or, "*where applicable, when the Articles of Association are adopted by a constituent general meeting*".

This latest assumption has now been explicitly validated and is designed in particular for cases when contributions in kind are paid up or for stipulations of special benefits for which the involvement of a shares auditor is essential.

In both cases, the company can only be formed once a constituent general meeting has been held. The revised Uniform Act makes up for the previous Act's shortcoming in this respect.

For public limited companies, it is worth noting from a formal point of view that the revised Uniform Act now stipulates that the assessment report produced by the shares auditor regarding contributions in kind and/or special benefits should be included as an appendix in the Articles of Association (Article 403).

Distinction made between a "de facto" company and a "de facto partnership"

16. In Articles 115 and 864 et seq., the Uniform Act distinguishes between "de facto" companies (persons acting as partners that have not formed between themselves one of the company forms recognized under the Uniform Act) and "de facto partnerships" (partners that have formed a company recognized under the Uniform Act but whose formation is flawed).

17. Although this distinction was previously implicit, it nevertheless is of no real substance as they are subject to the same legal regime.

Acts of company managers not demurrable to third parties acting in good faith

18. Members of the management bodies of the company have full powers to commit the company with respect to third parties. Article 121 of the Uniform Act states that any limitation of their legal powers by the Articles of Association shall not be demurrable to "*third parties acting in good faith*". This should not be looked upon as anything more than a purely formal confirmation, as the requirement to act in good faith regarding this matter was already mentioned in Article 123.

Joint decisions re-examined in light of the advent of new information technologies

Explicit confirmation of nullity

19. The Uniform Act is called upon to confirm the shortcomings that are liable to render the decisions taken null and void. Conversely, it can be concluded that any other shortcomings are not liable to imply nullity.

Article 129-1 explicitly states that any decision taken in breach of the provisions governing the voting rights attached to shares or company shares is null and void.

Similarly, Article 130 stipulates that joint decisions may be annulled for undue use of the majority powers.

Full legal recognition of the abuse of equality rights

20. Article 131 has been amended to recognize the abuse of equality rights and to align the legal regime with that of the abuse of minority powers.

Supplementing the provision for the abuse of minority powers, the legislator gives the competent jurisdiction the power to appoint a special representative who will represent the minority or equality rights partners whose behaviour has been deemed abusive and who will vote on decisions on their behalf in the company's best interests.

Full legal recognition of votes by correspondence and use of new technologies

21. The revised Uniform Act makes significant changes to how joint decisions can be taken. In Articles 133-1, 133-2 and 134, the OHADA legislator outlines the terms and conditions for exercising a vote by correspondence. These terms and conditions are now enshrined in a strict legal framework.

Consequently, votes by correspondence can only be taken into consideration if all of the following conditions are met:

- the possibility of voting by correspondence is expressly provided for in the Articles of Association;
- the partners inform the managers of their absence at least three days before the general meeting is held;
- the votes are received by the company at least 24 hours prior to the general meeting.

The partners now have the legal power to exercise their vote by correspondence, including by email.

22. The revised Uniform Act has the distinctive feature of integrating information technologies, as long as the possibility of using these technologies is expressly provided for in the Articles of Association.

It outlines the terms and conditions under which partners can take part in joint decision-making by either videoconference or, as stipulated by the legislator, any other means that makes their identification possible. Participation in this way is solely possible if the methods used transmit the voice of the participants and guarantee a constant, simultaneous transmission.

Regardless of their location, partners will therefore be able to get directly involved in the company's affairs.

Vigilance required concerning the new procedural requirements

Declaration of regularity and conformity reinforced

23. The founders and first members of the management organs of the company must file a "*declaration of regularity and conformity*". Failure to do so could result in the rejection of the application for registration of the company. Previously this was only a requirement when forming the company. The OHADA legislator has now extended it to include amendments to the Articles of Association.

Mandatory information in the management report

24. Apart from describing the situation of the company during the past financial year, prospects for continued company activity, the evolution of the cash situation and the financing plan, the legislator now requires the following to be included in the annual report submitted by directors to the general meeting: "*events occurring between the end of the financial year and the date the report was established*".

Terms and conditions for dividend payments

25. The power to make interim dividend payments, which was looked into when reforms were being assessed, was finally not retained.

The Uniform Act (Articles 146 and 756) confirms that the conditions for the payment of dividends shall be laid down by the general meeting. It also stipulates, however, that the general meeting may delegate such power to the board of directors, the managing director or the manager, as appropriate. It is therefore no longer necessary to make express provisions for the general meeting to delegate this power to these management bodies.

Formalities - Publication

26. The Uniform Act includes a restricted list of the mandatory information published notices must contain, including the name of the company, the form of the company, the amount of the registered capital, the address of the registered office and the references of the registration in the Trade and Personal Property Credit Register. Special attention must therefore be paid to ensure full compliance with this procedure.

27. Lastly, it is worth noting that the Act lists the information that should be included on the notice signed by the notary who received the company's Articles of Association.

28. In addition, and in keeping with the incorporation of new information technologies, the Uniform Act now makes it possible to carry out company formalities electronically.

Consequently, commercial companies will now be able to send copies of the summary financial statements electronically to the registry of the competent court in the month following their approval.

These powers nevertheless depend on each Contracting State being equipped with the resources capable of collecting, processing and archiving all of the information transferred electronically.

Extension of the conditions for solving disputes

29. By overhauling Article 148, the OHADA legislator favours solving conflicts by offering partners the power to not only refer the case to arbitration either through an arbitration clause, which may be statutory or not, or by reaching a compromise, but also to call on any other alternative methods available to solve their differences. For example, the Act offers partners the power to submit their disputes to a mediator.

Control procedures

Alert by the auditor

30. The auditor's role in alert procedures has been widened in both public limited companies and simplified public limited companies. The auditor now has the power (Article 156) within six months of the start-date of the alert procedure, to pick up the procedure at the point where he felt it could be stopped when, despite the factors that led to the assessment, the continued operation of the company is still in jeopardy and the urgent situation requires that steps be taken immediately.

Alert by the partners

31. Managers should be particularly aware that the time they now have to reply to questions from the partners in writing on any matters likely to jeopardise the company as a going concern, according to the revised Act, has been shortened from one month to two weeks.

Extension of management evaluation

32. A significant innovative step in the previous Uniform Act, partners holding at least one-tenth of the company's authorized capital may petition for a management evaluation. Previously, this power was allocated to partners holding one-fifth of the authorized capital.

Actions in the interests of the company re-examined

33. If a company manager does not act in the company's best interests, the OHADA law allows partners to sue directly for damages for injury suffered by the company (Article 167).

For public limited companies, the shareholders may, where they represent at least one-twentieth of the registered capital, entrust one or more shareholders to represent them in supporting the action in the company's interest (Article 741).

However, for such action to be admissible, the Uniform Act stipulates that the company must be duly joined to the proceedings through the intermediary of its legal representatives.

Based on full legal recognition of the special representative, the Uniform Act enables – and rightly so – the company or partners to ask the relevant court to appoint a special representative to represent the company in court if there is a conflict of interest between the company and its legal representatives.

Use of transformation auditors

34. As was the case for private limited companies, Article 187-1 now provides a general outline of the conditions of how to use an auditor during the transformation of a company for companies that do not have an auditor when they decide to transform into a joint-stock company. The auditors will then be responsible for assessing the value of the company's assets and special benefits. Unless there is unanimous agreement among the partners, the auditors are appointed by order of the competent court at the request of the company manager.

Nullity of a company and company acts

35. In keeping with the principle now well-entrenched in OHADA law, the legislator allows the

nullity to be regularized and confirms that nullity may only result from an express provision.

The OHADA law nevertheless leaves it up to the court's discretion to assess whether or not the provisions in the Articles of Association are essential and consequently, the related nullity where appropriate.

Conclusion

36. The Uniform Act Relating to Commercial Companies and Economic Interest Groups, adopted on 30 January 2014, represents a departure on two fronts. First, it is a departure from traditional African law: by increasing the number of company forms and making it easier to become a shareholder, the Act encourages the formation of corporate bodies. The rise in the number of corporate bodies and correlated capitalization of African companies will undoubtedly have an impact on their organization. Second, it is a departure from its 1997 predecessor: by incorporating new technologies, the 2014 Act eases the conditions for corporate management. This greater flexibility is sure to promote the emergence of new pan-African or possibly inter-continental groups.

Formation and functioning of private limited companies and public limited companies

37. The revised Uniform Act Relating to Commercial Companies and Economic Interest Groups has amended the specific rules concerning private limited companies and public limited companies.

These amendments are designed to make the rules more flexible for the formation and functioning of these two types of company.

Some of the changes relate to the functioning of public limited companies in the interests of establishing good governance.

Some modifications have also been made to transferable securities in public limited companies.

Specific rules governing the formation of private limited companies and public limited companies

Amendments relating to the formation of private limited companies

The condition to immediately pay up contributions in cash has been removed (Articles 311-1 and 361-1).

38. When subscribing to the share capital of a private limited company, the shares representing contributions in cash no longer have to be fully paid up.

From now on, at least 50 percent of their face value must be paid upon subscription.

Payment of the remaining share capital must be made in one or more instalments within two (2) years of the company's registration in the Trade and Personal Property Credit Register in compliance with the conditions outlined in the Articles of Association.

Minimum registered capital: this rule is now optional (Article 311).

39. The rule stating that the registered capital of a private limited company shall be at least one million CFA francs is no longer mandatory.

This minimum requirement now only applies if there are no national laws that state otherwise.

Amendment regarding the formation of private limited companies: the requirement relating to the face value of shares has been removed (Article 387)

40. The minimum face value of shares for the formation of authorized capital is no longer set at 10,000 CFA francs. It is now set freely in the Articles of Association.

This figure must be expressed as a whole number.

The minimum registered capital is still set at ten million.

Specific rules regarding the functioning of private limited companies and public limited companies

Functioning of private limited companies

Order to hold the annual ordinary general meeting (Article 348)

41. The Act now stipulates that an order can be invoked to hold the annual ordinary general meeting.

Consequently, if the annual ordinary general meeting has not been held within six (6) months of the end of the financial year, the public prosecutor or any partner can refer the matter to the competent court for a summary judgement to order the managers, subject to a fine or penalty if they fail to do so, to convene the annual ordinary general meeting or appoint a special representative to do so.

N.B.: this raises the question as to whether this measure is independent of that stipulated for managers to extend the six-month deadline.

Incompatibilities regarding auditor status: alignment with rules applicable to public limited companies (Article 378)

42. The rules relating to auditor incompatibilities within public limited companies (Article 678) have been extended to private limited companies in the interests of good governance.

Under the 1997 Uniform Act, the incompatibilities concerned only:

- managers and their spouses;
- contributors in kind and persons having special benefits;
- persons receiving, from the company or its managers, periodic payments of any type, as well as their spouses.

Functioning of public limited companies

Members of the board of directors: limit on the number of non-shareholder members abolished (Articles 416 and 417)

43. Unless the Articles of Association provide otherwise, the board of directors of a public limited company may be composed of non-shareholder members.

There is no longer a limit on the number of non-shareholder members.

N.B.: Previously, not more than one-third of the members of the board could be non-shareholders of the company. However, in accordance with Article 416 (revised), the Articles of Association can freely determine the limit for non-shareholder directors.

Consequently, a public limited company may be administered by a board of directors comprising not less than three (3) and not more than twelve (12) members, who may or may not be shareholders.

Any requirement in the Articles of Association that directors must own a certain number of shares in the company does not apply to employees appointed as directors.

If a stipulation of this kind exists, a director who, on the day he is appointed, does not own the number of shares required by the Articles of Association, or during his term of office ceases to own said shares, is in breach of the aforementioned stipulation of the Articles of Association.

If this is the case, the director must resign from the board in the three months following his appointment or, if the breach occurs during his term of office, within three months following the sale of the shares that triggered the breach. At the expiry of this deadline, he shall be deemed to have given up the new term of office and shall refund all remuneration received in whatever form, without the validity of proceedings in which he took part being called into question.

Amendment relating to the limitation of directors' terms of office (Article 425)

44. When calculating the limitation for the terms of office held by a director, the terms held within a group of companies are no longer taken into account.

Conditions for increasing share capital

Preference shares, issue or merger premiums taken into account (Articles 544, 562 et seq.)

45. The registered capital can now be increased by issuing preference shares or through the incorporation of issue or merger premiums.

Preference shares are shares to which certain rights are attached. According to the provisions of the revised Uniform Act (Articles 543 and 544), preference shares can only give rise to double voting rights and only under the conditions stipulated in Article 544.

46. In the case of an increase in capital by the incorporation of issue or merger premiums, double voting rights may be granted to registered shares given free of charge as soon as they are issued to a shareholder in proportion to the old shares for which he enjoyed such voting rights.

Allocation of free shares now permitted (Articles 626-1 to 626-6)

47. The registered capital can also be increased through the allocation of free shares to company employees or certain employee categories.

The terms and conditions for allocating free shares are established during an extraordinary general meeting subject to the mandatory provisions of the Uniform Act.

(See "Company Shares - free shares")

Amendments to limitations to the transfer of shares (Articles 765 et seq.)

Non-transferability clauses are now permitted

48. Non-transferability clauses for shares are permitted but with limits to avoid calling into question the principle of free transferability of shares. Consequently:

- non-transferability clauses for shares are only valid if they provide for the prohibition of a duration of less than or equal to ten years and they are justified by a just and valid cause;
- the scope of nullity for a share disposal in breach of the non-transferability clause depends on whether the clause is included in the Articles of Association: if the clause is included in the Articles of Association, the disposal will be deemed null and void; if the clause is extra-statutory, the disposal in breach of this clause will only be null and void if one of the sellers was aware of the clause or could not ignore its existence.

Changes to the approval regime

49. The approval regime is an exception to the rules limiting the transfer of shares. The Articles of Association may provide for the transfer of shares to a third party outside the company upon approval from the board of directors or the ordinary general meeting of shareholders.

The approval regime is also permitted for companies not listed on the stock exchange. It may be stipulated in the Articles of Association that the transfer of shares to a third party is subject to approval by the board of directors or the annual ordinary general meeting.

The parties can appoint an expert to set the disposal price.

The transferor also has the right to refuse to sell his shares.

Nevertheless, the shareholders, third parties or the company that have made a commitment to buy the shares cannot retract their offer if they have proposed to go through with the expertise procedure and the transferor has agreed to do so.

Pre-emption clauses

50. Pre-emption clauses are permitted in the Articles of Association or other shareholders' agreements.

According to these clauses, any shareholder looking to sell all or part of his shares must inform one or more shareholders who may inform him that they have pre-emption rights based on the price and conditions notified.

If there is a statutory pre-emption clause in the Articles of Association, any disposal of shares in breach of the pre-emptive rights will be deemed null and void.

If there is a pre-emption clause in another shareholders' agreement, the breach of pre-emptive rights leads to the irregular disposal of shares being deemed null and void if and when it is shown that one of the beneficiaries was aware of the clause or could not ignore its existence.

Amendments in favour of good governance in public limited companies

51. The amendments made to the Uniform Act relating to the good governance of public limited companies aim to clarify the roles and players involved in governance, improve the functioning of the board of directors, reduce the risk of a conflict of interests and bolster shareholders' rights and transparency.

Good governance rules relating to the functioning of the board of directors

52. To improve the functioning of the board of directors, the following amendments have been introduced:

Strengthening the role of directors (Articles 435 and 437)

53. The chairman of the board of directors must provide each director with the documents and information he needs to fulfil his duties.

The board of directors can create committees comprising directors that will be responsible for looking into issues submitted by the board or the Chairman for examination.

The board decides upon the composition and powers allocated to the committees that will carry out their duties under the board's supervision.

The Chairman can also decide if the committee can seek the opinion of experts who are not directors.

Transparency and traceability of the board of directors' activities

Option of participating in board activities by videoconference (Articles 518, 532 et seq.)

54. The revised Uniform Act has introduced the option for directors to participate in the work of the board of directors by videoconference or any other telecommunication technology as long as there is a guarantee of transparency and traceability vis-à-vis their actual participation.

Other telecommunication technologies include conference calls, for example.

To guarantee identification and participation at the meeting, the telecommunication technologies used must at least transmit the voice of the participants and meet the technical requirements that guarantee a constant, simultaneous retransmission of their voice.

Only under these conditions can directors taking part in board meetings by videoconference or other telecommunication technologies vote orally if provided for in the Articles of Association.

If one or more director(s) takes part in a board meeting by videoconference or other telecommunication technology, the board can only deliberate and make valid decisions if at least one-third of its members are physically present.

The Articles of Association can also place a limit on the type of decisions that can be taken when a meeting is held under these conditions.

Any decision taken in breach of the aforementioned rules or provisions of the Articles of Association will be deemed null and void.

Mandatory transfer to directors of the board of directors' report (Article 459-1)

55. According to the revised Uniform Act, the chairman of the board of directors must ensure that the minutes of the board of directors' meetings are delivered to the directors either personally, or hand-delivered by letter against a receipt, or by registered letter with acknowledgement of receipt, fax or email. This should be done as soon as possible and, by the very latest, when invitations are being sent for the next board of directors' meeting.

Rules of good governance to reduce the risk of conflicts of interest

Regulated (related party) agreements (Article 438)

56. To reduce the risks of conflict of interests in regulated agreements, the following rules of good governance have been introduced:

- agreements entered into with companies that own at least 10% of the company shall be subject to the approval regime for regulated agreements;

- non-compliance with the voting, quorum and majority conditions for the approval of agreements will now result in the agreement being deemed null and void: the director concerned cannot participate in the vote and his vote is not taken into account when the quorum or majority is calculated;

- the auditor's special report is given greater importance: the deliberations leading to the approval of the regulated agreements are now deemed null and void if there is no auditor's special report; they may also be cancelled if the auditor's special report does not contain the required information.

Remuneration of company directors (Articles 474, 482 and 490)

57. From now on, all remuneration received by the company directors (chairman and managing director, assistant managing director, chairman of the board and managing director) apart from the sums received and the benefits granted pursuant to an employment contract, must be approved and determined by the board of directors.

This amendment will therefore make it possible to distinguish between the remuneration attached to the corporate office and those relating to an employment contract.

Moreover, the Act stipulates that the corporate officer concerned must not take part in the remuneration vote and his vote is not taken into account when calculating the quorum or majority.

Any decision taken in breach of the aforementioned provisions will be deemed null and void.

Incompatibility of functions between the statutory auditor and the merger auditor (Articles 620 and 673)

58. From now on, the merger auditor cannot be selected from among the statutory auditors of the companies taking part in the merger.
This also holds true for the shares auditor.

Rules of good governance to boost the transparency of the management and decision-making organs.

Greater transparency for candidates for the post of director or managing director (Article 523)

59. Candidates for the post of director or managing director are now required to disclose all of the corporate offices held in the last five years. They must also mention their identity, their professional profile and professional activities during the past five years.

Reminder: candidates were previously only required to mention their identity, professional profile and their professional activities during the past five years.

Compulsory convening of the auditor to meetings of the board of directors or of the managing director (Article 722)

60. The auditor's invitation to any meeting of the board of directors or of the managing director of relevance to his duties other than the meeting to adopt the accounts of the financial year is no longer optional.

Consequently, the auditor must be convened not only to the meeting of the board of directors or of the managing director adopting the accounts of the financial year but also to any other meeting of the board or of the managing director of relevance to his duties.

If the auditor is not convened, the meeting may be cancelled.

However, the meeting cannot be deemed null and void if the auditor was present.

Possibility of the work of the board of directors being reported at the annual ordinary general meeting (Article 546)

61. As part of its remit, the annual ordinary general meeting no longer simply familiarises itself with the various reports and draft resolutions.

The revised Uniform Act also stipulates that the chairman of the board of directors must report on the work performed by the board to the annual ordinary general meeting.

Rules of good governance to strengthen shareholders' rights

62. In addition to the new common provisions to strengthen the rights of shareholders, i.e., the right to vote by correspondence or by videoconference or other telecommunication technologies or the introduction of the concept of the abuse of equality rights, specific provisions have been introduced to strengthen shareholders' rights.

Reinforcement of the right to attend general meetings (Articles 526, 532 to 535, 541)

63. The meeting held must respect the rights of the shareholders present. Failure to do so will result in the general meeting's deliberations being deemed null and void. Consequently:

- the attendance list must state the identity of each shareholder who took part in the meeting by videoconference or by any other means that made their identification possible;
- powers of attorney and correspondence voting forms shall be appended to the attendance list at the end of the meeting;
- the attendance list shall be signed by the shareholders present and by the agents at the beginning of the session;
- the scrutineers shall be responsible for certifying the attendance list;
- the minutes and attendance list for board of directors' meetings as well as the regulated agreements entered into by the company now form part of the body of documents that must be communicated to shareholders at all times.

64. If a shareholder participates in the meeting by videoconference or other means of communication, any technical incidents that occurred during the meeting and had a disruptive impact must be mentioned in the minutes.

65. The right to attend meetings is subject to the prior entry of shareholders in the company's registered shares register on the day of the general meeting.

Under the previous Uniform Act, this was an optional measure. However, the revised Act does not provide for any penalties if the aforementioned requirement is breached.

The revised Act nevertheless allows for the Articles of Association to provide for registration in the registered shares register up to three working days before the general meeting by midnight local time.

Improvement in shareholders' rights in relation to the auditor's duties (Article 717-1)

66. From now on, the decisions taken during the general meeting in the absence of the auditor's report are deemed null and void.

The deliberations can also be cancelled if the report does not contain the required information.

Contrary to the stipulations in Article 717-1, the information that must be included in the auditor's report is not detailed in the Article. It could be, however, that the required information is outlined in Article 715 but destined for the board of directors, the managing director and, where appropriate, the audit committee.

Nevertheless, the action for nullity is extinguished if these deliberations are expressly confirmed by the general meeting deliberating based on the report of a duly appointed auditor.

Rules of good governance for listed companies (Articles 829-1, 831-2 and 831-3)

67. The rules of good governance for companies refer mainly to their functioning.

They are as follows:

Creation of an audit committee by the board of directors

68. It is now mandatory for listed companies to have an audit committee.

The committee's key tasks are:

- auditing the accounts, particularly the pertinence and consistency of the accounting methods used to produce the consolidated accounts, and the financial information;
- monitoring the efficiency of internal control and risk management systems;
- providing an opinion on the auditors proposed for appointment at the general meeting.

The committee regularly reports to the board of directors regarding the execution of its duties and informs the board without delay of any problems encountered.

69. The audit committee exclusively comprises non-employee directors or directors that do not hold the office of chairman and managing director or assistant managing director within the company.

Obligation of the chairman to report to the general meeting

70. In listed companies, the chairman of the board must report to the general meeting regarding the work performed by the board of directors.

In unlisted companies, this is optional.

71. The report delivered as part of this obligation must contain information on the following points:

- the composition of the board, the conditions for preparing and organizing the work of the board and the internal control and risk management procedures implemented by the company;
- all remuneration, whatever form it takes, of all corporate officers;
- a list of all of the corporate offices and functions held by the corporate officers in all companies during the financial year.

Exemption to the conditions for attending general meetings (Article 831-1)

72. Notwithstanding the principle outlined in Article 541, the right to attend the general meeting of a listed company can be justified through the registration of shares in the shareholder's name or the intermediary's name registered on his behalf by midnight local time up to three working days before the meeting is held:

- in the company's registered share register;
- in the register for bearer shares held by an intermediary.

The principle is to justify the right to attend the general meeting through the registration of shares on the day of the meeting (see no. 49).

Amendments relating to transferable securities in public limited companies

Extension of the definition of transferable securities (Art. 744 and 744-1)

73. Transferable securities are now defined as a category of financial instrument which includes the notion of financial contracts.

The signature of financial contracts by public limited companies, if the opportunity arises, will take place under the conditions set by the competent authority in each Contracting State.

Equities and debt securities other than money market securities are included in the categories of transferable securities.

74. The definition of transferable securities issued by public limited companies also includes the concept of electronic transfers.

Transferable securities, whatever form they take, must be registered under their owner's name. They can be transferred electronically from one account to another.

Form of transferable securities: maintenance of the registered share register is mandatory (Art. 746-1)

75. Each company is now legally required to maintain registered share registers either itself or via an authorized party.

The registers must contain compulsory information and the entries they contain must be signed by a legal representative of the company or the company's representative.

The auditor is also now legally required to confirm the existence of the registers in his annual report and give an opinion as to whether or not they are being properly maintained.

A statement by the company's managers certifying that the registers are being properly maintained is contained in the appendix of the auditor's report.

Clarification on the rules governing the subordination of transferable securities (Art. 747-1)

76. The revised Uniform Act provides clarification on the rules governing the subordination of transferable securities.

The Act stipulates that subordinated transferable securities can be planned when issuing securities that represent the debt of the issuing company or that confer the right to subscribe to or acquire a transferable security.

It can be stipulated that these securities will only be redeemed after other creditors have been paid.

An order of priority for payment can also be stipulated vis-à-vis the various categories of securities.

Preference shares regime (Art. 578-1, 778-1 et seq.)

77. The revised Uniform Act provides clarification on the legal regime governing preference shares.

Decisions relating to preference shares: exclusive jurisdiction of the EGM

78. The extraordinary general meeting (EGM) is the sole competent authority that can decide to issue, repurchase or convert preference shares.

But this decision can only be taken on the basis of a report from the board of directors or the managing director and a special audit report.

The report of the board of directors or the managing director must contain certain information in addition to the information required for registered capital increases, i.e.:

- the characteristics of the preference shares;
- the impact of the operation on the situation of owners of equities and transferable securities that give access to the share capital.

The auditor must give his opinion on this clarification.

The EGM can delegate its authority in compliance with the rules outlined in the Uniform Act.

Regardless, any decision taken in breach of the aforementioned provisions will be deemed null and void.

Characteristics of the preference shares: with or without voting rights

79. When a company is formed or during its existence, preference shares can be created with or without voting rights, with special rights of any kind, and can be temporary or permanent.

Preference shares with voting rights

80. Preference shares can benefit from the double voting rights conferred on other shares.

The voting rights attached to preference shares can be converted or suspended for a fixed or determinable time limit, or can be withdrawn completely.

Preference shares without voting rights

81. Preference shares without voting rights cannot represent more than half of the registered capital, or more than one quarter in listed companies.

Any preference share issue that pushes the proportion beyond these limits is null and void.

Preference shares without voting rights when issued to which a limited right to receive dividends, reserves or share of the assets in the event of liquidation are attached, are denied pre-emptive rights of subscription for any share capital increase in cash, subject to provisions to the contrary.

Special provisions in the event of the repurchase, redemption or conversion of preference shares

82. The repurchase of preference shares must be expressly provided for in the company's Articles of Association before they are issued.

The conditions for their repurchase or conversion can also be established in the Articles of Association.

83. To include the conditions for the conversion, repurchase or redemption of preference shares in the Articles of Association, the board of director's report must inform the EGM of the aforementioned conditions as well as the conditions for making the reports of the board of directors, the managing director or the auditor available to shareholders.

The auditor must give an opinion on the conditions for conversion, repurchase or redemption.

84. Preference shares can be converted into ordinary shares or into a different class of preference share.

The auditor's or managing director's report must contain the following information. Failure to do so may result in the decision to approve the conversion being deemed null and void:

- the terms and conditions of the conversion;
- the method used to calculate the conversion ratio;
- the conditions for carrying out the conversion;
- the impact of the conversion on the situation of owners of equities and transferable securities that give access to the share capital; and
- where appropriate, the characteristics of the preference shares created from the conversion.

The auditor must give an opinion on the conversion and on the impact on the situation of owners of equities and transferable securities that give access to the share capital. Failure to do so may result in the deliberations being deemed null and void. The report must also outline the method used to calculate the conversion ratio.

85. The auditor's or managing director's report must contain the following information. Failure to do so may result in the EGM's decisions regarding the repurchase or redemption of preference shares being deemed null and void:

- the terms and conditions of the repurchase or redemption;
- the reasons and methods used to calculate the offer price;
- the impact of the operation on the situation of owners of equities and transferable securities that give access to the share capital.

Preference shares in the event of a merger or scission

86. If a merger or scission occurs, preference shares can be exchanged for shares in the companies receiving contributions from the transfer of assets comprising equivalent special rights, or based on a specific exchange parity that takes into account the special rights lost.

If there is no exchange of shares conferring equivalent special rights, the merger or scission is subject to the approval of a special general meeting.

Preference shareholders forming a group at a special general meeting

87. Preference shareholders forming a group at a special general meeting can appoint one of the company's auditors to draw up a special report on whether or not the company respects the special rights attached to preference shares. This report will be distributed to the preference shareholders during a special general meeting.

Hybrid securities regime (Art 822 et seq.)

88. The revised Uniform Act outlines the legal framework that applies to hybrid securities.

Hybrid securities are defined as securities that give access to the share capital or confer rights to the allocation of debt instruments.

Terms and conditions for the issue of hybrid securities

89. The EGM is authorized to approve the issue of hybrid securities. Any deliberations that breach this provision will be deemed null and void.

The EGM must issue an opinion on the report of the board of directors or managing director, as appropriate, and on the auditor's special report. Failure to do so may result in the deliberations being deemed null and void.

These reports must, for example, outline:

- the characteristics of the transferable securities conferring rights to the allocation of debt instruments or giving access to the share capital;
- the conditions for allocating the debt instruments or share capital to which the transferable securities confer the rights;
- the dates on which the allocation rights may be exercised.

In the event of an issue of transferable securities conferring rights to the allocation of debt instruments or comprising debt instruments alone, the auditor's report will focus on the company's debt position but will exclude the choice of components used to calculate the issue price.

Any deliberations taken on the basis of a report that does not contain the aforementioned information are null and void.

When a capital increase takes place and pre-emptive subscription rights are maintained, the auditor gives an opinion on the proposed issue and the choice of components used to calculate the issue price and on the price itself.

90. Hybrid securities can also be issued between companies in the same group.

Consequently, a public limited company can issue transferable securities that give access to the share capital:

- of the company that, directly or indirectly, holds more than half of its share capital; or
- of the company in which it holds, directly or indirectly, more than half of the share capital.

The issue must be approved by the EGM of the issuing company and by the EGM of the company in which the rights will be exercised, under the aforementioned conditions.

If this approval is not obtained, the issue is null and void.

Consequences of the issue of hybrid securities

91. Shareholders of a company that issues the hybrid securities have pre-emptive subscription rights proportionately to the amount of their shares.

This right is governed by the provisions of the Uniform Act applicable to pre-emptive rights of subscription (Articles 573 to 587-2 and 593 to 597).

Decisions taken and operations carried out in breach of the aforementioned pre-emptive rights for shareholders are null and void.

92. As of the date on which the hybrid securities were issued, the issuing company:

- cannot change its form or object unless authorized to do so by the issue agreement or based on the conditions outlined to issue the securities;
- cannot change its profit sharing rules or redeem its capital;
- cannot create preference shares leading to a change or redemption of this kind, or proceed with a reserved capital increase unless authorized to do so by the general meeting of the holders of these hybrid securities.

93. In the event of a merger, takeover or scission of the company that issued the securities, the owners of the hybrid securities may exercise their rights in the company or companies that benefited from the contribution of assets.

94. The issuing company is required by law to provide the owners of hybrid securities with access to corporate documentation; the issuing company can either send the documents to the shareholders or make them available to them by some other means.

When the rights to the allocation of a share of the registered capital are incorporated in or attached to bonds, the right of access to information is exercised by the representatives of the group of hybrid securities holders.

This group is automatically formed, after detachment of the original share rights, where appropriate, to defend the common interests of the holders. The body enjoys legal entity status and is subject to the same provisions as for groups of bondholders.

Validity of provisions of the Articles of Association and other partners' agreements

95. The adoption of a new legal standard raises several questions, including as to the validity of existing agreements and provisions. The adoption of the revised Uniform Act relating to Commercial Companies and Economic Interest Groups raises the question as to whether or not the provisions of the Articles of Association and other partners' agreements drafted in compliance with the Uniform Act of 17 April 1997 are still valid. This question had already been dealt with in the Uniform Act of 17 April 1997 (regarding the application of national legal provisions). The revised Act of 30 January 2014 offers nothing new on this subject. The validity of existing provisions of the Articles of Association and other partners' agreements should be examined by looking at which provisions comply with the new provisions of the Uniform Act and which provisions contradict these new provisions.

Validity of provisions in compliance with the revised Act

96. An existing provision is said to comply with the new regulations if it is completely in line with them. The existing provision is therefore still valid if it fully complies with the new law. As a result, provisions of the Articles of Association that are fully in line with the revised Uniform Act are still valid.

Conversely, any statutory clause that is not in line with the provisions of the revised Uniform Act will be deemed null and void.

97. Under the terms of Article 2.1, other agreements can be entered into by the partners on condition that they comply with the provisions of the Uniform Act that they must not depart from and the provisions of the Articles of Association; in this way, they can organize the following points as and how they see fit:

- the relationship between the partners;
- the composition of governing bodies;
- the business affairs of the company;
- access to registered capital;
- the transferability of company shares.

Consequently, the update of the Articles of Association required under the revised Uniform Act also applies to agreements other than the Articles of Association. It therefore follows that any such agreement that does not depart from the provisions of the revised Uniform Act and the Articles of Association is still valid.

Provisions that contravene the revised Act

Applicability over time of non-compliant provisions

98. Existing commercial companies and economic interest groups are required to update their Articles of Association to bring them into line with the revised Uniform Act within two (2) years of the revised Act coming into force.

The update is designed to repeal, change or replace, where appropriate, the non-compliant provisions to harmonize them with the mandatory provisions of the revised Act and to add the additional mandatory information required under the aforementioned Act.

The revised Uniform Act therefore intends to grant temporary validity to the provisions of the Articles of Association that contravene its new provisions for a period of two years starting from the date it came into force on 5 May 2014.

99. This also applies to the provisions of other agreements which are an extension of the Articles of Association. The revised Act states that, although the partners are free to enter into agreements on subjects such as the relationship

between the partners, the composition of governing bodies, and the transferability of company shares, they must comply with the Act's new provisions and those of the Articles of Association.

The new regulations highlight the two levels of compliance for provisions of other partners' agreements, namely compliance with the Uniform Act and compliance with the Articles of Association. Another advantage of the revised Act is that it expressly outlines the concept of such agreements, which was missing from the previous Act. In addition, it outlines their purpose.

100. There are two methods of of harmonization available:

- Amend the Articles of Association
- Adopt the newly-written articles

As was the case for the April 1997 Uniform Act, and to make harmonization easier, it is envisaged that harmonization can exceptionally be approved by an ordinary general meeting of shareholders or partners, notwithstanding any legal provisions or provisions of the Articles of Association to the contrary.

But if the ordinary general meeting is unable to give a lawful ruling, the harmonization of the Articles of Association will be subject to the approval of the competent court at the request of the company's legal representatives. This would ensure that the harmonization procedure was not delayed.

It is the responsibility of the legal representatives (company executives) to initiate the procedure to harmonize the Articles of Association.

Required formality

101. The decision to amend the Articles of Association or adopt new articles is subject to the formality of legal publication. This formality also applies to the deliberations of the general meeting that decide that harmonization of the Articles of Association is not necessary; this may occur, for example, when the provisions of the Articles of Association and other partners' agreements do not contravene the new regulations.

Validity of non-compliant provisions after the transitory period

102. The revised Uniform Act introduces two types of penalties in the event of non-harmonization of the registered capital of private limited companies and public limited companies and the non-harmonization of other provisions.

103. In the first case, companies that fail to bring their registered capital into line with the minimum requirement or that have not transformed the company into another form requiring more registered capital than is currently the case shall be automatically dissolved. Nevertheless, if no-one draws attention to the non-harmonization or non-transformation within the two (2) year transitory period, the companies will continue to operate as de facto partnerships under Article 865 of the Uniform Act.

104. In the second case, the provisions that are not harmonized within the required period will be deemed null and void and the new provisions will be applied. This appears to leave room for a regularisation.

Temporary administration enshrined in law

105. Article 4 of the Uniform Act relating to Commercial Companies and Economic Interest Groups of 17 April 1997[3] defines the company as follows:

"*A commercial company shall be formed by two or more persons who agree, by contract, to assign assets in cash or in kind to an activity for the purpose of sharing profits or benefiting from savings that may derive therefrom. The partners of the company shall accept to bear losses under the conditions stipulated in this Uniform Act.*

A commercial company shall be formed in the common interest of the partners."

This definition is an extension of Article 1832 of the Cameroon Civil Code. The parties that form a company through the signature of a contract agree to forego their personal interests in favour of the common interests of the partners. The assets assigned to the company are not only for the purpose of sharing profits but also any losses that may be incurred.

Sharing profits, benefiting from possible savings or sharing losses requires a real desire to enter into a partnership. This genuine spirit of cooperation between the partners is known as *affectio societatis*, a defining concept of commercial companies.

[3] The Uniform Act Relating to Commercial Companies and Economic Interest Groups, adopted on 30 January 2014, contains the same definition.

If there is no *affectio societatis*, there is no commercial company.

The life of a commercial company is never uneventful. It may go through some difficult periods.

Different solutions are available to help the company weather any storms it may encounter.

For example, it may be placed under temporary administration or a business management expert may be appointed; these are exceptional measures requiring the involvement of a third party in the running of the company.

Both measures are taken with different goals in mind.

106. This leads us to take a closer look at temporary administration.

Of Praetorian origin, temporary administration as a solution to deal with short-term corporate crises was first written into law by the famous Fruehauf judgement[4].

It is worthwhile mentioning here certain extracts from the judgement that still apply today.

The Paris Court of Appeal ruled that:

"Although in principle, it is not the responsibility of the interim relief judge to replace the company's managing bodies with a temporary administrator, this rule could be relaxed if the normal functioning of a company is no longer guaranteed, if it is threatened with bankruptcy or its management is clearly being hampered by serious disputes between the partners."

The Court of Appeal justified the appointment of a temporary administrator as follows:

"*...to appoint a temporary administrator, the interim relief judge must place the company's interests before the personal interests of certain partners, even if they are in the majority*".

This judgement by the Paris Court of Appeal provides some African judges with inspiration when it comes to dealing with temporary administration.

For example, an interim relief judge dealing with a case of a misunderstanding between partners in Cameroon did not hesitate to place the private liability company under temporary administration[5].

107. The 1997 OHADA legislator did not address the issue of temporary administration. Only the regulations for specific sectors, such as banking and insurance, deal with the question.

In the revised Uniform Act relating to Commercial Companies and Economic Interest Groups of 30 January 2014, temporary administration is legally enshrined in commercial company law in Article 160-1. This article stipulates that when the functioning of the company is no longer possible, the competent court must render a summary judgement; it may decide to appoint a temporary administrator to take over the running of the company's affairs.

The new regulations do not contain a definition of a temporary administrator. Of Praetorian origin, the temporary administrator is appointed exceptionally by the judge to ensure the running of the company experiencing difficulties.

As Yves Chassagnon so succinctly puts it, "*The person appointed by the courts must manage the company temporarily and resolve the issues that led to his appointment*"[6].

What are the conditions required under the revised Uniform Act for a commercial company governed by OHADA law to be placed in temporary administration? What is the status of the temporary administrator appointed by the competent court and what obligations must he fulfil?

[4] Fruehauf judgement, Paris Court of Appeal, 22 May 1965, Dalloz, Jurisdprudence, 1968, p. 147.

[5] Bafang Court of First Instance, summary judgement no. 27/ORD/CIV/TPI/2007, 27 May 2007, Sieur Noubicier Léon C. vs. Sieur Ngamako Michel

[6] Yves Chassagnon, Encyclopédie Dalloz, société "Administrateur provisoire".

Conditions for temporary administration

108. The conditions for temporary administration under OHADA law are that the normal functioning of the company is no longer possible due to issues with the management, directors or supervisory bodies, or with the partners.

Another condition is if there is an emergency situation, which implies an imminent threat to the company.

The revised Uniform Act uses the same criteria as case law regarding the appointment of a temporary administrator.

Normal functioning of the company impossible

109. The normal functioning of the company may be impossible due to issues with the management, directors or supervisory bodies, or with the partners.

The normal functioning of the company may be impossible due to issues with the management, directors or supervisory bodies.

110. The impossibility of the company to function normally due to issues with the management, directors or supervisory bodies results in the complete paralysis of the company's decision-making bodies. The company may be placed under temporary administration if a serious problem is almost crippling it or causing its management or corporate bodies to malfunction, thus preventing it from functioning normally.

For example, temporary administrators have been appointed in the following cases:

- a company has no directors and the general meeting cannot be held to appoint new ones[7];
- discord between two groups of shareholders, each of which owns 50% of the share capital, preventing any decisions from being taken or directors being appointed[8];
- discord between the directors on the board preventing the board from functioning properly as well as a serious problem within the company with implications for both its management and the business[9].

The competent court may therefore appoint a temporary administrator when the company is paralysed or it is no longer possible to apply the Articles of Association to the point where the company's very survival is in jeopardy.

It is worth mentioning that the courts previously would only appoint a temporary administrator if the company's decision-making bodies were paralysed or malfunctioning[10].

The famous Fruehauf judgement extended the situations in which a temporary administrator can be appointed to include disputes between partners.

The revised Uniform Act has taken this development on board and stipulates that a temporary administrator may be appointed if the dispute between the partners is making it impossible for the company to function normally.

Normal functioning of the company impossible due to the partners

111. The normal functioning of the company may be impossible due to a relatively serious dispute between the partners that could lead to the disappearance of *affectio societatis*, the cornerstone of every company.

The appointment of a temporary administrator could result in an abuse of majority powers by the shareholders. Case law states that, even if the company's management bodies are functioning properly, a temporary administrator may be appointed if there is a clear abuse of majority power by the shareholders that seriously threatens the interests of the company's minority shareholders[11], its creditors and/or the company itself[12].

In the Fruehauf judgement, the French judge appointed a temporary administrator due to the abuse of majority power by the US parent company which owned 60% of Fruehauf France's share capital. In so doing, the judge ensured that a vote by the majority shareholders in favour of terminating the contract would not put the French subsidiary out of business; as a result, the redundancy of over 600 workers was avoided.

[7] Comm. Pres. Bruges, 24 March 1983, T.B.R. 1984, p.36

[8] Comm. Pres. Charleroi, 1 February 1996, T.R.V. 1906, p.205

[9] Comm. Pres. Bruges, 15 July 1993, T.R.V. 1995, p.123, Comm. Pres. Tournai, 1 April 1994, T.R.V. 1994, p.355

[10] Guyon, Yves, note Paris Comm Court (interim proceedings), 9 May 1969, J.C.P., 1969, 16063

[11] Paris, 15 March 1968, R.P.S, 1969, 63

[12] Summary judgement, Comm. Brussels, 21 February 1972, R.P.S, 1973, 329. The judge felt that the abuse of a majority position deserves even greater criticism if it has economic and social repercussions.

It follows from this case law that "*the authority to run a company must not serve the best interests of the majority shareholders but of the company*"[13].

The interim relief judge also appointed a temporary administrator in the Sieur Noubicier Léon C. vs. Sieur Ngamako Michel case due to a conflict between two partners in the private limited company.

The administrator was appointed due to disagreements that led to a deterioration in the relationship of two partners. For example, one of the partners was removed from management and the company's business assets were placed under a management lease contract without the other partner's consent. Similarly, a temporary administrator has been appointed in other situations, such as extremely serious disputes or disagreements caused by the majority shareholders refusing to give access to information about the company's financial and accounting position during the annual general meeting, refusals to amend the meeting's agenda or the fraudulent purchase of a partner's shares by the managing partner[14].

112. The abuse of minority powers, majority powers or equality rights are all reasons that could lead to the appointment of a temporary administrator. The abuse of equality rights[15] has just been written into OHADA law via the revised Uniform Act of 30 January 2014.

Not every dispute between partners warrants the appointment of a temporary administrator. Such an appointment is subject to the functioning of the company being at a complete standstill. If this is not the case, then there is no need to request the appointment of a temporary administrator and the company's decision-making bodies will continue to function as before[16].

Requirement of an imminent threat: emergency situation

113. The fact that the company is unable to function normally due to issues with the management, directors or supervisory bodies, or partners, must constitute an imminent threat to the company, i.e., its failure or bankruptcy, which creates an emergency situation justifying the appointment of a temporary administrator.

If there is no imminent threat, the competent court will not make such an appointment.

114. A motion to appoint a temporary administrator can only be granted if the urgent nature of the situation is proven. The applicant must be able to prove that his interests are at risk and that only the appointment of a temporary administrator will remedy the situation.

For this reason, OHADA law stipulates that the applicant must refer the matter to the competent court that will render a summary judgement, i.e., the interim relief judge.

Any referral must comply with all of the applicable procedures given the emergency. The judge's ruling, which is provisional, must only stand for a limited amount of time and must not harm the principal cause or merits of the case.

A temporary administrator was appointed in the Fruehauf judgement in France and in the Noubicier Léon C. vs. Sieur Ngamako Michel case in Cameroon due to the existence of a serious threat that could have had very harmful repercussions for the company.

In the Peughoua Emmanuel and Kamkeng François vs. Tene Job case, a serious disagreement between the partners paralysed the company to such an extent that its very existence was threatened, hence the temporary administrator's appointment.

Moreover, the urgent situation meant that the interim relief judge had to appoint a temporary administrator for a private limited company despite the Articles of Association stipulating "*all disputes between either the partners or one of the partners and the company must be settled through mediation*"[17].

Goal of temporary administration: interim management of the company's business affairs

115. The temporary administrator is appointed on a provisional basis to manage the company's business affairs in the event of the company being unable to function normally due to issues with the partners or with the management, directors or supervisory bodies.

[13] Paris Court of Appeal, 22 May 1965, Dalloz 1968, p. 147, Contrin note

[14] Bonanjo Court of First Instance, summary judgement no. 367 of 16 July 2004, Peughoua Emmanuel et Kamkeng François vs. Tene Job case

[15] Defined in Article 131 of the Uniform Act relating to Commercial Companies and Economic Interest Groups.

[16] CA Abidjan, n° 258,25-2-2000: NACI, Bulletin Juris Ohada, n° 1/2002, Jan-Mar 2002, p.42, anonymous note, www.ohada.com, Ohadata J-02-132

[17] Douala-Bonanjo Court of First Instance, summary judgement no. 367 of 16 July 2004, Peughoua Emmanuel et Kamkeng François vs. Tene Job case

At the end of the temporary administrator's appointment period, the managers and directors must return to their positions.

An Appeal Court issued the following reminder in a recital: "*the decision taken by a summary judgement to replace the decision-making bodies of a company that have been allocated this power by the general meeting with a temporary administrator must be for as short a time period as possible, and everything must be done to resume the normal functioning of the legal entity as quickly as possible*"[18].

While the temporary administrator's remit is limited to carrying out certain administrative tasks, such as publishing the notice convening the annual general meeting, his powers are no longer valid once these tasks have been accomplished.

In other circumstances, it is possible to appeal against the interim relief judge's ruling if it does not place a precise time limit on the temporary administrator's appointment[19].

116. The Uniform Act did not provide for this kind of appeal. However, as from the entry into force of the revised Uniform Act, any interested party may appeal against the interim relief judge's ruling if it does not place a precise time limit on the temporary administrator's appointment. In this event, the court dealing with the appeal can rely on the rulings given in other jurisdictions.

[18] Summary judgement, Comm. Mons, 10 July 1979, R.P.S., 1979.256

[19] Summary judgement, Comm. Brussels, 9 March 1984. La petite ferme vs. Balta and Van Der Haeghen unpublished, quoted in Hormans, G., "Le rôle du juge dans la vie des sociétés", o.c, 429

Status and obligations of the temporary administrator

Status of the temporary administrator

Company representative

117. The person appointed as a temporary administrator must be a natural person who can also be a court-appointed representative registered on a special list, or any other person with experience or a specific qualification vis-à-vis the case in hand. The person must also fulfil certain requirements regarding qualifications and character.

He represents the company with third parties.

Extent of the temporary administrator's powers-appointment procedure-length of appointment-liability

Extent of the temporary administrator's powers

118. The ruling of the competent court to appoint the administrator also determines the extent of his powers.

The temporary administrator exercises his powers within the framework of the task that he has been appointed to carry out and within the limits of his remit. The company shall not be bound by any actions taken by the temporary administrator in the knowledge that he exceeded the powers granted.

If the powers are defined in general terms, the temporary nature of the assignment will mean that the temporary administrator will only be able to take decisions that will have a fundamental impact on the company's long-term future as a very last resort.

Some orders may limit the temporary administrator's powers for the accomplishment of certain specific tasks, such as administrative tasks (giving notice to convene the general meeting or the board of directors) or control of the company.

Appointment procedure

119. The instrument of appointment of the temporary administrator must be published in a notice in an official journal of the Contracting State where the company's registered office is located within fifteen (15) days of the appointment date.

Remuneration

120. The court's ruling will also set the amount of remuneration to be paid to the temporary administrator, which is borne by the company

Length of appointment

121. The length of appointment cannot exceed six (6) months unless an extension is granted by the competent court at the temporary administrator's request. The relevant parties will be invited to the hearing to discuss this extension.

In the extension request, the temporary administrator must outline the reasons as to why he was unable to complete the tasks set, the steps that he plans to take and the length of time that will be required to do so. Failure to do so will constitute grounds for inadmissibility.

122. The total length of the appointment set by the competent court cannot exceed twelve (12) months, including the extension.

Can another temporary administrator be appointed once the twelve months have expired and the company is still in crisis? In the banking sector, temporary administrators seldom complete the tasks assigned in the allotted timeframe. Their appointments are often extended. When the revised Uniform Act comes into force from 5 May 2014, it will deal with this question. We can already assume that the maximum time limit set by the Uniform Act applies to one single natural person. It therefore follows that it should be possible to appoint a different natural person if the crisis persists beyond the time limit set for the first temporary administrator appointed.

In this respect, we could criticise the OHADA legislator for not taking into account the socio-economic climate when drawing up the legislation, particularly the difficulties that temporary administrators tend to encounter when trying to achieve their goals.

It is understandable that the legislator gave priority to speed and solving the crisis as quickly as possible, but it may have been helpful to foresee that the temporary administrator may not manage to achieve a successful conclusion.

The temporary administrator can be dismissed at the request of any partner on condition that the request is made for a legitimate reason.

He will be replaced in accordance with the appointment procedures.

Liability

123. Both the company and third parties may hold the temporary administrator liable for any wrongdoing or mistakes that had a harmful impact on the company while he was performing his duties.

Obligations of the temporary administrator

Obligation of the temporary administrator vested with partial powers

124. Article 160-5 of the revised Uniform Act relating to Commercial Companies and Economic Interest Groups of 30 January 2014 requires the temporary administrator to present a report to the competent court at least once every three (3) months regarding the operations that he has carried out and the progress being made.

Obligation of the temporary administrator vested with full powers

125. Article 160-6 of the revised Uniform Act relating to Commercial Companies and Economic Interest Groups of 30 January 2014 stipulates that when the temporary administrator is vested with full powers, he must:

- draw up the annual summary financial statements based on the inventory of existing assets and liabilities;
- draft a report summarizing the temporary administration operations carried out in the course of the last financial year.

The annual summary financial statements and the written report must be produced within four (4) months of end of the financial year.

126. Unless otherwise stipulated by the competent court, the temporary administrator convenes the annual general meeting to approve the annual summary financial statements, grant any necessary authorizations and, where applicable, renew the auditor's term of office.

The annual general meeting is convened within six (6) months of the end of the financial year and in accordance with the provisions outlined in the Articles of Association.

During temporary administration, partners can obtain company documentation in the same way as they did when the company was functioning normally, i.e., at least fifteen (15) days before the general meeting is held.

127. It is worth mentioning that the revised Uniform Act of 30 January 2014 applies to companies governed by a special regime subject to the legislative or regulatory provisions that affect them.

Based on the clearer provisions laid down in the Uniform Act relating to Commercial Companies and Economic Interest Groups regarding temporary administration, the Act applies to credit and microfinance institutions, and insurance companies subject to special provisions.

These new provisions must therefore be read and applied alongside those outlined in the 1990 and 1992 agreements relating to the creation of the Central African Banking Commission and the harmonization of banking regulations in Central African states, as well as the CIMA (*Conférence Interafricaine des marchés d'assurance*) Code.

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Free shares

128. The registered capital can now also be increased through the allotment of free shares to company employees or certain categories of employees.

The terms and conditions of the allotment of free shares shall be determined at the extraordinary general meeting subject to the mandatory provisions of the Uniform Act.

This new mechanism is similar to that used for stock options except for two aspects: employees do not have to pay and automatically benefit from it regardless of the fluctuation of the share price provided the share price is not zero.

129. The provisions of the revised Uniform Act on free shares provide information on:

- the beneficiaries of free shares;
- the procedure for the allotment of free shares;
- the conditions for the allotment of free shares;
- the limit in relation to the registered capital.

Beneficiaries of free shares

Companies whose shares are not listed on the stock exchange (unlisted companies)

130. Free shares of unlisted companies shall be allotted to the employees of the company distributing free shares or to employees of companies which are at least 10%-owned by the company distributing free shares.

Free shares of unlisted companies shall also be allotted to the executives of the company distributing free shares or to controlled companies and subsidiaries.

The persons concerned are:

- the chairman of the board of directors, the managing director and assistant managing directors of a public limited company;
- the chairman (natural person), the managing director and assistant managing directors of a simplified public limited company.

Companies whose shares are listed on the stock exchange (listed companies)

131. The allotment of free shares of listed companies has been extended to employees of companies holding directly or indirectly at least 10% of the shares of the company allotting free shares or to employees of subsidiaries.

Free shares of listed companies shall be allotted to company executives in a given financial year provided free shares are also allotted to all company employees and at least 90% of the employees of subsidiaries.

Procedure for the allotment of free shares

Competent body

132. The extraordinary general meeting shall decide on the allotment of free shares based on the report of the board of directors or managing director.

The extraordinary general meeting shall delegate to the board of directors or managing director, the power to set the conditions and criteria for the allotment of free shares. The general meeting shall fix a time-limit of up to 36 months within which the board of directors or supervisory board can allot free shares.

Failure to comply with this procedure shall result in the operation being null and void.

Terms and conditions of the allotment of free shares

Vesting period

133. The general meeting shall set the vesting period which cannot be less than two years. The general meeting shall have the possibility to reduce the vesting period in the event of the beneficiary's incapacity.

The beneficiary's claimants can request the allotment of free shares in the event of the beneficiary's death.

Lock-up period

134. The general meeting shall set the lock-up period which cannot be less than two years.

The shares shall be freely transferable in the event of the beneficiary's disability.

The general meeting shall have the possibility to reduce or even remove the lock-up period when the vesting period has been set to at least four years.

The board of directors or the general meeting (for companies with a supervisory board) may decide that the executives must hold all or part of their shares until the expiry of their term of office.

The general meeting shall have the possibility to reduce the vesting period in the event of the beneficiary's incapacity.

Where the claimants have requested and obtained the allotment of the free shares, such shares shall be freely transferable.

Restriction on free transfer of shares

135. There are specific restrictions on the free transfer of shares of listed companies to prevent holders of free shares from taking advantage of their privileged information to the detriment of other shareholders and investors. Therefore, free shares cannot be sold:

- during the ten (10) trading sessions before and after the publication of the consolidated financial statements;
- between the time where the company becomes aware of information which is likely to have a material impact on the market price of the share and ten (10) days after the publication of this information.

Special report

136. The board of directors of the company allotting free shares or that of the company having a controlling interest in the latter shall submit a special report to the ordinary general meeting. This report shall include:

- the number and value of the shares allotted to executives by the company and by the controlled companies;
- the number and value of the shares allotted to the ten employees who are the most highly compensated by the company or the controlled companies;
- the number and value of the shares allotted to all the employees as well as the allotment by category of employees.

Conditions for the allotment of free shares

137. Free shares are allotted by issuing new shares or granting existing shares.

In the first case, the capital shall be increased through the capitalization of reserves (except for legal reserves), which automatically entails the renunciation by former shareholders of their pre-emptive right of subscription, in favour of the beneficiaries.

In the second case, the shares shall be redeemed for distribution.

The extraordinary general meeting shall fix a time-limit of up to 36 months within which the board of directors or supervisory board can allot free shares.

Limit in relation to registered capital

Authorized percentage

138. The allotment of free shares is subject to two limits: a general limit and an individual limit.

General limit

139. The maximum percentage of capital which can be allotted cannot exceed 10% of the registered capital at the allotment date.

Individual limit

140. An employee or executive cannot hold more than 10% of the registered capital as a result of the allotment of free shares. The date to be taken into account is the date of the allotment of shares and not that of the authorization granted by the extraordinary general meeting.

Sanction

141. Failure to comply with this procedure shall result in the operation being null and void.

Branch and representative office

142. The revised OHADA Uniform Act relating to Commercial Companies and Economic Interest Groups regulates companies and also their establishments, which are autonomous and as such must be registered in the Trade and Personal Property Credit Register.

The conditions relating to the branch have been amended and the representative office has been introduced.

Branch

The provisions applicable to branches of foreign companies...

143. The branch was already a legal structure recognized by the former Uniform Act. As a reminder, a branch is a commercial, industrial or service-providing establishment which belongs to a company or a natural person and which has been granted a certain degree of autonomy in its management.

Branches of foreign companies (or of a natural person established abroad), i.e., whose registered office was not located in the OHADA zone, had to be attached to a company whose registered office was located in this zone within two years from its registration. It could be a company with a registered office located in the country in which the branch was registered or in another OHADA Member State. The contribution was usually in the form of a partial cross-border contribution of assets and the host company could have any form.

The purpose of this measure was to encourage economic operators established outside the OHADA zone to conduct their activities through legal structures in the form of public limited companies or private limited companies, thereby securing, in principle, a more stable and long-term presence.

In the alternative, the branch had to close down and be removed from the register, a situation which was incompatible with the continued pursuit of activities.

A third option was to obtain a waiver from the minister in charge of trade of the Contracting State in which the branch was located.

The difficulty with this solution was that there was no regulated procedure, for example in terms of circumstances which could justify a waiver, the type of eligible activities and the duration of validity.

In the end, obtaining a waiver and its conditions were subject to the discretion of the relevant authorities.

This resulted in different practices from one State to another concerning the sectors for which a waiver was granted, factual circumstances, duration, etc., but generally, and above all, it resulted in legal uncertainty, not suited to the smooth development of activities.

All these rules are maintained in full in the revised Uniform Act, with some clarifications on the waiver system.

.... now reinforced

Limitation on waivers

144. A waiver is now granted only for a period of up to two years and cannot be renewed.

The conditions of the grant are still not regulated and the decision of the relevant minister remains discretionary. The reform only limits the number of waivers and their duration.

The business community would probably have preferred more extensive provisions which either tightened or eased the waiver practice.

The revised provisions provide that this rule applies subject to the provisions applicable to companies covered by a special scheme. The provision is somewhat unclear as it refers to "companies", which does not make sense for a rule relating to the duration of a branch. The concept of a special scheme also needs to be considered. Does it mean that each State would remain free to draw up a list of companies or business sectors which would not be subject to the new law, thereby potentially rendering the rule meaningless?

To date, there are no specific answers and there is a risk of divergent practices within the OHADA zone.

Civil sanctions

145. The reform is filling a void as it now provides for sanctions for failure to comply with the obligation to grant or obtain a waiver. This void made the rule too flexible.

Now, any interested party or the registrar of the relevant Trade and Personal Property Credit Register can ask the judge to remove the branch from the register.

The consequence is clearly defined, a non-compliant branch must close down following its removal from the register and cease all activities.

An interested party may include a competing economic operator or an authority. Therefore, it is essential to ensure compliance.

If no removal from the register is requested, it must be noted that the branch will in fact continue to operate. However, as was previously the case, this situation may generate collateral damages, depending on the Member States and practices in force. For example, certain tax authorities considered that expenses specific to branches, such as head office expenses, could not be deducted due to the fact that the two-year period had been exceeded and no action had been taken. In economic law, the relevant authorities sometimes considered that the licences and permits granted became *de facto* null and void. Irrespective of special licences, the branch could be treated as illegally engaged in a commercial activity. All this would inevitably result in legal actions and various sanctions.

Punitive sanctions

146. In addition, under Article 891-1 of the revised Uniform Act, the company executives of a foreign company which has not attached the branch to a local company or has not removed it from the register shall incur punitive sanctions. The quantum of penalties shall be determined by the law of each Member State.

For practical and territorial reasons, any legal actions shall first be brought against the branch's legal representative.

What should be done?

147. With stricter requirements imposed on waivers, together with civil and punitive sanctions, it is advisable to consider regularizing the situation of foreign companies' current branches, which is imperative for those already in a situation of non-compliance.

Therefore, these issues must be considered, especially for groups operating or planning to operate in several countries of the OHADA zone.

148. The creation of a central company, in one of the OHADA Member States, which registers branches in the OHADA zone, enables these branches to no longer be subject to a limited duration and possible uncertain waiver.

It enables entities to operate in the form of a branch, with the related management flexibility.

The Member State chosen shall depend on a number of factors, including operational and tax factors as well as factors related to the environment of the country.

149. Alternatively, a subsidiary can be created in each Member State, implying greater management constraints (level of shareholders' equity, existence of administrative, management and approval bodies involving special obligations, appointment of an auditor, etc.).

In any event, it is important to prepare the conditions of the contribution, as effectively as possible, as it involves cumbersome formalities (comparable to those of a merger) and tax costs, which are sometimes considerable. The requirements in this respect vary from one Member State to another.

Operators considering setting up establishments are now faced with the pressing question of whether to set up a subsidiary instead of a branch.

Representative office

Legal recognition at last

150. The revised Uniform Act introduces Articles 120-1 to 120-5 dedicated to the representative office (also known as "liaison office").

It is defined as being an establishment belonging to a company and serving as a liaison between the latter and the market of the Contracting State in which it is located. It has no management autonomy and only carries out activities of a preparatory or auxiliary character in relation to the founding company.

This legal recognition is important, in view of the different practices of the OHADA Member States.

Some Member States refused the registration of such a structure.

Other Member States allowed it, but it had to take the form of a branch, which is intended to carry out a commercial activity, whereas the representative office was a cost centre, creating problems with the tax authorities which claimed trade and other taxes and the ability to generate taxable income.

Other Member States already recognized this structure, but in view of the lack of legal framework, from time to time, the relevant court registrar could be inclined to refuse the registration in or removal from the register of the existing offices.

This situation could not be justified in view of the divergent practices in a zone with a common commercial law and the inconsistency of the court registrar himself or other authorities incidentally involved.

These issues have now been addressed, which is reassuring for economic operators considering a representative office.

Functioning of a representative office

151. Like a branch, a representative office has no legal personality separate from its founding company. Its assets and liabilities are considered to be those of the founding company. It must have a legal representative (natural person).

It can be the establishment of a company whose registered office is not located in the OHADA zone. However, unlike branches, it is not limited to a two-year period.

It must be registered in the Trade and Personal Property Credit Register.

In summary, a representative office is a branch with no commercial activity (i.e., trading and industrial activities or the provision of services).

As a cost centre, it cannot carry out any commercial activity.

The representation activities can be summarized as activities of a preparatory and auxiliary character. These activities include follow-up, coordination, information gathering, promotion or public relation activities and more generally any administrative duties not directly generating profits.

Conversely, it cannot engage in trading activities or be involved in such activities, such as negotiating and/or entering into any commercial contracts, on behalf of the founding company.

The representative office is intended to be a simple structure.

Limitation of the non-commercial activity

152. In view of their non-commercial status, representative offices were granted a special tax status by the Member States where they were recognized before the reform.

Based on the principle that it could not generate any profits, it was not subject to corporation tax as no profit was attributable to it. Similarly, it was exempt from VAT, which it paid on its purchases, without the possibility of a refund, like any end-user. Generally, the representative office was not subject to taxes specific to commercial activities, such as business tax.

Employees were subject to applicable taxes unrelated to the conduct of a commercial activity (wealth tax or personal income tax).

Certain Member States considered that the representative office could only be temporary, as it conducted an activity of a preparatory and auxiliary character. Therefore, for tax purposes, after a specific period defined by local legislation, representative offices were subject to a flat tax, calculated based on expenses incurred, in discharge of income tax. In other words, there was a presumption of commerciality.

153. As the representative office now has a legal status, it is most likely that the Member States, which did not fully recognize it as such until now, use a similar tax treatment as that above, in line with its activity which is restrictively defined by the Uniform Act.

Certain Member States may maintain or use a treatment based on a tax presumption of commerciality under set conditions.

However, it is clear that the representative office must not be involved in a commercial activity per se, such as:

- following-up commercial contracts;
- transferring or fulfilling customers' orders;
- delivering goods to the company's customers;
- receiving or storing goods held for resale;
- coordinating and supervising the activities of the business entities of the group to which it belongs.

In reality, these situations correspond, in most cases, to the tax concept of permanent establishment, resulting in the classification of a foreign company as a tax resident and thereby subject to the taxes applicable to a commercial activity in the country concerned. There may be specific cases subject to tax treaties for the avoidance of double taxation.

If the representative office carries on all or part of these activities, it becomes an office of a commercial nature, and, it is true that the situation of certain representative offices can be perceived as ambiguous in this respect, without however meeting the definition of commerciality.

154. In the event of commerciality, the activity must be operated by an entity having a commercial legal form.

In that respect, the revised OHADA Uniform Act is perfectly consistent and aware of the limits of a representative office. The amendments must be entered in the Trade and Personal Property Credit Register to enable its transformation into a branch when its activity exceeds that of a representation activity.

The duration of the branch's activity cannot exceed two years when the registered office of its parent company is not located in one of the OHADA Member States.

In this case, a representative office could make a direct contribution to a commercial company. However, this solution seems complicated as it would imply the contribution of a cost centre instead of an asset or a line of business. The prior transformation into a branch remains preferable.

If the amendments are not entered in the Trade and Personal Property Credit Register, they can be made, as of right, by the court registrar, by decision of the judge ruling on requests or at the request of any interested party.

It is an important lever for the tax authorities which presume commerciality and which are focused on asserting their rights.

In summary, the recognition of the representative office constitutes a welcome improvement, and its corollary will probably be that the authorities, especially the tax authorities, will pay closer attention to this type of structure.

Company with variable capital

Specific conditions of a company with variable capital

What is a company with variable capital?

155. Companies whose Articles of Association provide that "the capital may be increased by successive subscriptions by shareholders or on the admission of new shareholders, and it may be reduced by the total or partial redemption of subscriptions", are companies with variable capital.

It does not correspond to a legal form. A company with variable capital is subject to its own general rules based on its legal form.

Which company forms can be with variable capital?

156. Public limited companies not calling for public capital, simplified public limited companies.

Ease of entry and exit of shareholders

157. The terms and conditions for the subscription, payment and redemption of shares are freely laid down in the Articles of Association, notwithstanding the provisions of the Uniform Act.

Shareholders can withdraw from the company at any time by repurchasing or transferring their shares, unless otherwise provided and provided the minimum capital requirements are met.

The exclusion of one or more shareholder(s) can be decided on a majority of all the shareholders, as laid down in the Articles of Association.

In the event of a capital reduction not arising from losses, the creditors' right to object does not apply.

Limitation to free entrance and exit

158. Under the Articles of Association, the company executives, general meeting or all the shareholders may be granted the right to object to the transfer of the shares on the company's registers.

Withdrawal of shareholders

159. Shareholders may decide to withdraw at any time, unless otherwise provided.

Shareholders leaving the company are bound by all their obligations towards other shareholders and third parties existing at the time of their withdrawal, for a period of five (5) years, within the limit of the sums refunded to them before their departure.

The company shall not be dissolved upon the withdrawal or death of a shareholder. It shall continue, as of right, among the other shareholders.

Provisions to be included in the Articles of Association

Minimum amount of registered capital

160. The Articles of Association set the amount of the company's registered capital.

The Articles of Association set the amount of capital below which the capital cannot be reduced.

This amount cannot be lower than one-tenth (1/10) of the registered capital provided for in the Articles of Association or the minimum amount required for the specific form of company according to its governing provisions.

The words "with variable capital" must be added to the company form in all the documents of the company

161. The Articles of Association provide that in all the documents of the company, the company form must be followed by the words "with variable capital".

The terms and conditions for the subscription, payment and redemption of shares

162. The terms and conditions for the subscription, payment and redemption of shares are laid down in the Articles of Association, as an exception to the provisions of the revised Uniform Act.

Majority to decide on the exclusion of a shareholder

163. The Articles of Association must lay down the majority rules applicable to the decisions to exclude a shareholder.

Filing and publication formalities

164. The deeds recording increases or decreases of the registered capital of a company with variable capital or withdrawals of shareholders are not subject to filing and publication formalities.

However, the deeds recording the withdrawals of managers and company executives are subject to filing and publication formalities.

Simplified public limited company

165. Introduced by the revised OHADA Uniform Act on commercial companies and economic interest groups adopted on 30 January 2014, a simplified public limited company (*société par actions simplifiée* – SAS) can be created by one or several shareholders. Subject to mandatory governing rules, it can be organized and operated in accordance with the Articles of Association.

166. The SAS addresses the need to simplify the way investments are made in the OHADA zone. The SAS is a solution for investors considering (i) adopting a flexible legal structure, (ii) organizing their partnership by limiting their liability to their capital contributions, (iii) organizing their relations within company groups between parent companies and subsidiaries.

In view of its appeal, it is important to set out the special rules governing the SAS.

Features of the simplified public limited company

Status of shareholders

167. An SAS is a company in which the liability of each shareholder (natural person or corporate body) for the debts of the company is limited to the amount of shares he has taken and his rights are represented by shares.

The SAS may have several shareholders or one shareholder (simplified public limited company with a sole shareholder).

In the latter case, the sole shareholder has all the powers vested in shareholders, within the limit of their powers for collective decisions.

Name of the company

168. The company name must be immediately preceded or followed by the words "simplified public limited company" or the abbreviation "SAS" written in legible characters.

Where the company only has one shareholder, its name shall be immediately preceded or followed by the words "simplified public limited company with a sole shareholder" or the abbreviation "SASU".

Provisions of the public limited company applicable to the SAS

169. The rules applicable to the public limited company (SA) also apply to the SAS , if they are not inconsistent with the rules specific to the SAS.

However, there is a limit regarding the rules relating to:

- the minimum amount of registered capital;
- governance;
- the publication of the decisions taken by the sole shareholder;
- the conditions for transforming the SA into another corporate form;
- the voting rights attached to the shares;
- the loss of double voting rights.

For the application of these rules and in the absence of specific provisions of the Articles of Association, the duties of the board of directors or of its Chairman are performed by the Chairman of the SAS or the executive(s) appointed by the Articles of Association for this purpose.

Prohibition on calling for public capital

170. The SAS cannot call for public capital;

Registered capital

171. The Articles of Association freely lay down the amount of the registered capital and the face value of the shares.

The SAS can issue inalienable shares resulting from contributions in the form of services. The terms and conditions for the subscription and allocation of these shares are determined by the Articles of Association.

Transformation of a company into an SAS or transformation of the SAS into another corporate form

172. The decision to transform a company into an SAS shall be taken unanimously. The same applies to the merger of a company into an SAS.

The transformation of an SAS into another form shall be collectively decided by the shareholders under the conditions stipulated in the Articles of Association.

Functioning of the simplified public limited company

173. Regarding the functioning of the SAS, the provisions applicable to the board of directors or the Chairman of a public limited company relating to their duties are applicable to the Chairman of an SAS, unless otherwise expressly provided in the Articles of Association.

Chairman

174. The company shall be represented in dealings with third parties by a Chairman (natural person or corporate body) appointed under the conditions laid down in the Articles of Association.

The Chairman shall be vested with the widest powers to act under all circumstances on behalf of the company within the limits of the objects of the company.

The company shall, in its relations with third parties, be bound even by the acts that do not relate to the objects of the company, unless it can prove that the third parties were aware of this fact, or that, given the circumstances, the third parties could not have overlooked it.

Other executives

175. In addition to the Chairman, the Articles of Association may provide for the appointment of one or more persons holding the title of Managing Director or Assistant Managing Director who may perform the duties of the Chairman.

The provisions of the Articles of Association, or decisions of the organs of the company limiting the powers of the Chairman, Managing Director or Assistant Managing Director shall not be demurrable to third parties.

Executives who are corporate bodies

176. In contrast to the SA, a corporate body can be appointed as Chairman of an SAS. In this case, the company executives of this corporate body shall be subject to the same conditions and obligations and shall incur the same civil and criminal liability as if they were the Chairman or company executives on their own account, notwithstanding the

joint and several liability of the corporate body they are managing. This provision is an additional guarantee for the company, shareholders and third parties.

Liability of executives

177. The rules fixing the liability of the board of directors of public limited companies shall also be applicable to the Chairman and executives of the SAS.

Framework of the decisions to be taken collectively by the shareholders

178. The Articles of Association set out the forms and conditions of the decisions to be taken collectively by the shareholders. The Articles of Association may freely select the method of consultation of the shareholders (general meeting, written consultation, etc.).

The decisions taken in violation of the Articles of Association shall be null and void.

Decisions falling within the jurisdiction of the collective decisions of the shareholders

179. The duties of public limited companies' ordinary and extraordinary general meetings are performed collectively by the shareholders. Each share shall give right to at least one vote. It is therefore possible to have multiple voting shares.

Decisions regarding the increase, reduction or redemption of capital, as well as the merger, scission, partial transfer of assets, dissolution, transformation, appointment of auditors and approval of the account, shall be taken collectively by the shareholders.

The decisions taken in violation of this rule, including those taken collectively that are in violation of the conditions set out in the Articles of Association shall be null and void.

Case of a simplified public limited company with a sole shareholder (SASU)

180. The management report, annual financial statements and consolidated financial statements, if any, are adopted by the Chairman of an SASU.

The sole shareholder shall approve the accounts, after having read the auditor's report, if any, within six (6) months following the end of the financial year.

The powers of the sole shareholder cannot be delegated, and his decisions are recorded in a special register. Decisions taken in violation of the above-mentioned principles can be cancelled at the request of any interested party.

The accounts shall be deemed to be approved in the case where the sole shareholder (natural person) personally assumes the chairmanship of the company, the deposit of the duly signed inventory and annual financial statements at the Trade and Personal Property Credit Registry, within six (6) months.

Appointment of an auditor

181. The shareholders can appoint one or more auditors by a collective decision.

An SAS shall be bound to appoint at least one (1) auditor at the end of the financial year where one of the following three conditions are met:

- a balance-sheet above one hundred and twenty-five million (125,000,000) CFA francs;
- the annual turnover exceeds two hundred and fifty million (250,000,000) CFA francs;
- the permanent staff exceeds 50 persons.

182. However, the SAS shall no longer be bound to appoint an auditor if during the two (2) financial years preceding the expiry of the auditor's term, the company has not met two (2) of the conditions set out above.

An SAS controlling one or more companies, i.e., which effectively holds decision-making power within the companies, or which is controlled by one or more companies, shall also be bound to appoint an auditor.

However, when the conditions set out above are not met, the appointment of the auditor may be requested before the court by one or more shareholders controlling at least one-tenth (1/10) of the registered capital.

On the occasion of an increase of capital by set-off of claims on the company, if the latter does not have an auditor, the statement of accounts prepared by the Chairman must be certified as true by an auditor.

Control of regulated agreements

183. An SAS which has an auditor shall present a report to the shareholders on the agreements concluded directly between the company, its Chairman, or one of its executives or shareholders holding more than 10% of the voting rights, or if it is an associated company, the company controlling it.

The same shall apply to agreements indirectly involving one of the persons referred to above, or in which he deals with the company through a third party.

When there is no auditor, the report of the agreements referred to above is prepared by the Chairman of the company.

The shareholders shall give a decision on the report. The shares of the persons directly or indirectly involved shall not be taken into account in determining the quorum and the majority and they shall not be entitled to vote. The decisions taken in violation of these rules shall be null and void.

Disapproved agreements shall have effect. It shall be the responsibility of the interested party and possibly the Chairman and the other executives to bear the harmful consequences for the company.

Any decision taken in violation of the report of the auditor or Chairman shall be null and void.

184. When the company is a SASU, the special register only refers to the agreements concluded directly or through a third party between the company, its executive or one of its executives. However, when the agreement is concluded with the sole shareholder, no entry has to be made in the register, and the auditor does not have to prepare the report.

Limits regarding the agreements

185. Agreements relating to ordinary transactions concluded under normal terms are not subject to the requirements referred to above.

It shall be prohibited for the Chairman and executives, as well as their spouses, ascendants or descendants and through other third parties, under penalty of the agreement being declared null and void, to contract, in any form whatsoever, loans from the company, to have it grant them a current account overdraft or otherwise, as well as to have the company provide security or guarantee for their commitments towards third parties.

Managing corporate bodies shall not be subject to this prohibition.

Rules relating to shares

Lock-up clauses barring the sale of shares or securities

186. Shares or securities granting access to the registered capital of an SAS can be subject to a lock-up for a period of no more than ten (10) years, under the conditions laid down in the Articles of Association.

It should be pointed out that the Articles of Association must contain information on the scope of application of this lock up, to ensure it is restricted only to the sale and to prevent its extension to any merger, scission, partial transfer of assets, establishment of usufruct, succession or donation.

These clauses must also specify if the restriction applies to all share transfers or only to third party share transfers.

Approval and pre-emption clause

187. Any transfer of shares or securities granting access to the registered capital may also be subject to the prior approval of the company and a pre-emption right under the conditions laid down in the Articles of Association.

In this case, the Articles of Association must provide for the conditions for obtaining this approval by introducing more flexible or more restrictive rules.

Exclusion clause

188. The Articles of Association can also provide that the shareholder must transfer his shares, and the shareholder's non-monetary rights shall be suspended until the transfer of the shares.

Any share transfer conducted in violation of a provision of the Articles of Association introduced pursuant to one of the principles referred to above shall be null and void.

Change of control of a shareholder (corporate body)

189. In the event of a change of control of an associated company, the Articles of Association can provide that the SAS should be informed as soon as the change is made. The SAS may decide to suspend the non-monetary rights of this shareholder and to exclude the shareholder under the conditions stipulated in the Articles of Association.

If no information is given regarding the conditions of the control of the company (direct or indirect control) and the implementation of this

exclusion, it would appear that the shareholders have been given the greatest freedom to determine the causes and conditions of the exclusion in the Articles of Association.

These rules can also apply to a company that has acquired the status of shareholder following a merger, scission or dissolution, under the same conditions.

Setting the price of the share transfer in the absence of provisions in the Articles of Association

190. If the Articles of Association do not contain any information on the price of the share transfer when the company is implementing one of the clauses referred to above, the price shall be fixed by mutual agreement between the parties or determined by an expert designated either according to the provisions of the Articles of Association, or by both parties or, failing that, by order of the competent court within whose jurisdiction the registered office is located, by summary proceedings.

When the shares of the company are redeemed by the company, it shall transfer the shares within a period of six (6) months.

Conditions for amending the provisions of the Articles of Association

191. The provisions of the Articles of Association referred to above may only be adopted or amended unanimously by the shareholders. Any decision taken in violation of this rule shall be null and void.

It should be pointed out that the rules relating to the amendment of the provisions of the Articles of Association do not apply to SASUs.

Conclusion

192. The flexibility in the organization and functioning of SASs, in which contractual freedom prevails, clearly makes this new legal form a vehicle of choice for investors in OHADA Member States.

The SAS will meet the increasing number of requests from stakeholders wishing to make joint investments in joint subsidiaries. The contractual freedom of the SAS will limit the need for agreements between the shareholders.

Nullity of a company and company acts

193. The reforms introduced by the revised OHADA Uniform Act relating to Commercial Companies and Economic Interest Groups (hereinafter the OHADA Uniform Act) regarding the nullity of a company and company acts, concerns mainly the grounds for nullity.

A distinction has now been made between the grounds for nullity of a company, the grounds for nullity of acts, decisions or deliberations amending the Articles of Association and the grounds for nullity of acts, decisions or deliberations not amending the Articles of Association.

194. No major innovation was made regarding the provisions relating to the action for nullity, its time-limit, regularization as an exception to the nullity principle and the effects of the nullity decision. Only the new Article 250-1 of the revised Uniform Act provides that the provisions related thereto are applicable to all the cases of nullity.

Regarding the effects, it is expressly provided in paragraph 2 of Article 242 of this Uniform Act that the nullity of a company shall entail its dissolution followed by its liquidation in accordance with legal provisions.

Grounds for nullity

Nullity of the company

195. Article 242 of the OHADA revised Uniform Act relating to Commercial Companies and Economic Interest Groups provides that: "*Nullity of a company can only result from an express provision of this Uniform Act to that effect or, subject to the provisions of the following paragraph, from the laws governing the nullity of contracts.* […]".

The said Article no longer refers to the nullity of all acts, decisions or deliberations amending the Articles of Association. The provisions relating to the above are provided in a separate Article, i.e., Article 243 of the OHADA revised Uniform Act.

According to the provisions of Article 242 of the OHADA revised Uniform Act, the nullity of a company must:

- be expressly provided by a provision of the Uniform Act;

or

- result from laws governing the nullity of contracts.

196. The wording "provision expressly provided by the Uniform Act" shall mean that nullity of a company may not be assumed and/or result from the interpretation of an unclear or ambiguous provision.

Article 245 of the OHADA Uniform Act expressly provides that compliance with the formalities of publication shall be compulsory for sleeping partnerships or private companies, under penalty of nullity of the company.

197. The wording "the laws governing the nullity of contracts" shall mean:

- first, the general conditions of validity of contracts which are consent, capacity, object and cause;
- second, the special conditions which include the number of shareholders, the rules relating to contributions, etc.

Regarding this ground for nullity, a distinction must be made based on each company type, as these rules do not always entail nullity of the company.

As mentioned above, paragraph 3 of Article 242 provides that nullity of private limited companies and public limited companies may not arise from lack of consent or from incapacity of a partner, unless such incapacity affects all the founding partners.

Nullity of acts, decisions or deliberations amending the Articles of Association

198. Article 243 of the Uniform Act now provides for grounds for nullity of acts, decisions or deliberations amending the Articles of Association.

It refers to the decisions of extraordinary general meetings having the authority to amend the Articles of Association, or any other supervisory bodies empowered by the extraordinary general meeting (such as the power granted to the board of directors by the general meeting for an increase of capital).

According to this Article, nullity of acts, decisions or deliberations referred to above can only result from:

- a provision of the Uniform Act expressly providing for nullity;
- laws governing the nullity of contracts in general; or
- the violation of a clause in the Articles of Association deemed essential by the competent court.

199. The first of these grounds for nullity is identical to that referred to above in the case of nullity of companies.

The second ground seems to only refer to the general conditions of validity of contracts also referred to above, i.e., consent, capacity, object and cause, without extending to the special conditions of validity of company contracts, such as failure to meet the minimum number of shareholders in public limited companies.

The third ground for nullity is new in that it shall be assessed by the competent courts, which shall now be able to claim the violation of a clause in the Articles of Association that they deem essential, to pronounce the nullity of a corporate act amending the Articles of Association.

Nullity of acts, decisions or deliberations not amending the Articles of Association

200. This ground for nullity, although governed by the provisions of Article 244 of the Uniform Act, has been amended.

Article 244 of the Uniform Act now provides that:

"Nullity of all acts, decisions or deliberations not amending the company's Articles of Association may only arise from:

- a provision of this Uniform Act expressly providing for nullity;
- a violation of a mandatory provision of this Uniform Act;
- a violation of a mandatory provision of the laws governing contracts;
- a violation of a clause in the Articles of Association deemed essential by the competent court."

This Article refers to the acts, decisions or deliberations taken by the governing bodies (Manager, board of directors, Managing Director) and by the ordinary and extraordinary general meeting, provided the decisions taken do not require an amendment to the Articles of Association.

201. It should be pointed out that except for the first condition which relates to a provision expressly providing for nullity, the Uniform Act refers to a "**violation**" of a mandatory provision of this Act, a "**violation**" of a mandatory provision of the laws governing contracts, and a "**violation**" of a clause in the Articles of Association deemed essential by the competent court.

This violation includes infringements to any provision that the legislator expressly classifies as a matter of public policy, by prohibiting any contrary practice, or to the rights vested in shareholders.

202. In case of nullity of the company or its acts, decisions or deliberations founded on lack of consent, incapacity of a shareholder or the breach of publication regulations, under the OHADA Uniform Act, any interested person may give formal notice to the legally incapable shareholder or to the one whose consent has been vitiated or the company to regularize or take action for annulment.

The OHADA Uniform Act extends the means of any interested party to give such formal notice.

Former Articles 248 and 250 provided that the formal notification could be made through an extra-judicial act, by hand-delivered letter against a receipt or by registered letter with a request for acknowledgement of receipt.

Now, these Articles provide that the formal notification may be made by "bailiff's writ or by any means making it possible to prove its actual receipt by the recipient".

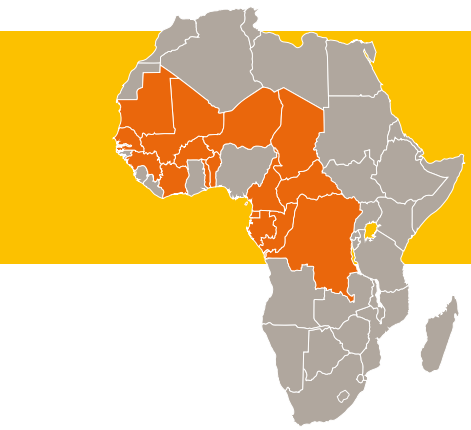
For your information, certain Articles of the OHADA revised Uniform Act expressly providing for nullity of companies or corporate acts are listed in the table set out below.

GROUNDS FOR NULLITY	
Grounds for nullity relating to the formation of a company	**Article**
Prohibition, incapacity or incompatibility of natural persons	Art. 7
Minors and legally incapacitated persons	Art. 8
Spouses indefinitely or jointly and severally liable for the company's debts	Art. 9
Unlawful object	Art. 20
Contributions of each partner	Art. 37
Types of contributions	Art. 40
Unauthorized public calls for capital	Art. 82
Grounds for nullity relating to the functioning of a company	
Deliberation or decision taken in violation of the provisions governing voting rights attached to shares	Art. 129-1
Joint decisions may be annulled for undue use of the majority powers	Art. 130
Deliberation on the distribution of undistributable reserve funds in accordance with the provisions of the law or of the Articles of Association Deliberation on the distribution of reserve funds where the equity capital is or may be following such distribution, lower than the capital plus reserves which may not be distributed	Art. 143
Grounds for nullity relating to civil liability action brought against company executives	
Decision that may extinguish a civil liability action brought against company executives for a tort committed in the performance of their duties	Art. 169
Grounds for nullity relating to the transformation of a company	
Absence of unanimous partners' decision for the transformation of a company in which the partners' liability is limited to their contributions into one in which their liability is unlimited	Art. 181
Grounds for nullity relating to mergers, scissions and partial transfers of assets	
Failure to deposit at the court registry a statement reviewing all the actions taken towards the conclusion of a merger, scission or partial transfer of assets in accordance with the OHADA Uniform Act	Art. 198

Grounds for nullity	
Grounds for nullity relating to the liquidation of a company	**Article**
Failure to comply with the quorum and majority conditions for the appointment of one or more liquidators	Art. 206
Failure to comply with the conditions for dismissing and replacing a liquidator	Art. 211
Absence of unanimous consent of the partners for the transfer of all or part of the assets of a company under liquidation to a person who has had in the company the capacity of partner in name, active partner, manager, member of the board of directors, managing director or auditor	Art. 213
Transfer of all or part of the assets of a company under liquidation to the liquidator, his employees or their spouses, ascendants or descendants	Art. 214
Failure to comply with the conditions of quorum and majority for the authorization of the transfer of all the assets of a company or the assignment of the assets	Art. 215
Grounds for nullity relating to variable capital	**Art. 269-6**
Grounds for nullity specific to partnerships	
Absence of the unanimous consent of the partners for the transfer of shares	Art. 274
Meetings of partners or provisions of the Articles of Association or setting the manager's remuneration in the absence of the majority in number and capital of the partners	Art. 278
Absence of the unanimous decision of the partners for the dismissal of managing partners	Art. 279
Failure to comply with the conditions of majority for the dismissal of a manager who is not appointed by the Articles of Association, whether or not he be a partner	Art. 280
Absence of the unanimous decision of the partners for decisions not falling within the powers of the managers	Art. 283
Collective decisions not taken at a general meeting or by written consultation	Art. 284
Failure to comply with the conditions of majority for holding the annual general meeting	Art. 288
Grounds for nullity specific to sleeping partnerships	
Failure to comply with the conditions applicable to the transfer of partnership shares	Art. 296
Decisions taken in violation of the provisions of the Articles of Association setting the procedure of consultation either by means of meetings or by writing, and the rules of quorum and majority	Art. 302

GROUNDS FOR NULLITY	
Grounds for nullity specific to sleeping partnerships	**Article**
Decisions on amendments to the Articles of Association decided without the consent of all the active partners and the majority, in number and capital, of the sleeping partners	Art. 305
Failure to comply with the conditions of majority for holding the annual general meeting	Art. 306
Grounds for nullity specific to private limited companies	
Absence of all the partners' participation in the Memorandum of Association in person or through their authorized agent with special powers	Art. 315
Decisions taken in violation of the majority rules for the appointment of the manager(s)	Art. 318
Decision that may extinguish a civil liability action brought against company executives for a tort committed in the performance of their duties	Art. 331
Collective decisions not taken at a general meeting or by written consultation	Art. 333
Decisions taken in violation of the rules of representation of the partners at general meetings	Art. 334
Decisions taken at a general meeting on an issue not included in its agenda	Art. 338-1
Decisions taken in violation of the rules related to the appropriation to the legal reserves	Art. 346
Failure to comply with the conditions of majority for holding the annual general meeting	Art. 349
Deliberations on regulated agreements in the absence of the report presented by the manager or the auditor, where there is one	Art. 353
The partner concerned taking part in the voting during the deliberations on the regulated agreement concerning him	Art. 354
Failure to comply with the conditions for amendments to the Articles of Association	Art. 358
Grounds for nullity specific to public limited companies	
Failure to comply with the provisions relating to the appointment of directors	Art. 419
Decisions taken by an irregularly constituted board of directors	Art. 428
The shareholder concerned taking part in the voting during the deliberations on the regulated agreement concerning him	Art. 440-5

Grounds for nullity	
Grounds for nullity specific to public limited companies	**Article**
Improper convening of board of directors' meetings	Art. 453
Decisions taken not in accordance with the quorum and majority conditions for board of directors' meetings	Art. 454
Appointment of a chairman and managing director who are not a natural person	Art. 462
Failure to comply with the conditions governing remuneration of the chairman and managing director	Art. 467
Deliberations on regulated agreements taken in the absence of the auditor's special report	Art. 503-4
Decisions taken at a general meeting on an issue not included in its agenda	Art. 522
Absence of certification of the attendance list by the scrutineers	Art. 534
Failure to comply with the provisions relating to increases of capital	Art. 562, Art. 563, Art. 564, Art. 565, Art. 566-2, Art. 572
Failure to comply with the provisions relating to pre-emptive rights of subscription	Art. 573, Art. 575, Art. 576, Art. 577, Art. 579, Art. 580, Art. 586, Art. 587
Failure to comply with the provisions relating to the issue price	Art. 588
Failure to comply with the provisions relating to individual renunciation of the pre-emptive right of subscription	Art. 596, Art. 597
Failure to comply with the provisions relating to increases of capital by contributions in kind and/or the grant of a special benefit	Art. 623, Art. 625
Failure to comply with the provisions relating to the allotment of free shares	Art. 626-1 Art. 626-2 Art. 626-6



GROUNDS FOR NULLITY	
Grounds for nullity specific to public limited companies	**Article**
Failure to comply with the provisions relating to reductions of capital	Art. 627, Art. 628
Failure to comply with the provisions relating to the conditions of capital redemption	Art. 652, Art. 654, Art. 655, Art. 657, Art. 658, Art. 659
Failure to comply with the provisions relating to mergers	Art. 675, Art. 677
Failure to comply with the provisions relating to scissions	Art. 685, Art. 686
Failure to comply with the provisions relating to company transformations	Art. 690 to 693
Failure to comply with the provisions relating to the transfer of shares	Art. 766
Failure to comply with the provisions relating to preference shares	Art. 778-2, Art. 778-3, Art. 778-4, Art. 778-7, Art. 778-8, Art. 778-10, Art. 778-12
Failure to comply with the provisions relating to the issue of bonds	Art. 780 to 783
Failure to comply with the provisions applicable to the conduct of bondholders' meetings	Art. 803, Art. 804
Meetings seeking to increase the responsibility of bondholders or practice unequal treatment between bondholders of the same bond issue	Art. 808
Failure to comply with the provisions relating to hybrid securities	Art. 822-1, Art. 822-5, Art. 822-7, Art. 822-8, Art. 822-13
Grounds for nullity specific to simplified public limited companies	**Article**
Absence of the unanimous decision of the shareholders in cases of the transformation or merger of a company into an SAS	Art. 853-6
Failure to comply with the provisions relating to collective decision-making procedures	Art. 853-11
The shareholder concerned taking part in the voting during the deliberations on the regulated agreement concerning him	Art. 853-14
Failure to comply with the provisions relating to the transfer of shares or transferable securities granting access to capital	Art. 853-17, Art. 853-18, Art. 853-19, Art. 853-20

New penal provisions

203. The revised Uniform Act strengthens the security of commercial transactions by criminalizing new acts and omissions. It also removed or reclassified certain offences.

However, the penal provisions retain their dual character as reference is made to the Uniform Act for offences and to the legislations of the various States for penalties.

Innovations in introducing new offences

204. It seems that the OHADA legislator is seeking to strengthen the protection of shareholders and third parties by introducing new offences to be borne by company executives and shareholders. The new offences include mainly:

- the failure to deposit the summary financial statements;
- the failure to use company identifiers;
- the failure to meet the obligation to transform a branch into a subsidiary after two (2) years;
- the failure to prepare the minutes of general meetings;
- the improper issue of shares;
- the application of legal penalties to offences committed by the Chairman of the SAS.

205. The Uniform Act only required public limited companies to deposit the summary financial statements at the registry of the court, for annexation to the Trade and Personal Property Credit Register, within one month following approval.

The reform not only extends this requirement to all commercial companies, but also imposes punitive sanctions to company executives who fail to deposit the summary financial statements within the allotted time-limit. To a large extent, this measure enables third parties interested in a company's financial position to be informed.

206. Regarding the requirement for commercial companies to show on all deeds and documents from the company (letters, bills, notices and various publications) a certain amount of information (form of the company, the amount of its registered capital, the address of its registered office and its registration number in the Trade and Personal Property Credit Register), no sanction was attached to this requirement. The revised Uniform Act filled this void by treating the violation of this requirement as a criminal offence. Now, executives who do not comply with these formalities shall incur punitive sanctions.

207. The previous Uniform Act required branches of foreign companies (or those belonging to an individual established abroad – outside the OHADA zone) to be attached to a company located in the OHADA zone, within two years of their registration, unless this obligation was expressly waived by order of the minister in charge of trade in the Contracting State. However, the Community legislator did not address the sanctions for failing to meet this obligation.

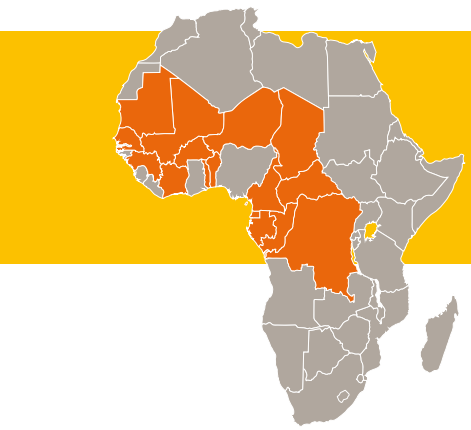
With the entry into force of the revised Uniform Act, punitive sanctions are provided against company executives who fail to comply with the obligation to transform the branch into a subsidiary upon the expiry of its legal existence or remove the branch from the register.

The punitive sanction can also be accompanied by automatic removal from the Trade and Personal Property Credit Register at the request of any interested party (Article 120).

208. The Community legislator has also provided sanctions for company executives who have knowingly not prepared the minutes of the general meetings under the conditions provided for in the Uniform Act. This is new as this sanction did not exist before the entry into force of this revised Uniform Act.

No sanction was imposed on executives for omitting to prepare the minutes. The law also requires fraudulent intent for the offence to be established.

With the introduction of this offence, company executives incur greater liability, thereby forcing them to comply with the legal requirements regarding the drafting of minutes.



209. Regarding the issue of public company shares, before the reform, the Uniform Act only punished the improper issue of public company shares on the occasion of an increase of capital, while a doubt remained as to the improper issue of partnership shares.

The revised Uniform Act innovates

by expressly providing for punitive sanctions against managers of limited liability companies who issue shares on the occasion of an increase of capital without paying up at least half of the face value of these shares during capital subscription. This requirement is in line with the new provisions which now allow the payment of at least half of the shares representing contributions in cash of private limited companies compared to the payment in full before their entry into force.

The simple act of issuing new shares is considered an offence if less than half of the face value of shares has been paid up during subscription. Such sanctions are intended to protect former shareholders and to cover any possible improper issue of shares.

210. The revised Uniform Act extended the application of punitive sanctions provided for company executives to include the Chairman of the SAS as a consequence of the introduction of this new form of company in the OHADA zone.

Innovations in revising existing offences

211. In its new version, the revised Uniform Act removed the offence relating to the issue of shares on the occasion of an increase of capital, without the new initial shares having been fully paid-up before the registration of the amendment in the Trade and Personal Property Credit Register.

212. In addition, the improper trading of shares has been reclassified as it is now attached to offences relating to the management and governance of companies. In its version of 17 April 1997, this offence was recognized during the company formation phase.

The Uniform Act referred to the following three types of improper trading of shares:

- trading of registered shares which have not remained in the registered form until they were fully paid up;
- trading of initial shares before the expiry of the time-limit during which they are not negotiable;
- trading of shares issued for cash for which payment of a quarter of the face value has not been made.

The revised Uniform Act tends to only focus on the payment of shares to be traded, as punitive sanctions shall be incurred for the trading of non-fully paid-up shares, as well as shares issued for cash for which one quarter of the face value has not been paid.

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