

Fiduciary Duties of Corporate Directors: a Comparative Study of the U.S. Corporate Law and the Organization for Harmonization of Business Law in Africa (OHADA)

By

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Abstract

From Africa to the United States of America (“US”), the people who invest money and other capital to create business ventures need protection against the people they entrust to manage and fructify their investments. The first category, known as shareholders for corporations, owns the business. The second category, known as management, has the expertise, and makes the day-to-day business decisions. As more US investors contemplate doing business in the continent of Africa, the legal protections they would be afforded there should be analyzed, and compared to the US corporate law with which they are, arguably, more familiar.

In the US, the once beloved assumption that shareholders’ interests were ultimately aligned with management interests led to rather weak mechanisms designed to control management’s actions. High compensation of management combined with high profitability of companies were a testament, for proponents of that theory, that management and shareholders’ interests could only be aligned. However, repeated corporate management scandals including the Enron affair demonstrated that the ‘interest alignment’ principle is not sacred. Since then, US corporate law has refocused tremendously on protecting shareholders.

In Africa, the multiplicity of laws, and, most importantly, their dissimilarities, made it very difficult to understand the legal environment as a whole and promote investments. To address this challenge, several African leaders, in the early 1990s, initiated an effort to coordinate business law across the continent in order to achieve simplicity, predictability, and economic growth. This initiative, now known as the Organization for Harmonization of Business Law in Africa (“OHADA”), covers areas as diverse as corporate law, securities, bankruptcy, commercial law, and arbitration. OHADA is a multilateral treaty for business with an unprecedented pace of expansion across the continent.

Both in the US and Africa, however, the main question remains how to protect investors, the people who risk money and property to create business ventures but do not necessarily possess the expertise or the time to oversee the day-to-day operations. The underlying issue is how to keep directors, or management in general, under control without harming the ability of the corporation to grow, expand, and give maximum returns.

Both the US and OHADA corporate law systems rely heavily on the legal concept of fiduciary duties to achieve investor protection. However, neither the construct, nor the understanding, of fiduciary duties and the obligations thereunder are the same under US and OHADA laws. Despite the fact that both systems enunciate traditional duties such as loyalty and care, US and OHADA have fundamental differences, and their design of mechanisms to hold management accountable as fiduciaries are profoundly unlike.

This paper will discuss similarities and specificities of the concept of fiduciary duties under the US and OHADA laws. The discussion of the concept of fiduciary duties in African law (OHADA), alongside the more familiar construct of the concept under US law, will provide an easily understandable description of the legal framework. Additionally, this paper will equip all interested parties in general, and investors specifically, with an added consideration in their investments decision-making process.