

PROTECTIVE MEASURES IN OHADA CORPORATE LAW

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"The biggest risk is not taking any risk...In a world changing really quickly, the only strategy that is guaranteed to fail is not taking risks" **Mark Zuckerberg**

→ The idea of doing business itself is risky.

- **Operational risk:** What if an event interrupts the company's core operations?
- **Financial risk:** What if I lose my money?

How can I protect the time, money and energy devoted ?

The OHADA Corporate Law reform adopted on January 30, 2014 has strengthened the protection of:

- **founders**, who take on the risk of creating something from nothing and
- **the corporate entity** resulting therefrom.



I- PROTECTION OF FOUNDERS

1) SHAREHOLDERS IN GENERAL

- **The validity of shareholders' agreement**

In addition to the Articles of Association, Shareholders can now freely enter into a shareholders' agreement in order to freely organize the management of the company.

Article 2-1 Uniform Act on Commercial Companies (UACC)

- **The introduction of a more flexible type of company: The Simplified Joint Stock Company (known under the French acronym "SAS")**

- ✓ Shareholders are now able to invest in a corporate structure similar to that which exists in other mature markets ;
- ✓ No minimum share capital is required. No minimum value for shares;
- ✓ The mode of governance is flexible and can be tailored to the shareholders' needs: the creation of *preferred shares* grant specific shares to shareholders with increased financial or voting rights. **Article 853-1 UACC et seq.**

2) FOREIGNERS

• **The right to select the size of the entity to set up**

Foreign companies are now free to choose between three (03) options:

- ✓ **A Representation or Liaison office:** which is fully owned by the foreign company and is simply set up to secure a *slight presence* in the OHADA zone. It has no autonomy of management.
 - ✓ **A Branch:** to secure a dynamic commercial approach
 - ✓ **A Subsidiary:** which has full autonomy of management
- ### • **The right to have recourse to new technologies for effective attendance and vote in meetings**

Few years ago, shareholders residing outside the relevant OHADA Member State had to personally attend meetings or vote by proxy for attendance to be considered. Now, Where the Articles of Association so provide, shall be deemed present for the purpose of calculating quorum and majority:

- ✓ Shareholders voting by e-mail
- ✓ Shareholders attending the meeting remotely, by videoconference or other means of telecommunication allowing their identification. Articles 133-1 and 133-2 UACC

3) SPOUSES AND MINORS

- **The OHADA Legislator values the status of spouses in corporate venture**
 - ✓ The right of spouses to be shareholders in the same corporate entity is protected under OHADA Law.
 - ✓ To protect family estate, the Law has expressly prohibited the incorporation of company with both spouses being jointly and severally liable for the company debts (unlimited liability to debts). **Article 9 UACC**
- **The right of a minor emancipated or not to set up a company is safeguarded under OHADA**
 - ✓ The minor can only incorporate a company in which he/she is not liable for the company's debts beyond his contribution to the share capital. **Article 8 UACC**

II- PROTECTION OF THE CORPORATE ENTITY

1) PROTECTION AGAINST THE MANAGEMENT BODY

- **The possibility to appoint temporary management when the normal operation of the company becomes impossible**

Whenever the company faces crisis in its management due to the dangerous acts of members of the management body, any shareholder, without any minimum share requirement, can file an action in court for **the appointment of an *Interim Director/Administrator***. Article 160 -1 et seq. UACC

- **The possibility to sanction minority or equal shareholders who fail to act in the company's best interest while voting**

Whenever, a shareholder can establish that minority or equal shareholders, under no demonstrated legitimate ground, have frustrated the process of decision-making, he/she can file an action in court for **the appointment of an *Ad hoc Agent*** to vote for them. Article 131 UACC

2) PROTECTION AGAINST RISKS CREATED BY THIRD PARTIES

Delay in payment, unpaid invoices or “*bad deals*” are likely to lead to financial crisis in the company.

In order to avoid winding up, the 2015 Revised OHADA Insolvency Law offers two preventive proceedings:

- **Preventive Settlement:** is available to the company/debtor that can prove serious financial difficulties though not in cessation of payment. The company shall seize the court through an application. **Article 6 of the Revised OHADA Insolvency Law**
- **Judicial administration:** is available to the company/debtor in cessation of payment but that can justify that a scheme of composition has been or is being elaborated with the creditors.

The above protective measures undoubtedly demonstrate how modern and business-oriented OHADA law has become.

The question you may need to answer at this stage is:

How protected do you feel?

