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The Management of a Public Limited Company in Cameroon

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Abstract

There is significant concern regarding how companies are currently managed in Cameroon. Although laws were adopted to regulate the management of companies in Cameroon, business operators in the Anglophone regions of Cameroon lack sufficient mastery of the essential rules governing corporate management, resulting in poor governance and enterprise failure. It is in this perspective that the article provides clarification of the laws governing corporate management in Cameroon and the statutory duties of those in charge of the administration of a public limited company (PLC) with the aim to clear the discrepancies between the duties of a managing director/board of directors and an insolvency practitioner. Through the doctrinal, comparative, and exploratory research designs, the article clarifies the laws governing corporate management as well as the statutory duties of a managing director and insolvency practitioner and the dividing lines between them. The overall aim of this article is to greatly improve understanding of the rules in relation to corporate management and the statutory duties of those in charge of the administration of a PLC. If the rules are understood and followed, business operators shall be able to build investors' confidence and escape insolvency. This article is valuable because it offers information not found in the English-language literature.

Keywords: Business operators, Cameroon, commercial companies, corporate management, OHADA, public limited company

INTRODUCTION

Cameroon has two official languages: English and French [1]. At the regional level, Cameroon belongs to several regional organizations, including the Economic and Monetary Community of Central Africa (CEMAC) and the Organization for the Harmonization of Business Law in Africa (OHADA). As a member of OHADA, Cameroon applies the Uniform Act on Commercial Companies and Economic Interest Groups, commonly referred to as the Companies Act [2]. The Companies Act regulates business activities, protects investors, and ensures a fair and transparent business environment; all of which are pivotal to the sustainable development of the country [3]. That being said, business operators in the Anglophone regions of Cameroon lack sufficient mastery of the essential rules governing corporate management. As a result, there is poor governance and business failure; both of which are undesirable for any business.

It is on the strength of these findings that the article provides clarification of the laws governing corporate management in Cameroon and the statutory duties of those in charge of the administration of a public limited company (PLC) with the aim to clear the discrepancies between the duties of a managing director/board of directors and an insolvency practitioner. To attain this, the article employs the doctrinal, comparative, and exploratory research designs to clarify the statutory duties of a managing director and insolvency practitioner and the dividing lines between them. The overall aim of this article

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is to greatly improve understanding of the rules in relation to corporate management and the statutory duties of those in charge of the administration of a PLC. If the rules are understood and followed, then business operators shall be able to build investors' confidence and escape business failure. Again, they shall be able to promote effective corporate governance and starve off abuses of power; thereby enhancing the credibility, reputation of companies and sustainable development of the country [4]. The value of this article lies in the fact that it offers information that is not available in existing English-language literature.

RULES GOVERNING CORPORATE MANAGEMENT IN CAMEROON

In an attempt to create a secured legal environment for business, OHADA was established to harmonize the business laws in the member states through the adoption of Uniform Acts (UAs) [5]. Apart from Cameroon, which was colonized by the Germans and then the French and British [6], the rest of OHADA's member states are French colonies where consequently, the French imparted their tradition and laws on which OHADA is largely based [7]. Although Anglophone Cameroon adopted a common law system [8], the provisions of the OHADA treaty and its UAs in the respective jurisdictions are in pari-materia with the provisions in the other contracting states. The UAs are modeled on the French civil and business laws, a fact due not to the arbitrary choice of the member states, but to that of history and the socio-cultural realities of the member states [9]. The applicability of the UAs is derived from the OHADA treaty itself, in the sense that once the treaty is ratified according to the constitutional procedures of the member states, the UAs become automatically binding on the member states [10].

It follows, therefore, that, once a UA is adopted, the member states no longer have the right to apply national laws in respect of the matter regulated by the UA [11] but to review their laws with the view to set aside national laws that do not conform to the UAs. So far, nine UAs are in force in the member states [12]; one of which is the Companies Act. The Act has produced limited case law, which makes the interpretation of some of its provisions challenging. As a result, French case law and legal doctrine are frequently relied upon when interpreting the Act. The Companies Act establishes the legal framework governing the creation, operation, transformation, and dissolution of commercial companies [13]. Because it is difficult to clearly distinguish between a company and a partnership, the French term "société commerciale" (commercial company) is used.

According to Article 4 of the Companies Act, a commercial company is defined as a contract between two or more persons who agree to contribute assets, whether in cash or in kind, to an undertaking with the aim of sharing profits or bearing any losses arising from the contract [14]. This definition is misleading because OHADA's Council of Ministers has not adequately preserved the distinction between a company and a partnership [15]. Although drawing a clear distinction between a company and a partnership does not necessarily reconcile the two concepts, such a distinction is essential to prevent confusion among readers. A defining characteristic of a company is that, upon incorporation, it acquires a separate legal personality independent of its members [16]. This implies that once incorporated, a company gains the capacity to enter into contracts, as well as to sue and be sued in its own name. Another key characteristic is that a company does not cease to exist automatically; this is known as the principle of perpetual succession, under which changes in membership do not affect the company's continued existence [17].

A partnership, by contrast, is defined in Black's Law Dictionary as "a voluntary association of two or more persons who jointly own and operate a business for profit" [18]. A partnership is assumed to exist when individuals agree to share the profits or losses of a business proportionally. It is not considered a separate legal entity, as it does not acquire legal personality upon formation. Since the partners and the partnership are legally indistinguishable, the partnership's debts, which are joint and several by law, are the personal responsibility of the partners. Accordingly, a company is distinct from a partnership, and the definition of a company under Article 4 of the Companies Act cannot be interpreted to include a partnership. However, if the Council had intended for the term "company" to serve as a synonym for "partnership," this would have been explicitly stated in the Companies Act [19].

Therefore, any commercial company with its registered office in an OHADA member state is governed by the provisions of the Companies Act. The corporate framework provides a variety of business structures for conducting commercial activities, including private unlimited companies, sleeping partnerships, private limited companies, public limited companies, joint ventures, de facto partnership companies, and economic interest groups [20]. The main advantage of this system is that anyone, regardless of nationality or capital, who wishes to engage in commercial activity as a company in any of the contracting states, can do so by selecting from the company types outlined in the Companies Act. Notably, it also allows for the establishment of a single-person business, which is a particularly significant option [21].

Each of the companies come with its unique characteristics that influenced how they are managed. The new regulatory framework does not provide for the two-tier system of governance but adopts the two-tier board option [22], with management either in the hands of the board of directors (conseil d'administration) presided over by a chairperson or a sole managing director (administrateur général) acting as Chief Executive officer (CEO) [23]. On the strength of this, it can be understood that directors are the persons (natural or legal, as the case may be) designated in the Companies Act with powers to manage, control, administer, and direct the company, to act in the name and on behalf of the company [24]. Art. 4 is reinforced by Art. 121 of the Companies Act, which grants to the management body, officers, and board full powers to bind the company in its relations with third parties. The powers are wide and not subject to any limitation. Nevertheless, a company is not bound by the acts of its managers if the acts are not within the purpose of the company [25].

The corporate framework outlines the duties and responsibilities of directors. Compliance with these duties helps companies strengthen their credibility, reputation, and contribute to the country's long-term sustainable development. However, since the courts have not yet addressed any cases of duty breaches, it remains unclear how rigorously the law would be enforced. Knowledge of the rules and Judicial interpretation of the statutory duties of corporate managers will be very helpful in avoiding poor governance and business failure. considering the foregoing, it is apt or correct to say that the Companies Act regulates the appointment, mission, powers, and duties of those in charge of the administration of commercial companies in Cameroon. Then the real questions are: What is a PLC? What are the statutory duties of those in charge of the administration of a PLC? What happens when a PLC goes burst?

A PUBLIC LIMITED COMPANY (PLC) EXPLAINED

A public limited company (PLC) is a large corporation in which shareholders' liability is limited to the amount they have invested, and their ownership is represented by shares [26]. It may be formed by a person or group of persons with a minimum registered capital of 10million francs CFA when there is no public call for capital or 100million francs CFA when there is a public call for capital. Like other companies, the administration of a PLC depends on its financial position, that is, whether it is solvent or insolvent. When a PLC is solvent, the Companies Act makes provisions for two alternative methods of management, one of which must be chosen in the Articles of Associations [27]. There could be a sole managing director (adminstrateur general) acting as a chief executive officer (CEO) or a board of directors (conseil d'adminstration) presided by a chairman [28].

Regardless of whether authority rests with the board or a managing director, the roles of chairperson and CEO are not separated [29]. These provisions provide flexibility in the corporate structure and help attract foreign investment. In normal circumstances, the managing director or board of directors is responsible for safeguarding the company's interests. However, if the company becomes insolvent, an insolvency practitioner takes over management to protect both the company's and its creditors' interests [30]. Art. 33 of the OHADA Uniform Act Organizing Collective Proceedings for Wiping off Debts (Insolvency Act) [31], is in line with the objectives of the Insolvency Act as stipulated in Art. 1 of the Act. It is clear from Art.1 that the law makers intention is first and foremost the survival of the business in order that the economic activities and jobs are preserved for the wider interest of the community (pro-debtor approach). Secondly, it is to maximize greater returns for the creditors through sale of assets on a going concern basis (pro-creditor approach) [32].

Statutory Duties of a Managing Director or Board of Directors in Cameroon

When shareholders invest their money or assets to create a PLC, they appoint a director or board of directors, as the case may be to control and manage their investments [33]. Through this arrangement, the director or board acts as agent (s) or trustee (s) for the corporation and its shareholders guided by their fiduciary duties. The management body holds broad authority to commit the company in its transactions with third parties, unless it can be shown that the third party knew the act was beyond its authority [34]. In the capacity of an agent or trustee, their main responsibility is to act in the best interests of the company and its shareholders [35]. Reason being that OHADA adopted the French system of "intêret corporel" as its standard of corporate management which in various sections of the Companies Act is identified as criteria for the definition of abuse of the majority [36] and minority shareholders [37]. This notion is defined by some as "corporate interest", and by others as "social interest".

As a concept, corporate interest closely resembles the shareholder primacy doctrine in the United States, under which management is required to act in the best interests of the company and its shareholders [38]. This shows that, under the first approach, management is accountable solely to the corporation's members. In contrast, the second approach (social interest) requires management to consider both the interests of the corporation and the broader public good.

The drafters of OHADA explicitly stated that a corporation must be managed for the benefit of its members and the company – primarily the shareholders, and secondarily the employees and creditors (referred to as "corporate interest"). The notion of corporate interest represents OHADA's initial effort to balance the interests of potential foreign investors with those of the region [39]. At a minimum, the interests of the owners and third parties dealing with the corporation are safeguarded, reflecting the principle of shareholder primacy. This perspective considers the interests of the owners, the corporation itself, and its contractual partners. According to minority views, corporate interest is limited to the individual and collective interests of the owners. At its broadest, however, the concept encompasses all stakeholders, including the state, owners, the wider community, suppliers, employees, and clients, aligning with the stakeholder approach.

The adoption of the stakeholder concept would demonstrate whether OHADA is adaptable and safeguards property rights. However, there is currently insufficient evidence to determine if OHADA's notion of corporate interest actually includes these broader interests. Some scholars have strongly questioned the principle's relevance. For instance, Assi-Asso of the Higher International Law School regards it as "irrelevant to the business realities in the region." The author, in contrast, supports the principle, arguing that it promotes productivity. Pougoue also fully supports it, suggesting that it prevents abuse, though without specifying the nature of such abuse [40]. Dickerson refers to the misuse of authority by managers in their corporate dealings [41]. The principle also aims to highlight the importance of good governance for corporate managers, which is crucial for maintaining the integrity and efficiency of financial markets. Additionally, it safeguards shareholders by ensuring the protection of their long-term interests.

In protecting the interests of the company, the directors must exercise due care, skills, and diligence in the discharge of their duties. This demands that they follow precise formalities relating to the birth (incorporation), functioning and dissolution of the company (liquidation) [42]. In the formation of the company, both general and specific conditions [43] must be fulfilled while in the dissolution of the company, directors must register at the trade and personal property credit register (TPPCR) the dissolution decision and appoint a liquidator to realize and distribute proceeds realized from the sale of assets to shareholders [44]. This responsibility is shifted to the auditor when it comes to the finances of the company. Although not a director, the auditor is accountable for the company's financial well-being and can be held civilly liable to both the company and third parties for any harm, errors, or negligence arising from the performance of their duties [45]. OHADA assigns the auditor the role of a "watchdog," responsible for continuously monitoring the company's financial health. By so doing, he may ask questions on any matter likely to jeopardize the smooth functioning of the company and to report any discrepancies in the management [46].

As well, directors are required to use corporate assets or credit in good faith and for the interest of the shareholders [47]. Article 891 requires that corporate assets be used for the benefits of the shareholders and for a purpose other than the one provided in the law. Compliance with Art. 891 has proven difficulty by family-owned companies where the assets of the company is considered to be that of the members of the corporation. Dickerson recounted a case in which a father owned a company and entrusted its management to his son. Acting as manager, the son negotiated and finalized a merger without obtaining the father's consent or approval. This reveals a breach of the duty of loyalty, but no litigation over ensured; rather the son received the encouragement of his father and the community for his actions [48].

Art. 891 is violated by directors when they divert corporate assets, opportunities, information or when they engage in transactions in which they have personal interest. When these happen, they are subject to criminal liability, as was with the case of Edward Etonde Ekoto v Douala Seaport wherein Edward was sued for corporate waste and embezzlement [49]. To avoid violation of this duty, the company director should seek the approval of the board in transactions carried out outside the ordinary course of business [50] or "disclose his position and his personal interest in transactions agreement, by stating his holdings, his role and his personal relations with other parties to the transactions and the extent to which he could personally benefit from it" [51].

The duty of disclosure is at the heart of OHADA and demands that directors report back to the shareholders by disclosing all information pertaining to the birth, life, and death of the company. This duty ensures that shareholders have access to accurate and timely information on financial performance, operation, and decision-making process of the company; thereby promoting transparency and accountability in the business and have confidence in the business world [52]. Also, it objectively helps shareholders to determine whether the company is properly managed in line with the objectives set and to evaluate the performance to make informed decisions. This obligation is made practical by the commercial registry [53].

At birth, that is incorporation of a corporation, directors must disclose to the commercial registry completely or honestly, all information about the company to be formed such as the mission, the name, value of assets raised, line of business, form, duration, and full names of shareholders of the corporation [54]. Upon receipt of the information and the supporting documents, the corporation is issued a receipt stating the date of incorporation [55]. During the life of a company, directors must disclose all major events in the life of the company such as change of the name, address or performances, and information regarding the death, dissolution or liquidation of the company [56]. Failing this, they shall be subject to criminal penalty for any false or misleading information provided to shareholders or the public [57]. The criminal penalties are defined by each member state of OHADA. To date, only Cameroon and Senegal have implemented sanctions for breaches of fiduciary duties as outlined by OHADA.

The life of a company is rarely without challenges. A PLC may encounter difficulties that, if left unresolved, could lead to insolvency – a situation governed by the Insolvency Act. The Insolvency Act is the basis for the settlement of national and cross-border insolvency within and outside the OHADA region. In insolvency, an insolvency practitioner is appointed to manage the insolvent estate of the bankrupt as discussed below.

Statutory Duties of an Insolvency Practitioner (IP) in Cameroon

This section begs an answer to the question: what happens when a PLC goes burst or insolvent? Broadly speaking, "insolvency" means inability to pay creditors [58] which could be due to lack of financial resources (Cash-flow insolvency) or insufficiency of assets (Balance-sheet insolvency). OHADA adopted the balance-sheet approach as its test for corporate insolvency. Balance-sheet insolvency is when a debtor is unable to pay its debts because the value of its assets is less than that of its liabilities (balance sheet approach) [59]. As soon as a PLC goes burst, an IP is appointed to protect the interests of the creditors involved in the bankruptcy process. An IP is, "expert in preventive settlement cases and trustee in reorganization or assert liquidation proceedings" [60]. Alternatively, an IP is an individual authorized to act with respect to an insolvent estate.

Art. 4 (1) of the OIA establishes the conditions for authorization and appointment [61]. As per Art. 4 (1), a person wanting to become an IP must register on the national list of IPs of each state. The author argues that the inconsistencies in the registration and exercise of powers hinder OHADA's unity, urging legislators to eliminate the legal fragmentation of rules and establish uniform standards for the registration and appointment of practitioners. To register, a candidate must be a natural person of legal age, meaning minors or corporate entities cannot act as insolvency practitioners. Additionally, the candidate must have full civil rights, have never faced disciplinary sanctions or imprisonment, possess accounting expertise, provide proof of residence in the state where registration is sought, and present adequate guarantees to the competent court [62].

The idea of a sufficient guarantee is welcomed, but the law has not specified the type of guarantee to be furnished or the qualification, knowledge or experience to act as such. This has resulted in the poor understanding and interpretation of the law by IPs. In the Cameroonian case of SOH Cameroon S.A v. UDEC S.A [63], the judge declared bankruptcy without precision of the type of bankruptcy procedure. In the author's view, the poor quality of IPs is behind the lengthy insolvency proceedings in the country [64]. This situation creates uncertainty for all parties and diminishes the estate's assets, thereby lowering the likelihood that creditors will recover their outstanding debts [65]. Given the complexity of bankruptcy proceedings, it is preferable for an insolvency practitioner to be a properly qualified individual with expertise and experience in law and related areas, including finance, business law, and accounting [66].

The protection of creditors is not only imposed by the requirement to respect original contract bargains but more so by the increasing relevance of this protection in achieving greater bankruptcy proceedings objectives [67]. The protection of creditors enhances confidence among credit providers and increases access to credit, which in turn promotes entrepreneurship, preserve jobs, and create new employment opportunities. To achieve this, the IP is allowed to avoid, reverse, or set aside impeachable or voidable transactions [68]. Voidable transactions are deals done by the insolvent during the so-called suspect period [69], and which is to the detriment to the general body of creditors. The effects of such transactions are that they put some creditors in a disadvantaged position, reduces the value of the assets of the insolvent estate, and disturbs the principle of equitable treatment of creditors [70].

Though not common in Cameroon and in the OHADA region, it is something to be aware of. There are several types of avoidance actions recognized by the OIA and the most common are preferences and fraudulent transactions. Fraudulent transactions include gratuitous transfers of deeds of personal and real property, entering into contracts in terms of which the obligations of the debtor far exceed those of the other party, contracting without receiving any security in exchange, and payment of debts not due; while preferences include payment of certain creditors Voidable transactions are considered as illegal and unenforceable against the general body of creditors [71]. In this regard, the OIA makes voidable transactions an offence when an insolvent engages in voidable transactions. When it happens, section 234 of the OIA gives both the public prosecutor and IP the power to prosecute the insolvent debtor by instituting criminal action against the debtor.

On top of that, they are to protect the interests of all creditors involved in the bankruptcy process by disclosing to the competent court anything that may jeopardize their independence, neutrality, and impartiality [72], perform their duties with honor, conscience, honesty, and probity and conform to applicable law in the discharge of their duties; failing which they shall be subject to disciplinary proceedings [73]. The OIA allows for a moratorium against the debtor's assets. This implies a stay of enforcement actions by creditors against the insolvent. In short, creditors are prohibited from enforcing their individual claims against the insolvent, thereby forcing them to look up to bankruptcy proceedings for recovery of their claims [74]. The suspensive order equally freezes the accruing of legal and contractual interests and ends ongoing registration of all personal and real securities [75]. Though Arts. 72 and 77 of the IA infringe on the enforcement rights of creditors, it is meant to maximize returns to creditors, protect weak creditors from aggressive creditors and ensures equitable treatment of creditors. Art. 72 does not apply to creditors who are due wages or salaries because of their contributions in the company.

Conclusively, when a company is in bad condition, it is managed by an IP; a position regulated by the Insolvency Act who in terms of the Act have as a primary duty the protection of the interests of creditors through rescue or liquidation of the assets of the company and setting aside of voidable dispositions for the benefits of all creditors involved in the bankruptcy process.

STATUTORY DUTIES OF A COMPANY DIRECTOR AND AN INSOLVENCY PRACTICITIONER: COMPARATIVE ANALYSIS

From the above analyses, it is evident that there are essential rules governing corporate management in Cameroon: Companies and Insolvency Acts; both of which are directly applicable in the internal legal order of Cameroon and the rest of the contracting states of OHADA [76]. Despite the existence of the rules, the business operators lack sufficient mastery of the rules governing corporate management which according to the author has resulted in poor governance and business failure [77]; both of which are undesirable for any business. It is also evident that the management of a PLC depends on the financial position of the company. Practically, when a PLC is in good condition, a managing director or board of directors is appointed; a position regulated by the Companies Act. On the other hand, when a PLC goes burst, an IP is appointed; a position regulated by the Insolvency Act.

In the exercise of their powers, the managing director/board of directors acts in the best interest of the company by maximizing as much profits as possible for the benefits of the shareholders [78]. This demands that the directors focus not on personal dealings but transactions that are beneficial to the shareholders. On its part, an IP is not to stop business failure but to protect the interests of creditors involved in the bankruptcy process by setting aside voidable transactions which are considered detrimental to the general body of creditors [79]. Again, an IP's appointment is based on the fulfillment of certain conditions which is not the case with a company director as there is no basis for appointment. More so, an IP's payment is fixed based on certain criteria [80] while there is no basis for compensation of managing directors.

CONCLUSION

In as much as there are laws regulating corporate management in Cameroon, business operators in the Anglophone regions lack sufficient mastery of the laws. As a result, there is poor governance and business failure; both of which are undesirable for any business. On the strength of these challenges, it is essential for business operators to understand the rules governing corporate management. If the rules are understood and enforced, then the business operators shall be able to effectively manage companies, build investors' confidence and escape business failure. To achieve this, the article provides understanding of the rules regulating corporate governance and the statutory duties of those in charge of the administration of a PLC with the aim of clarifying the differences between a company manager and an IP. To this end, the article highlighted some differences between the two; some of which are that the position of a company manager is regulated by the companies act while that of an IP is regulated by the insolvency act. Again, the appointment and remuneration of an IP is based on certain conditions which is not the case with a company director as there is no basis for payment and appoint.

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61. Ibid., Art. 4 (1) provides "No one shall be appointed expert in preventive settlement cases or trustee in reorganization or asset liquidation proceedings unless he is registered on the national list of judicial administrators".
62. Ibid., Art. 4 (2).
63. Mfoundi high court, judgment No.158 of 23rd January 2002.
64. See World Bank. Cameroon – resolving insolvency: Recovery rate (cents on the dollar). 2021. Available at: https://tradingeconomics.com; accessed 9 October 2021.
65. Leno ND. The resolution of insolvency in Cameroon: problems and proposals for reform in Kashyap A, ed. Corporate insolvency law and bankruptcy reforms in the global economy. USA; 2018:183.
66. UNCITRAL legislative guide 2004 (the "practice guide") paras 39 at 175–180 (hereinafter referred to as the legislative guide) and the UNCITRAL model law on cross-border insolvency 1997 (hereinafter referred to as the model law).
67. Kwati E. The treatment of the creditor in insolvency proceedings under OHADA. Juris Pérodique. 2014;99:92p.
68. Idem., Art. 70.

69. The suspect period is the period prior to the opening of bankruptcy proceedings. It starts from the date of insolvency and subsists until the closing of bankruptcy proceedings; Art. 67.
70. Jasnica A. Applicable law for avoidance actions in cross-border insolvency. Virtual colloquium on applicable law in insolvency proceedings; 11 December 2020.
71. Court of appeal of Abidjan judgment No.452 of 27 April 2007: Axa-Iard v Alain Guillemain Jean-Luc Henri Ruelle.
72. Ibid, Art. 4 (4).
73. Art. 4 (7) OIA.
74. Ibid., Arts. 72 to 77.
75. Ibid., Arts. 72, 73 and 77.
76. Art. 10 of the OHADA treaty, 2008.
77. See para 1 above.
78. See paras 3.1 above.
79. See paras 3.2 above.
80. Art. 20 insolvency act.