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

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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.[1] 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.[2] However, repeated corporate management scandals including, recently, the Enron affair demonstrated that the 'interest alignment' principle is not sacred.[3] Since then, US corporate law has refocused tremendously on protecting shareholders.[4]

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 laws across the continent to achieve simplicity, predictability, and economic growth.[5]

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[1] Claire Dickerson, *Corporate Social Responsibility and the Failure of Transparency*, 35 Conn. Law. Rev. 1035 (2003).
[2] See Kelli Alces, *Debunking The Corporate Fiduciary Myth*, 35 J. Corp. L. 239 (2009).
[3] *See In re Enron Corp. Sec. Deriv. & Erisa Litig.*, 2002 WL 32154270 (S.D. Tex., 2002).
[4] William Bratton, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: Enron and the Dark Side of Shareholder Value*, 76 Tul. L. Rev. 1275 (2002).
[5] Jean Gatsi, *L'effectivite du Droit de l'OHADA*, Cameroon P.U.A. (2006).

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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. [6] 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 unalike.

This paper will discuss similarities and specificities of the concept of fiduciary duties under the US and OHADA laws. The discussion of fiduciary duties under 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.

I. Similar Duties Under US and OHADA Laws

Fiduciary duties are necessary because of the trust needed between shareholders, management, and directors of a corporation. Shareholders invest and create the corporation, and then they trust directors to take care of the business and manage it for the shareholders' best interest. This relationship resembles that of the Principle and Agent. As a matter of fact, several scholars have argued that shareholders and the corporations are principals, and directors are their agents.[7] As a

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[6] *JOSEPH ISSA-SAYEGH, PAUL-GÉRARD POUGOUÉ, FILIGA MICHEL SAWADOGO, OHADA,TRAITE ET ACTES UNIFORMS COMMENTES ET ANNOTES,* (3 Ed. 2008)(Cameroon).

[7] See Moldoveanu and Roger Martin, Agency Theory and the Efficient Design of Governance Mechanisms (Feb., 2001). *See also* Joseph, Stiglitz, *Principal And Agent* , Princeton (1988).

consequence, duties of an ordinary agency relationship extend to the shareholder/directors relationship. Though sometimes differently enunciated and emphasized, the main duties of loyalty and care are encountered both under the US law and OHADA.

A. The Duty of Care

Managers of corporations are chosen because of their expertise. Directors enjoy a general presumption of "know how" in the exercise of their duties. Both under OHADA and US law, directors are required to exercise due care in carrying out their business. Nevertheless, the construction and understanding of due care are unique to each of these business environment.

1. Duty of care under US law: an obligation to be informed and follow the process

The duty of care is best understood when examined under the agency relationship. The Restatement (Third) of the Law of Agency indicates that an agent is required to act with care, competence and diligence in carrying out his duties.[8] Echoing that idea, the Model Business Corporation Act requires directors to act with due care, which is considered to be at least the care that would be expected from a reasonable person in a similar position.[9] These statutory constructions are vague, and the standard of conduct for corporate directors has been shaped by courts.[10] The duty of care specifically has been strictly construed to a point where it is very difficult to prevail in court nowadays under that claim alone.

In the leading case which remains the only successful one on the ground that directors breached their duty of care, the court held that directors are required to be well informed and follow process to satisfy due care. *Smith v Van Gorkom,* decided by the Supreme Court of Delaware, involved a proposed leverage buyout of a corporation. The defendant Van Gorkom, chairman and Chief Executive Officer of the corporation, chose a price of $55 per share for the buyout without consulting an outside expert, and without offering any explanation of how he arrived at that price. After a brief presentation and a two hour meeting with the Board, Van Gorkom convinced the Board to approve the buyout.

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[8] *See* Restatement (Third) of Agency §8.08 (2006).
[9] *See* Model Bus. Corp. Act § 8.30 (3d ed. 1999).
[10] *See Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985). *See also Cede & Co. v. Technicolor, Inc.,* 634 A.2d 345 (Del. 1993); *Omnicare, Inc. v. NCS Healthcare, Inc.,* 818 A.2d 914 (Del. 2003).

A class action was brought by shareholders of the corporation, originally seeking rescission of the cash-out merger of the corporation into a new corporation. Alternate relief in the form of damages was sought against members of board of directors. The Court found that the directors were grossly negligent, because they quickly approved the merger without substantial inquiry or any expert advice. For this reason, the court held that the board of directors breached the duty of care owed to the corporation's shareholders.[11] In its enquiry, the Delaware Supreme Court did not focus on whether the board made a good or a bad decision. Rather, the court was highly critical of the fact that the board did not allow enough time to gather information, did not seek outside expert advice, and acted carelessly in arriving at its decision. Justice Horsey, who wrote the opinion of the court, stressed the fact that directors need not be specialists in all matters they encounter in the exercise of their duties, but they are required to seek information on the matters, and have the obligation to educate themselves before making any decisions. Therefore, the lack of information in coming to such a significant decision in an unusual short period of time led the court to decide that the directors acted in a grossly negligent manner, and breached their duty of care.

This decision generated a flow of criticism in the corporate world. Daniel Fischel eventually called it one of the "worst decisions in the history of corporate law".[12] Reactions to this ruling quickly translated into the solidification of the business judgment rule, and the institution of exculpation clauses and other liability insurance for directors of corporations.[13] On the one hand, liability insurance protects directors against any and all cost they may incur in defending themselves against potential fiduciary duty breach claims by providing a reimbursement. On the other hand, exculpatory clauses disclaim eventual liability of directors at the outset of the performance of their duties.

Since the *Van Gorkom* case, courts have become increasingly protective of directors by applying the business judgment rule more often.[14] This principle gives rise to a presumption that directors' actions are taken in the best interest of the corporation; as a consequence, courts should not second guess their decisions. The weight given to this rule makes it very difficult today to prevail

[11] Smith, 488 A 2d. 858, 893.
[12] Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. Law. 1437, 1455 (1985).
[13] Clein and Coffee, Business Organization and Finance Legal and Economic Principles (9th Ed. 2004).
[14] *See Churella v. Pioneer State Mut. Ins. Co.*, 671 N.W.2d 125 (Mich. Ct. App. 2003).

on a duty of care claim. Directors can no longer be liable for making decisions that end up being bad judgment calls for the corporation. This rule further makes it difficult to sue directors because the burden of proof is shifted, and plaintiffs (usually shareholders) have to prove that due care was not exercise. The business judgment rule is very difficult to overcome, and as a result, courts will almost never interfere with business decisions.

In another case brought to the Illinois Supreme Court, the court strictly applied the business judgment rule, and declined to interfere with a resolution of the Board of directors challenged by a shareholder. In that *Shlensky v. Wrigley* case,[15] Mr. Shlensky, a shareholder of a corporation in charge of managing the assets of a baseball team, brought an action challenging the decision of the Board of Directors not to install night lights at the baseball field, and not to schedule night games. Mr. Shlensky argued that the decision of the Board was based on the need to please neighbors, and not on the directors' duties to maximize shareholders' benefits.[16] The Court held that the role of the corporation, and the duty of directors, is indeed to maximize shareholders benefits. However, the attitude of the board in reaching that objective is protected by the business judgment rule. The court therefore reasoned that Mr. Shlensky had no conflict of interest, there is no fraud committed, and there was no evidence that lights could dramatically increase the revenues of the business. Consequently, the decision of the Board was a business judgment call which Judges are not allowed to second guess. The court further highlighted the fact that directors are chosen for their expertise, and are not bound to make similar decisions as their colleagues in similar corporations.

More recently, in the *McCall* case,[17] the United States Court of Appeals for the Sixth Circuit held that a conscious disregard of known risks by directors is a breach of their duty of due care, and a manifestation of bad faith. In that case, shareholders brought a derivative action against current and former directors and officers of the corporation for failure to pay appropriate attention to potentially illegal activities of the corporation. The court noted that corporate directors are not liable for mere inattention, but any intentional ignorance or willful blindness to obvious "red flags" constituted a breach of due care and a lack of good faith.

[15] *See Shlensky v. Wragley*, 237 N.E.2d 776 (Ill. Ct. App. 1968).
[16] *Id*. at 778.
[17] *McCall v. Scott*, 250 F. 3d 997 (6th. Cir. 2001).

Further, out of a desire to protect directors, the law has provided exculpatory clauses and liability insurance as mechanisms to indemnify directors. The Delaware General Corporation Law § 102 (b)7 limits, and, eventually, eliminates personal liability of directors in several circumstances. Personal liability is eliminated mainly when directors rely on outside experts, or when directors' acts are ratified by the whole board, or by the shareholders.[18] Many corporations now offer liability insurance to their directors. Under these circumstances, directors are covered for expenses they may personally incur in a suit related to their actions in managing the corporation. These situations imply the relative death of the duty of care. Proponents of establishing insurance for corporate directors argue however that it will unleash directors' creativity and their willingness to take risks that may allow growth of the corporation. Supporting this view, William Klein wrote: "[M]anagers are hired for their expertise… they must be allowed to exercise discretion, to have freedom of action".[19] The issue is to be raised in a different way under the Organization for Harmonization of Business Law in Africa.

2. The duty of care under OHADA: the "bonus pater familia" role

Under OHADA, managers of a corporation are considered "good fathers"[20] and are given a high level of trust in the management of the corporation. The high level of trust given to directors under OHADA is justified by the fact that they are presumed to manage the entity for the benefit of a larger group. The duty of care, as established under OHADA, requires directors to follow precise formalities, requires an independent and responsible auditor within each public corporation, and contains no explicit enunciation of the business judgment rule.[21]

The duty of care required under OHADA is very stressed upon at the incorporation and during a potential death of the corporation. During these phases, directors have to be very careful with the process, and they are liable for any irregularities in their actions. After incorporation, directors are expected to act like "homo juridicus,"[22] which means that their actions and decisions have to be those of an average informed reasonable person in a like circumstance. Though the Statute

[18] Del. CODE ANN., Gen. Corp. Law, § 141.
[19] *William Klein and John C. Coffee*, *supra n*ote 28.
[20] The term *Bonus pater familia* is an extension of the general notion of *Homo Juridicus*, a prototype of a human being, reasonable and taking care of the common good in good faith and for the benefit of all.
[21] World Bank, *Report on the Observance of Standards and Codes (ROSC), Corporate Governance, Country Assessment*, (Senegal, 2006).
[22] *Homo Juridicus* reflects the average reasonable person in a like position.

specifies that directors should allocate all of their expertise to the management of the corporation, the standard of review of due care of directors remains that of a "homo juridicus": an average informed and reasonable person. In the event of liquidation, similar to US law, directors are required to exercise due care, to assure the regularity of the process, and to aptly represent all stakeholders in the liquidating corporation.

Similar to US law, OHADA emphasizes on the process followed by directors. The question is usually whether the directors acted in a way in which an ordinary reasonable person in a like position would act. The care under US law is judged according to general business standards, while care under OHADA is assessed on the basis that the directors are dealing with the common good. Therefore, in regard to government procedures, the duty of care is strictly enforced. However, in regard to the directors/shareholders relation, the minimum care is satisfactory due to the relative lack of distance between directors and shareholders, and the high level of trust given to each other.

Under OHADA, the duty of care is shifted and imposed on the auditor when it comes to finances of the corporation.[23] The auditor is technically not a director, however, OHADA requires at least one auditor in every public company. The auditor has strict responsibilities and is held to a high standard of care for the corporation. As a result, it seems like OHADA has shifted the duty of care from regular directors to the auditor who is ultimately responsible of the financial health of the corporation and can be held personally liable thereof.[24] OHADA charges the auditor with the role of a "watch-dog," and is permanently on the lookout for the general and financial health of the corporation. The auditor is required to report any dangers perceived or any discrepancies in the management of the corporation.

The high level of trust mentioned above contrasts with the absence of a clear and explicit business judgment rule provided by OHADA law. Similar to the US, the text of the statutes does not mention a business judgment rule as a way of protecting directors. Unlike the US however, OHADA has no body of case law in that respect. The business judgment rule is a creation of the US courts, and courts have continuously applied it. There is no jurisprudence related to fiduciary duties under OHADA law; consequently, courts have not yet been called on to decide on the

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[23] *See* Section 710 AUSCGIE.
[24] *See* Section 725 AUSCGIE.

duty of care required, and there is no evidence of application of the business judgment rule as of yet. However, odds are that OHADA courts will adopt the business judgment rule to reinforce the high level of trust given to directors under OHADA law. Since directors are believed to be taking care of the common good and are trusted in that regard, the direct assumption would be to welcome a strong business judgment rule which would give more freedom of action to directors. The high level of trust given to directors of corporations in Africa, though controversial due to competence issues, justifies the weak construction of directors' loyalty under OHADA, a situation in contradiction with the strict construction of loyalty under US law.

B. The duty of loyalty

Similar to the duty of care, the duty of loyalty is an extension of the laws of agency. Loyalty is the backbone of fiduciary duties. It is an abstract concept that is frequently used to control directors and make sure that the interest of the corporation is respected first and foremost. Though OHADA has only very limited provisions related to the loyalty of managers, the US have explored several situations in which loyalty of directors can be called under scrutiny. The general provision of section 740 of AUSCGIE that Directors owe a duty to the company and to third parties to obey the law, applicable regulations, as well as the Sections of Association, contrast with the detailed construction of loyalty under US law through an extensive jurisprudence.

1. The strict construction of directors' loyalty under the US law

US law has construed the duty of loyalty for directors of corporation through specific situations that may arise. The main cases in which the duty of loyalty has arisen are in situations of self-dealing and the corporate opportunity.

First, the greatest fear of owners of a corporation is that managers will lead the corporation into transactions in which the managers receive personal benefits. Originally, the fear of directors' "sweet deals"[25] prompted the law to make all transactions in which directors are involved, "voidable at the option of the corporation".[26] As a consequence, all transactions that corporate managers entered into personally with the corporation were voidable anytime at the option of the

[25] "Sweet deals" common means deals in which directors obtain an undue personal interest.
[26] H. Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 Bus. Law. 35 (1966).

corporation. Soon, however, courts realized that this strict position was inconvenient in business. Therefore, the rule was changed, and transactions between directors and the corporation became allowed as long as there was an adequate disclosure of involved directors' interests in the transaction.[27]

Disclosure has thus become the requirement in validating even interested directors' transactions with the corporation. Conflicted directors' transactions with the corporation have gone from being voidable to becoming justifiable. The remaining question however, is the level of disclosure needed.[28] The Model Business Act lays out a procedure of disclosure and approval by directors to make their otherwise conflicted transactions valid.[29]

In *Fliegler v. Lawrence*,[30] the court held that an action taken by an interested director was not voidable per se. In that case, Fliegler, the shareholder, sued Lawrence, the director, about the decision to acquire a new corporation in which he had personal interests. The court reasoned that since the decision of the directors was necessary to finance the corporation, and since the transaction ended up being a "good deal" for the corporation and since Lawrence disclosed his interests, the director acted with entire fairness and did not breach any fiduciary duty.[31]

Also, loyalty is usually examined under the corporate opportunity doctrine. Frequently managers come across good business opportunities in the exercise of their duties. The difficulty has usually been to determine whether it is appropriate for directors to use the opportunities for their own gain. This issue is connected to the general loyalty that directors owe the corporation. Directors must act in the interest of the corporation and are required to think of the corporation first when they come across a business opportunity. Therefore, US law requires that directors should not take personal opportunities that may benefit the corporation. Directors may personally use the opportunity if it is first presented and rejected by the corporation. Courts have applied this standard in several cases.

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[27] Ahmed Bulbulia et al, *Statutory Responses to Interested Directors Transactions: A Watering Down of Fiduciary Standard?,* 53 Notre Dame L. Rev. 201 (1977).
[28] *See* Douglas M. Branson*, Assault on Another Citadel: Attempts to Curtail the Fiduciary Standard of Loyalty Applicable to Corporate Directors,* 57 Fordham L. Rev. 375, 380–81 (1988).
[29] See Model Bus. Corp. Act § 8.61 (3d ed. 1999).
[30] *See Fliegler v. Lawrence*, 361 A.2d 218 (Del. 1976).
[31] *Id*. at 224.

In the *In re eBay Shareholders Litigation*,[32] eBay directors received from Goldman Sachs, eBay's financial advisor, offers of very lucrative Initial Public Offerings.[33] EBay directors did not present the opportunity to the corporation, and instead, used it for themselves. As a result, shareholders sued for breach of the duty of loyalty, specifically under the corporate opportunity doctrine. The question presented to the court was whether the directors usurped an opportunity that belonged to the corporation. In its opinion, the Court of Chancery of Delaware held that the eBay directors usurped the corporate opportunity.[34] The court found that directors received the opportunity in their capacity as directors of eBay. The court also noted that the opportunity was in the line of business for eBay. Further, the court indicated that the financial standing of eBay would have allowed it to seize the opportunity, but the directors fail to present the opportunity to the corporation first. For these reasons, the court concluded that the eBay directors did not respect the corporate opportunity doctrine. `

The court's position above shows how strict and careful the application of the duty of loyalty is under US law, which contrasts with the weak construction of loyalty under OHADA.

2. The weak construction of the duty of loyalty under OHADA

Fundamentally, OHADA faces a different issue than the US. OHADA struggles with the practical difficulty to separate management from ownership for corporations in Africa.[35] This issue becomes increasingly complicated with the imprecision as to whom directors owe their fiduciary duties to. The unanswered question under OHADA remains whether directors owe their duties solely to the corporation, to shareholders directly, to the society as a whole, or to all of them at the same time.[36] Because OHADA tends to give a larger social role to directors, what may seem disloyal to the corporation may be justified by directors as appropriate and loyal to society as a whole. Nevertheless, OHADA explicitly requires avoiding self dealing or corporate waste. Section 891 of AUSCGIE for example provides that:

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[32] *In re eBay, Inc. S'holders Litig.*, 2004 WL 253521 (Del.Ch. 2004).
[33] *Id*. at *1.
[34] *Id*. at *5.
[35] *See* Claire Moore Dickerson, *The Cameroonian Experience under OHADA: Business Organizations in a Developing Economy*, Bus. And Soc'y Rev., 112, 191-213 (2007).
[36] *See* World Bank, *supra* note 39.

> "Any manager of a private limited company, directors, chairman and managing director, general manager, managing director or assistant managing director who, in bad faith, use the assets or credit of the company in a way they know is against the interests of the company, for personal, material or moral ends, or in favour of another corporate body in which they have an interest directly or indirectly, shall incur a punitive sanction."

Section 891 of AUSCGIE above clearly targets circumstances of directors self-dealing. The text of the Code indicates that managers can be sued, and are exposed to criminal penalties if they engage the corporation in transactions in which they have a personal benefit.[37] This section is central in avoiding abuse in the management of African corporations. Frequently, people are directors of different corporations at the same time. Sometimes, corporations they manage deal extensively with other companies which are managed and controlled by their direct relatives. This provision of the statute targets these specific situations.[38] The text of the statute warns that directors are exposed to criminal penalties if they engage the corporation in transactions to benefit them personally "directly or indirectly". Courts have not been called to examine any situation of breach of the duty of loyalty yet, and, as a consequence, it is difficult to determine how strictly this provision would be applied to directors. Furthermore, Section 438 of the AUSCGIE indicates that the interested director can disclose his interest to the board and seek its approval. Section 344 provides the appropriate procedure for disclosure.

Corporations in Africa remain to a great extent, a family affair. Managers are more likely to transact with relatives, and the actions that they take are more likely to be those of interested directors. An illustrative situation can be found in Professor Dickinson's writings on the experience of OHADA law in Africa. Professor Dickerson reports[39] the case of a father owning a company and delegating its management to his son. As manager, the son agreed to a merger and closed the deal without seeking consent of his father. This revealed a breach of loyalty as generally known, but no litigation ever ensued; rather, the son received the encouragement of his father and the whole community in his actions.[40] Under the general obligations imposed on the management of corporations, a manager is not allowed to close a major transaction such as an acquisition without seeking at least the approval of the whole board of directors, or seeking authorization of the shareholders.

[37] Section 891 AUSCGIE.
[38] *See* § 161, 889-891 AUSCGIE.
[39] DICKERSON, *supra* note 56.
[40] *Id*.

The other main issue addressed by OHADA is corporate waste. Section 891 also states that managers are subject to criminal sanctions for the use of corporate property for purposes contrary to the corporate interest.[41] Because the line is so unclear between ownership and management for African businesses, it is very common for corporate managers to use corporate goods for other purposes. This provision targets waste as well as misuse of corporate goods. The AUSCGIE reaffirms the fact that, under OHADA, the corporation is a legal entity, a person. As a consequence, corporate goods have to be used for the purposes assigned to the corporation. Any use of these goods, other than for the corporate interest, is subject to punishment. The AUSCGIE anticipates and prevents the common misuse of corporate goods which is a very tempting situation under African circumstances.

Nevertheless, OHADA itself weakens the applicability of this provision. In its official comments, the AUSCGIE indicates that to be held liable for waste of corporate assets, the good has to be intentionally misused, and with bad faith.[42] The plaintiff, therefore, is required to show that the Director knowingly misused and wasted the assets of the corporation, and that s/he did so with bad faith.

Several cases in Cameroon, Gabon or Chad are now in a preliminary phase of resolving the issue of whether they are subject to State or OHADA law. Most of these cases involve managers of corporations in which the government is either the sole or majority shareholder. One of these cases involves Mr. Edward Etonde Ekoto as manager of the Douala Sea Port.[43] This sea port is situated in Douala and is the largest in central Africa. The port is organized as an ordinary corporation and the government owns most of its shares. Mr. Ekoto was sued for corporate waste and embezzlement. The big debate has been whether the case is governed by Cameroonian or OHADA law. Many practitioners and researchers hope that in cases such as this, OHADA will prevail and that there will be OHADA jurisprudence on fiduciary duties. The judicial application and enforcement of OHADA in the field of fiduciary duties will be very helpful to understand how strict the duties actually are, and how judges interpret them.

[41] *See* Section 891 AUSCGIE.
[42] *See* Official Comments to Section 891 AUSCGIE (requiring a bad faith specific argument).
[43] *Ministere public v Etonde Ekotto*, (available at http://fr.allafrica.com/stories/200909280694.html) (last visited Oct. 29, 2010).

The other main weakness of OHADA in enforcing the duty of loyalty is that OHADA does not contain strong language to protect corporate opportunity against usurpation by directors or managers.[44] Most of the time, managers of the corporation are presented with opportunities that can either be exploited by the corporation or by the managers personally. US law, as seen above, has developed a strong mechanism to protect an opportunity directed to the corporation, and of which it could take advantage. However, the OHADA statute does not target this issue specifically. This problem is even more dangerous because OHADA law allows other corporations to act as directors. Section 419 of the AUSCGIE provides that legal persons (corporations) can be directors in a corporation.[45] Though OHADA enacts the conflict of interest, this provision poses a serious threat to an opportunity that may be used either by the corporation served, or by the corporation director. Reacting to this situation, the World Bank review of Senegal, a country under OHADA, indicated that the business law "should consider removing the ability of legal persons to be board members…"[46]

The US law, thanks to a very active judicial system, has enacted very strong and detailed fiduciary duties to impose on corporate directors in furtherance of their agency relationship to the shareholders. The seeds of a serious treatment of fiduciary duties are seen under OHADA. Unfortunately, the young and less active judicial system has not yet elaborated in more detail, the extent to which these agency-like duties apply to corporate directors.

Beyond these similarities of the "Agency-like" duties imposed on directors, the US and OHADA legal systems differ on ways to hold directors accountable and enhance corporate governance. Once again, the US goes about it mostly through judicial constructions and doctrines. In contrast, the analysis of the OHADA environment commands strict obedience to the language of the statutes. This situation calls to mind the fundamental difference of approach between the common law (under which US law operates) and the continental civil law (on which OHADA is largely based).

II. Duties specific to each legal system

[44] *See* World Bank, *supra* note *39.*
[45] Section 421 AUSCGIE provides: "A corporate body may be appointed director ..."
[46] *See* World Bank, *supra* note 39.

US law and OHADA provide duties that are specific to each system.[47] It is not that the duties are nonexistent in the other system, but it is more that each system gives a specific weight to certain duties while the other barely enunciates them. The general difference between US law and OHADA seems to be that while US emphasizes abstract "duty-like" obligations, OHADA focuses on clear and concrete obligations for corporate management. This relative abstraction of US law may be justified by the fact that the US system can rely on the strong judicial system to interpret and apply in appropriate ways principles that are abstract. In addition, the relative clarity and concreteness of OHADA obligations[48] may be justified the same way with a less active and arguably less competent judicial body.

The duty of "good faith" which overrides duties of loyalty and care today marks the particularity of subjective "duty like" of the US system. The OHADA system, however, which focuses on the Commercial register, or the requirement of an auditor, focuses on concrete obligations. Another striking difference between the two systems is their specific construction of remedies for the breach of fiduciary duties. Here again, the clarity of US law contrasts with the rather unpredictable and unsecured remedies under OHADA.

A. Strong duty of good faith under US law: a focus on Courts' interpretation

In the US, traditional duties of loyalty and care have sometimes proven insufficient to hold management accountable. As seen above, the enactment of theories such as the business judgment rule, or liability insurance have made it almost impossible for a shareholder to prevail solely on a duty of care claim. Similarly, multiple requirements needed in self dealing and corporate opportunity for instance, have brought great uncertainty as to the outcome of a breach of loyalty claim. Being conscious of these barriers, the judiciary has enacted the abstract and large concept of good faith. Consequence, several shareholders' claims are tried in court nowadays on the sole duty of good faith grounds. In its application, the duty of good faith tends to override loyalty and care; and fairness seems its cornerstone.

1. The duty of good faith: a remedy to the limits of the duties of loyalty and care

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[47] Pistor, Fiduciary Duty in Civil Law Jurisdictions: Lessons from the Incomplete Law Theory (2002).

[48] OHADA imposes clear obligations to the management of corporations.

The notion of good faith is very abstract and subjective. In trying to define good faith in a corporate sense, Melvin Eisemberg noted that the concept "consists of four elements: subjective honesty, or sincerity; nonviolation of generally accepted standards of decency applicable to the conduct of business; nonviolation of generally accepted basic corporate norms; and fidelity to office"[49] The Model Business Act provides in § 8.30 (a) that "each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith…"[50] This section indicates that the duty of good faith is conceived as an independent duty and can stand alone in a shareholder's claim. This view of the Act is further supported by § 8.31 (a) 2 i, which provides that directors will be held liable only if the plaintiff shows that the action taken was "not in good faith".[51]

The enactment of the duty of good faith and its preeminence today as a standalone duty is justified by the fact that the duties of loyalty and care do not cover all the areas in which directors acted improperly. In the *L*yondelle case, shareholders based their claim on the bad faith of the board in negotiating the merger acquisition of the corporation. Although the shareholders did not prevail on the claim in the Delaware Supreme Court, the claim stood on the ground of bad faith alone. This was arguably to avoid suing on the duty of care grounds because that would have been effectless due to the liability insurance that benefited the management.[52] Similarly, in the *In re The Walt Disney Co. Derivative Litigation*, the Delaware Supreme Court indicated that bad faith was a legitimate claim.[53]

Nevertheless, as the majority of commentators have noted, the duty of good faith is closely tied to the duty of loyalty. Whatever the outcome of that debate may be, it is worth noticing that the inclusion of good faith has brought a higher level of protection to shareholders, and has enlarged their chances of holding directors accountable and of being more successful in courts. As a matter of fact, fairness, which is an elastic notion that courts will use as the test of good faith, makes it more likely for shareholders to question directors' actions.

2. Fairness as measure of good faith

[49] *See, Duty of Good Faith in Corp law,* Del. J. Corp. L., vol 31 n°1 p. 1-75 (2005).
[50] Model Bus. Corp. Act § 8.30 (3d ed. 1999).
[51] *Id*. at § 8.31 (a)2(i).
[52] *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009).
53 *In re Walt Disney Co. Derivative Litig.* 906 A.2d 27 (Del. 2006).

Throughout the Model Business Act, the text requires over and over again that directors should demonstrate "entire fairness" in their actions.[54] In a duty of care claim, for example, directors could show their entire fairness by proving that they reasonably relied on information provided to them by experts on the matter. Similarly, in a duty of loyalty claim, directors can show their entire fairness by proving that they disclosed the conflicted interest, or that the corporation was presented with an opportunity that it was unable to seize.[55]

The enactment of the duty of good faith now makes it clear that whatever the action of a director may be, it must reflect intrinsic fairness. This standard usually requires proof that the director has acted solely in the best interest of the corporation. Therefore, the standard by which to judge directors' actions is no longer mechanical and objectively measurable. While directors could be held liable for actions in which they did not act "fairly", directors may be excused for actions that appear to violate fiduciary duties, provided that they acted in good faith.

Although this common use of fairness to measure good or bad faith establishes a relative uncertainty as to the outcome of eventual cases, this situation still gives more opportunities for shareholders to question directors' actions more often. Consequently, the power is placed onto judges to decide these cases. This situation contrasts with the relatively bright line rules impose by OHADA; rules that Judges could apply without much discretion if called upon to do so.

B. Strong duty of Disclosure and the Auditor requirement under OHADA

Disclosure is at the heart of OHADA. This obligation exists at the birth of the corporation, during its life, and at its death. The requirement to disclose is made practical by the institution of the Commercial Register.[56] Section 19 of the AUSCGIE underlines the roles of the Commercial Register. The Section indicates that:

> "The register shall also record entries and information on changes in the status and legal capacity of natural persons and corporate bodies that have occurred since their registration. It shall also record documents the filing of which is provided for by the provisions of this Uniform Act and by those of the Uniform Act relating to the Law on commercial companies and economic interest groups."

[54] Model Bus. Corp. Act §6.40, §7.04, §8.07-8.09 (3d ed. 1999).

[55] *See* Fliegler 361 A.2d 218 *supra* note 51.

[56] *See* Uniform Act OHADA on General Commercial Law, Section 19-50 (1997) (organizes the role and procedures for the Commercial Register).

The incorporation, as well as every other major change in the corporation during its life, must be disclosed with the Register. Furthermore, OHADA requires every public corporation to host an Auditor. Unlike directors, whose duties are sometimes not strongly stated by the statutes, OHADA clearly defines the obligations of the Auditor who is primarily responsible for any hidden unhealthy acts within the corporation.

1. The requirement to comply with the Commercial Register

OHADA began by solving the long standing debate about the number of people able to incorporate. OHADA legitimates a corporation formed by one person.[57] However, regardless of the fact that the corporation has a sole or multiple shareholders, strong disclosure requirements are imposed on it from its inception through its death.

At the birth of the corporations, directors (to be) must disclose, under a high standard of honesty, all the information about the corporation to be formed. This means that directors have to disclose the mission of the corporation, and the value of the assets being raised. All business entities must register with the Commercial Register by filing their legal addresses within a month of their creation. The Statute also requires companies to file their Sections of Incorporation, as well as information on the company form, initial capital, members or shareholders, and managers and directors. These requirements are close to the requirement to comply with the Secretary of State in the US; however, the Commercial Register differentiates because it exists alongside the government procedures of incorporation. Section 27 of the AUSCGIE Law indicates that the corporation will only be formed after the above information is provided and registered with the Commercial Register. The registration has to be made within a month of the creation of the Corporation, and the corporation will start its legal existence only after the registration. Therefore, the registration with the Commercial Register is seen as the birth certificate of the corporation under OHADA. Interestingly, OHADA holds directors responsible for any act accomplished in that process.[58] In fact, Section 886 of the AUSCGIE indicates that directors are subject to criminal sanctions for irregularities in the incorporation process.[59]

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[57] Section 5 AUSCGIE provides "A commercial company may also be created, as provided by this Uniform Act, by a single person."
[58] *See* JEAN GATSI, *supra* note 5.
[59] *See* Section 887-888 AUSCGIE (*See also* the Official comments to Title 1 of the Statute).

During the life of the corporation, directors are required to stay in close contact with the Commercial Register. Any and all major events in the life of the corporation must be disclosed and registered with the Commercial Register. In any event, directors of the corporation must renew their files with the Commercial Register at least once every year. The idea is that this information is re-filed annually, or upon a significant change. OHADA created the Commercial Register as a mean of disclosure, and for the public (shareholders and all other stakeholders) to be able to get information about the corporation. Therefore, the information is public, at the cost to the corporation for copies and stamps. Every regional court holds the Commercial Register. The Register is conceived as a public database. All changes in the corporation, names, addresses, and performances must be disclosed, and directors who do not comply are subject to criminal penalties. Aside from complying with the Commercial Register, directors are subject to a strict disclosure and honesty requirement,[60] and are subject to criminal sanction(s) for any untrue or misleading information they provide to the shareholders or the public. Directors are also subject to sanctions for distribution of dividends when the corporation does not have profits.[61] In general, therefore, directors are liable for false or misleading information throughout the life of the corporation.[62] This role of the Commercial Register is close to the Securities and Exchange Commission ("S.E.C") in the US. In fact, the Commercial Register and the S.E.C. have the same objective: the disclosure of information to the public, and the monitoring of the corporate life.

In case of dissolution of the corporation, directors are required to take all legal action needed in a very careful manner, and follow the laws and the corporation's bylaws. Title VI of the AUSCGIE describes several situations in which directors can be held liable for actions related to the dissolution of the corporation. Section 901 provides that management and directors are liable for failure to file with the Commercial Register for dissolution when capital falls below registered capital.[63] However, this section requires proof of the bad faith of directors. Here again, it becomes difficult to enforce the obligation against directors.

The creation of the Commercial Register was a very positive step forward within the system as a whole. However, the Commercial Register is actually ineffective today. The Assessment of

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[60] *See* Section 890 AUSCGIE.
[61] Section 889 AUSCGIE.
[62] *See* Section 893-895 AUSCGIE.
[63] Section 901 AUSCGIE.

Senegal by the World Bank shows that most of the time files are not up to date. This situation can be explained by the fact that a computerized system is still not available. Processes are complicated mainly because disclosure is still effectuated manually, which is extremely time consuming and, arguably, discouraging for corporations. Still, the Register remains the main outside disclosure tool. In contrast, the Auditor plays the watchdog role inside the corporation.

2. Role of the Auditor

Since the enactment of the AUSCGIE, one of the most discussed topics is the auditor. The Statute places a great deal of responsibility on the auditor's shoulders, allowing for criminal penalties in case of failure. The Auditor is technically not a manager, but he works very closely with the management. For businesses of a considerable size, a combination of disclosure and monitoring are imposed on official, Statutory Auditors. These statutory auditors must be public accountants, but are more regulated and more constrained than are the classic certified public accountants, who mainly serve as auditors in the United States. The main difference between the OHADA Auditors and the Auditors in the US is that in the US, firms are usually Auditors to public companies. Under OHADA however, the Auditor is usually a natural person, rather than a legal entity. Furthermore, the existence of the OHADA Auditor within the company does not preclude outside Auditors. Contrary to the US, the OHADA Auditors are qualified as the personal representatives and advocates of the Shareholders within the corporation.[64] Section 721 of the AUSCGIE makes the presence of the Auditor "compulsory" in Boards' meetings. Similarly, Section 722 of the AUSCGIE indicates that the Auditor shall attend shareholders meetings. As a consequence, inclusion of the auditor is necessary in order to fully understand fiduciary duties under OHADA.

The general situation and, specifically, the financial health of the corporation, are in the hands of the auditor. S/he has the obligation to certify that the information being offered by the Board is adequate.[65] The auditor is the public eye in the corporation and has the obligation to inquire into and access any irregularity. OHADA makes the auditor responsible if s/he fails to disclose any irregularity s/he may find in the way the corporation is managed. During the ordinary meeting of the board (which the auditor attends), the auditor delivers a report mainly stating either that s/he

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[64] *See JEAN GATSI*, *supra* note 5.
[65] *See* Section 710 AUSCGIE.

certifies that the financial statements are accurate, or that s/he makes reservations as to the accuracy of the statements.[66]

Section 712 of the AUSCGIE states that the main task of the auditor is to audit and make sure that there is no illegal actions or operations within the company. The auditor has to make sure that directors are acting in the interest of the corporation and that they are treating the interest of the shareholders fairly. To carry out their mission, the auditors are given powers and privileges by the Statutes. Directors are subject to criminal penalties if they obstruct (directly or indirectly) the auditors from performing their functions.[67] The auditors inquire, audit, and make reports periodically to reveal the results of their enquiries.[68] The reports shall be made available to the chairman of the Board, and must clearly state any irregularities and inaccuracies discovered.

OHADA goes further by providing another remedial procedure beyond the Board. Section 716 of the AUSCGIE indicates that if the Board does not take action, or if the irregularities are continuous, the auditor "shall" disclose this to the public prosecutor's office. The official comment to the AUSCGIE clarifies that the Auditor can take action even for irregularities made before the auditor started working with the corporation.

To balance these extensive powers given the auditors, OHADA makes them responsible for failing to carry out their mission. Section 725 provides that the auditor shall be liable, to both the company and third parties, for the torts, and negligence of which they are guilty in the exercise of their duties. This language reflects a very strong duty of care to the auditors in carrying on their duties.

C. Different Construction of Remedies for Breach of Fiduciary Duties

US law and OHADA explicitly differ on the way they each provide remedies to the breach of fiduciary duties. In the US, centralized laws, and an arguably coherent body of case law, make it predictable as to the penalties available for breach of fiduciary duties. OHADA however, provides several situations in which directors can be held liable for breach, but never states what the sanctions may be. OHADA is a description of several situations that constitute infractions,

[66] Section 711 AUSCGIE.
[67] Section 897 AUSCGIE.
[68] *See* Section 715 AUSCGIE.

and yet, no clear and coordinated indication of the penalties. As a consequence, each member country is called on to enact the sanctions for violations of OHADA provisions. The coherent system of sanctions in the US contrasts with the uncoordinated and unpredictable system of sanctions under OHADA.

1. The Coordinated System of Remedies for Breach of Fiduciary Duties under US.

US law, mainly through its jurisprudence, gives a general understanding of penalties directors expose themselves to while engaging in actions that violate their fiduciary duties. Though the fight to establish violation of fiduciary duties can be rough, the punishment once the violation is proved is well established under US law. Under US corporate law, a claim for breach of fiduciary duties goes through the following process. The first issue is usually whether or not the person against whom the action is brought is actually a director. If this preliminary interrogation is answered in the affirmative, then the question of whether s/he has violated a fiduciary duty is raised. The answer to this question, as seen above, depends on satisfaction of specific elements by the plaintiff. When the plaintiff establishes that a fiduciary duty has been violated, s/he has the burden of establishing that damage has been suffered. In these claims usually, as indicated by Izaz Ali,[69] the plaintiff must answer in the affirmative to the three following questions: Do we have a director? Did she breach a fiduciary duty? Is there any damage suffered? The affirmative answer to these questions gives way to remedies. Penalties are usually civil, but because the breach of fiduciary duties is often accompanied by the breach of other substantive law, there can be criminal penalties as well. Claims of breach of fiduciary duties usually give rise to four main outcomes in courts. The main sanctions are usually civil, but if the breach of fiduciary duties is accompanied with other misconduct such as fraud, criminal penalties can be applied as well.

First, courts can issue injunctions. This is usually the case when directors engage in actions that breach fiduciary duties and these actions are still being executed. The court, in this instance, has the power to order that the actions be stopped.

Second, courts can award damages. This is usually the remedy sought by most plaintiffs in fiduciary duties claims. In a claim brought by shareholders, for example, the damage suffered could be that the value of the shares has decreased because of illegal action taken by their

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[69] Izaz Ali, *Remedies For Breach of Fiduciary Duties*, (Jan 2010).

directors. In this situation, the court can award damages in accordance to actual damages incurred by the shareholders, or the court can order punitive damages. Contrary to ordinary damages, which aim to put the shareholder in the place where she would have been had the illegal action not occurred, punitive damages sanction directors for their illegal actions.

Third, courts can order restitution. In this situation, directors are asked to give back to the corporation, all and any benefit they may have received from the illegal action. Courts usually lean toward ordering restitution in cases of breach of fiduciary duties.

Finally, the court can order criminal sanctions against the directors for violation of fiduciary duties if this violation breaks other substantive laws. This eventuality has been more discussed since the Enron like scandals of the early 2000. Criminal sanctions are usually ordered when directors are found to have committed fraud by their actions. In the Enron case,[70] or more recently the Madoff affair,[71] courts have discovered the use of fraud in the management of the corporation or dishonesty to shareholders or other stakeholders. That situation led courts in these cases to order criminal sanctions against the involved directors.

The US system is fairly predictable as to the remedies for breach of fiduciary duties. OHADA however, leaves it up to each member state to determine the nature, and the extent, of the sanction for breach of fiduciary duties.

2. The "member state specific" orientation of remedies to breach of fiduciary duties under OHADA

OHADA is a specific legal construction difficult to compare to others in the world. OHADA is heavily based on continental civil law systems, but its desire to attract common law countries causes OHADA sometime to abandon some fundamental civil law principles. Further, OHADA reassembles different countries, and wants to avoid alienating their sovereignty. The problem usually is to find a balance which harmonizes the law of several sovereign countries, without a deprivation of sovereignty. One way OHADA has tried to establish that balance was to delineate illegal conduct, and then leave it up to the sovereign member states to determine the sanctions for the conduct. Though this may be justified by the respect of the sovereignty of the OHADA

[70] *See Enron supra* note 2.
[71] *United States v. Bernard Madoff*, 2009 WL 3347945 (S.D.N.Y. 2009).

member-states, it, arguably, contradicts the objective of OHADA to create simplicity, predictability, and security in business law in Africa.

The principle that OHADA provides a definition of what constitutes an illegal action, and the member states provide sanctions is a dangerous approach. OHADA was formed in 1993, and the majority of its Uniform Acts were adopted in 1999 by its member states. More than a decade later, OHADA includes 17 member countries. As a consequence, the AUSCGIE, for example, is applicable to all these 17 countries as the applicable law for business. As seen above, the AUSCGIE provided several circumstances in which directors are subject to criminal sanctions for violating fiduciary duties. However, more than a decade after adoption of this AUSCGIE, only two countries, Cameroon and Senegal, have enacted sanctions to the OHADA violations.[72] The remaining countries have yet to enact what the punishment would be in case of violation of fiduciary duties provided by OHADA. This situation causes at least two major problems.

First, the fact that each member country has the right to enact sanctions to infractions provided by OHADA makes it very difficult to understand the system as a whole. There will still be a problem of security and predictability. Investors and other stakeholders usually seek to know in advance what their remedies would be in case directors commit illegalities in the exercise of their functions. By not settling this issue at the OHADA level, the organization for harmonization of business law in Africa has disregarded a very important area in which coordination is crucial.

Also, leaving it up to each member country to determine the sanctions makes the Common Court of Justice's role confusing, and weak in enforcing OHADA. One of the specificities of OHADA was the creation of a Common Court of Justice which stands as the highest judicial institution on matters concerning OHADA.[73] Member states courts are currently called to apply OHADA in addition to state laws and other regulations. OHADA requires every member state to enact sanctions to infractions provided by OHADA. As mentioned above, over a decade later, only a handful of countries have done so.

III. The impact of the duties on both business environments

[72] *See* Law N° 2003-008 (July 10, 2003).
[73] See Section 14 of the OHADA Treaty. The CCJA is the judicial body for OHADA matters.

Despite the fact that the US remains focused on traditional, duty-like provisions, and OHADA tends to create rules and external structures, there is a great amount of similarity between both legal systems in the way they hold management accountable. As seen above, care and loyalty can be used to summarize the scope of action of management as fiduciaries. In that regard, it can be admitted that the young OHADA law has, in some extent; followed in the footsteps of the older US law. Surprisingly, the consequences have not been the same; the use of fiduciary duties seems to have led to different results in each of these business environments.

A. A primacy of the Shareholder under US Law: the Strong Duty of Loyalty

The strong duty of loyalty to the shareholders has contributed to the theory of the primacy of the shareholder. Under the US standards, all actions taken by the management of the corporation ought to be taken to maximize shareholders benefits.[74] Milton Friedman even made OF increasing shareholders benefit, the ultimate social responsibility of the corporation.[75] The corporate management scandals of the early 2000 discussed above, and the regulatory reaction that followed, has to some extent refocused the law on protecting shareholders. The relationship between management and ownership under US law seem to be very close to a trust relationship. The management is usually considered as very similar to trustees in that they have to manage the corporation for the good of the shareholders.[76] This view argues that just as in agency or trust relations, management/ownership relationships are those of beneficiary and trustee, and the trustee is bound to act for the beneficiary. Franklin Tamar indicated: “fiduciary relationships are service relationships”.[77]

This doctrine of primacy of the shareholder under US law is sustained in order to place the shareholder in a stronger position. This position however shows its weaknesses in event of the death of the corporation. In the case of liquidation or other circumstances marking the end of the corporation, directors are subject to strong fiduciary duties toward many stakeholders. Directors in these instances are also under strong duties of loyalty, of care, and of disclosure toward

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[74] *See* Gordon Smith**,** *The Shareholder Primacy Norm*, J. Corp. L. 23 (1998).
[75] *See* Milton Friedman*, A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sunday Magazine, Sept. 13, 1970 at 17.
[76] *See* Tamar Frankel, *Fiduciary Law*, 71 Ca. L. Rev. 795 (May, 1983).
[77] Tamar Frankel, The New Palgrave Dictionary of Economics and the Law, Definition of "fiduciary duties" 2 (1983).

creditors in general. As specified by Joseph Marrow,[78] this situation of obligations to creditors arises only in case of real termination of the corporation, not merely in case of distress or insolvency. Until recently, the situation was not clearly stated in the jurisprudence and several specialists advised management that they would have fiduciary duties toward creditors in case the corporation is in any distress. The Supreme Court of Delaware finally ended the debate in 2007. The Court in the so called "*Gheewalla"* case made it clear that creditors would have the right to bring a derivative suit on behalf of the corporation. This situation reminds one of the tendencies of the US corporate law: in general, the more the corporation approaches the end of its life, the wider the duties of corporate directors become. In these circumstances directors need to exercise care and loyalty toward shareholders and other stakeholders as well.

B. Larger Social Impact of Directors under OHADA: the "Bonus Pater Familia" role

OHADA is primarily based on the French civil law system. Though its desire to attract common law countries in Africa has caused it to embrace some common law principles, OHADA did not adopt the shareholder primacy doctrine. OHADA, without calling it so, adopted the French system of '*interet social*" as a standard of its corporate responsibility. This notion of "interet social" has been defined by some as being close to the "corporate interest", and by others, as revealing the "social interest."[79]

Understood as the corporate interest, this notion comes very close to the shareholder primacy doctrine in the US. Under this view, the management is compelled to act in the interest of the corporation and its shareholders only. The directors' ultimate objective is to maximize the benefits of the corporation, and they are only responsive to the ownership of the corporation. The management in this case shall act only for the benefit of the corporation and the shareholders who own it. This view has not been adopted by OHADA.

The second understanding of the expression "interet social" is the social interest. Under this approach, the management shall act for the benefit of the corporation and for the good of a larger society. "Interet social" here aligns with the notion of "bonus pater familias". Under these circumstances, directors are in charge of a common good and shall act in a way to protect and

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[78] *See* Joseph Marrow, *Fiduciary Duties of Directors to Creditors*, (2009).
[79] *See* Monique Aimée Mouthieu, L'intérêt social en droit des societies, (L'Harmattan Collection, 2009).

benefit a larger public. OHADA does not state that the corporation shall act for the benefit of the whole society, but the reading of its provisions compels the conclusion that the notion of "interet social" includes at least shareholders and employees alike.[80]

OHADA has tried to hold a middle ground in the crucial question of to whom directors owe their fiduciary duties to. OHADA did not adopt the US approach of shareholder primacy, nor did it make official the more socialist view of corporate responsibility to the entire society. The drafters of OHADA carefully and implicitly indicated that the corporation has to be managed for the benefit of all the stakeholders in the corporation. This conception will automatically include the shareholders at the first place, but will also reserve a central place to employees, and other creditors of the corporation.

Had OHADA failed to provide a larger social responsibility to the management of the corporation, the cultural reality would have trumped it and made the law not adapted in that area. The law usually influences social norms, but most of the time, social norms influence the law and contribute to the overall legal structure.[81] Under African cultural views, the management is in charge of the common good; they must manage the good as "good fathers". These cultural norms have contributed to shaping OHADA law; nevertheless, OHADA has tried to make the "bonus pater familia" role more objective by not adopting the flowed notion of society as a whole.

C. The Paradox of Quite Similar Duties, but Totally Different Corporate Performances

OHADA, as seen above, contains provisions similar to US law. Under each structure, the need to hold directors accountable, as fiduciaries, is well established. Nevertheless, the aptitude of the management and, therefore, the economic capacities of companies under those systems, are not the same. Though the US corporate environment can rely on strong fiduciary duties and generate quite impressive corporate economic performances, OHADA, imposing quite similar duties, leads to rather poor corporate management and unimpressive economic performances. This contradictory situation can be explained in at least three ways.

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[80] *See* Section 828-844 AUSCGIE.

[81] *See* *Katharina Pistor and Chenggang Xu, Fiduciary Duty in Transitional Civil Law Jurisdictions: Lessons from the Incomplete Law Theory,* (March, 2002).

First, in Africa, social and cultural norms tend to trump legal constructs. Corporations seem to be managed more in accordance with the cultural norms than according to what OHADA provides. As indicated above, the law is inspired and created from cultural norms and habits.[82] In places such as the US, laws have adapted to culture, and the differences between cultures, habits, and laws, have has been reduced to a minimum. However, in Africa, the effort to adapt the law to cultures is still in progress, with an added difficulty under the OHADA context, due to the presence of multiple cultures. It is therefore not surprising to see ordinary OHADA norms not complying with some local cultures. In cases of conflict between OHADA provisions and local cultural norms, priority seems to be accorded to old habits. In these circumstances, OHADA encounters enormous difficulties in implementing its well intended and advanced thoughts, policies and norms of corporate governance. Here again, the intent of OHADA to create security and legal predictability is endangered. In Africa, the study of OHADA provisions remains insufficient to understand the business environment because cultural norms remain a decisive source of conducting business. Under this atmosphere, notions of corporate governance and other fiduciary duties may still carry a meaning, but this meaning cannot be taken only from the reading of the statutes. The existence of hundreds of different cultures makes it difficult to anticipate the way they will shape notions related to corporate governance in general, and fiduciary duties specifically. As a consequence, the system remains uncertain in this regard, and OHADA's ambition to boost business ventures by harmonizing and coordinating the laws has not been spectacularly successful as of yet. This situation contrasts with the US where there is at least a great deal of certainty that laws apply and command the creation and existence of businesses. Security and predictability are very important in business creation and promotion. Therefore, OHADA has yet to seek its primacy and enforceability over cultural norms and traditions specific to its member countries.

Second, the reality of the conduct of business in Africa reveals a lack of expertise in the management of corporations. The economic success of corporations under OHADA cannot be tied solely to the application of fiduciary duties. In fact, the adequate application of fiduciary duties is very dependent on the knowledge by the management of the outstanding duties, or the willingness of the managers to discover these duties and put them into use. In Africa, family ties

[82] *See DICKERSON*, *supra* note 56.

and business ownership are sometimes preferred to expertise in selecting the managing team of a corporation. In addition, corporations are deemed a family affair, managers are often family members, or claim important ties with the family or group owner. It is therefore not surprising that some managers are not aware of the duties imposed on them, and are not thoughtful of the need to apply OHADA provisions.

Fiduciary duties are not an exception to this general picture of OHADA: well intended statutory provisions remain considerably turned down by local realities. Therefore, the provisions of OHADA have often failed in bring their part to the construction of a productive corporate environment. This situation contrasts with the US corporate environment. In the US, the main criterion in selecting management remains expertise.[83] The knowledge of directors' duties or their willingness to apply them remains one of the determinative principals in selecting directors. Not that all managers of US corporations are competent, but the extreme mobility and instability in corporate management shows the permanent lookout for a better team. This contradicts with the permanence, and longevity, of managements of corporations in Africa. Fiduciary duties which are designed to enhance the management of corporations, but also to protect shareholders' interest, would appear ineffective if the management does not have the fear of being removed by shareholders, for their eventual mischiefs. Some may argue that the instability of corporate management in the US a negative, but as long as the instability is justified by the need to acquire the best management, one with a better expertise, instability would be appreciated to protect strict corporate governance principles. Fiduciary duties are the heart of corporate governance standards, and their respect affects the health of the entity as a whole.

Third, and not negligibly, political pressures impact largely the economic performance of corporations in Africa.[84] OHADA law was born in an environment which is hampered by regrettable practices of corruption and the like. Corporate managers, in some instances, feel they may get away with any kinds of behavior as long as the political atmosphere of bribes allows them to do so. Sometime, corporate managers intentionally disregard the fiduciary obligations imposed by OHADA, and engage in illegal behavior and remain unpunished. Political pressures give rise to the need to satisfy the "political" instead of the "legal". In Cameroon, Senegal or

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[83] *See* Stuart Read, *How Expertise Shapes Decision Making* (August, 2008).
[84] See *CLAIRE DICKERSON*, *supra* note 1.

Cote d'Ivoire for example, it is not uncommon to have businesses engage in bribery practices toward tax collectors, instead of filling regular tax returns. The example of the Air fare Agency that entertained a suspiciously close relationship with the government, and key political figures, and remained unpunished notwithstanding alleged illegal behavior the management engaged into. The reality within OHADA countries still shows a very blurry line between the political power and the economic power. The relationship between politics and the economy remains that of subordination. In fact, the "political" seems to have subordinated the "economic", and there is a feeling within the business community that as long as the political appetite is satisfied, the law and complying with the applicable legal exigencies are worthless. In the US however, the separation between the "political" and the "economic" seems to have been established. On the one hand, business operators in the US do not seem of be subordinated by political power and those who exercise it. On the other hand, the support to a certain political organization, or any political personality, does not imply that the rule of law can be thrown out the window. The business environment in the US seems to be oriented to applying its standards, and accomplishing its objective through outstanding economic performances. In this context, the political power at most, creates an appropriate environment for the best expression of these business entities. The business environment in Africa, however, seems to be oriented toward satisfying (sometimes personally) political powers. In Africa, governments do their best to create good legal constructions and very appealing laws, but surprisingly, these same governments entertain, and sometimes encourage, practices that lead to a complete disregard of these legal "niceties." In this context, nevertheless, business still gets done, and there are some large companies operating within OHADA countries.

Conclusion

Corporations, regardless of the political, economic, or cultural climate in which they exist, are most of the time placed under the responsibility of a group in charge of their operation. The corporate law, regardless of it source or characteristics, aims to create the scope in which managers of corporations satisfy their obligations. US law and OHADA fundamentally conceptualize fiduciary duties to enhance corporate governance, and protect the interests of shareholders.[85] US law and OHADA are very similar in the treatment of the basic fiduciary

[85] Black, *The Principal Fiduciary Duties of Boards of Directors*, Singapore (April 2001).

duties of corporate managers, duties that are inspired from the fundamentals of the Laws of Agency. The duties of loyalty and care are enunciated and applied quite similarly under US law and OHADA. Despite these similarities however, the young OHADA law has differentiated itself from the older US law in some key areas. Unlike US corporate law, which imposes abstract duty-like obligations on the management, relying on a very enthusiastic and active judicial system for the interpretation and concrete application of the laws; OHADA focuses on concrete and precise obligations imposed on managements of corporations. Unfortunately, there is a lack of a body of case law for a general reading on how successful these clear-cut OHADA provisions are in practice. In contrast to US law, which has established the vague principle of good faith in the management of corporation, OHADA has accompanied that good faith requirement with concrete obligations to comply with the Commercial Register, and the need for a permanent auditor for example. The objective in each of these legal environments is to enhance corporate governance through fiduciary duties. Nevertheless, the enactment and application of fiduciary duties has not produced the same results in both legal systems. US law's reliance on fiduciary duties has contributed to outstanding corporate economic performance. Corporations under OHADA still struggle with mediocre economic performances. This is certainly not because OHADA failed to enact well conceived provisions, but only because OHADA has not yet taken command of the practice of business in Africa. The principles posed by OHADA remain considerably unknown within the ordinary public, and, shockingly, within the legal community of the member countries. Principles of corporate governance in general and fiduciary duties in particular contained in OHADA's Uniform Acts remain superseded by local realities and a regrettable lack of judicial activism and activity. The US can learn from the OHADA's focus on more concrete obligations to keep managers responsible as fiduciaries.[86] OHADA does not have to seek a transplantation of US law. The recent joining of the DRC, the largest territory in Africa,[87] is proof that OHADA will expand across Africa. However OHADA's success, in general, as a tool of development, and on the field of fiduciary duties specifically, will depend on how well it manages its dissemblance with local laws and cultures. But again, similar to US Law, maybe OHADA just needs time to grow and figure out the best way to deal with its uniquely complex diversity.

[86] Seligman, The Historical Need for a Mandatory Corporate Disclosure System, 9 J. CORP. L. 1 (1983).
[87] See OHADA Press Conference for DRC's official joining, http://www.ohada.com/actualite/1614/depot-des-instruments-d-adhesion-de-la-rdc-a-l-ohada-dakar-13-juillet-2012.html (last retrieved 1/28/2015).