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A Comparative Analysis of Remedies and Challenges in the Protection of Stakeholders Rights: OHADA vs. English Corporate Law

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Abstract

This article provides a comparative analysis of the remedies and challenges in the protection of stakeholder rights under OHADA (Organization for the Harmonization of Business Law in Africa) and English corporate law. The study focuses on key legal remedies available to stakeholders, including the derivative action model, the unfair prejudice remedy, personal right of action, remedies for breach of contract and torts, representative actions amongst other remedies. Under OHADA, the uniform legal framework aims to harmonize business laws across member states, promoting legal certainty and economic growth. In this context, the derivative action model allows minority shareholders to seek redress for wrongs committed against the company, while the unfair prejudice remedy protects stakeholders from actions that harm their interests. Personal right of action and remedies for breach of contract and torts provide additional avenues for stakeholders to seek justice. Representative actions further enable collective redress for affected parties. In contrast, English corporate law, rooted in a common law tradition, offers flexibility and judicial interpretation in protecting stakeholder rights. The derivative action model in English law allows shareholders to bring claims on behalf of the company, while the unfair prejudice remedy addresses situations where minority shareholders are treated unfairly. Personal right of action and remedies for breach of contract and torts are well-established, providing robust protection for stakeholders. Representative actions in English law facilitate collective litigation, enhancing access to justice. In tandem with the foregoing, this paper explores challenges in the practical enforcement of these remedies, including differences in legal culture, enforcement mechanisms, and jurisdictional issues. By comparing OHADA and English corporate law, the study provides insights into the effectiveness of various legal frameworks in protecting stakeholder rights and offers recommendations for enhancing stakeholder protection through legal reforms and policy initiatives. Through a content analysis of primary and secondary data, we uphold that this article contributes to the discourse on corporate governance and stakeholder theory, offering valuable perspectives for policymakers, legal practitioners, and scholars interested in the protection of stakeholder rights in diverse legal environments.

Keywords: remedies, challenges, stakeholders' rights, OHADA and English Corporate Law

1. Introduction

As trade barriers continue to collapse, it will become progressively easier for investors from one country to invest in companies in another. The competition for investment will not only be at the domestic level, but countries will also build structures that serve different interests in order to attract sophisticated investors from abroad. [1] A crucial factor influencing the attractiveness of a particular jurisdiction will be its system for protecting stakeholders. A good system will assure foreign and domestic investors that the company is managed by trustworthy, honest and effective managers and that all shareholders are treated fairly and equally.[2] More importantly, a proper system for protecting the rights and interests of stakeholder is by providing them with remedies when their rights have been infringed. [3] The primary purpose of such a remedy is to establish a mechanism for ensuring that directors do not abuse their corporate powers and shareholders and non-shareholders constituencies always have a means to obtain some kind of remedy where it is warranted. [4] The protection of stakeholder rights is a critical component of corporate governance[5], encompassing various legal remedies designed to address the interests and concerns of stakeholders. In this regard, the legal frameworks of OHADA and English corporate law offer distinct approaches to safeguarding these interests. OHADA, established to harmonize business laws across its member states, aims to create a stable and predictable legal environment conducive to economic development[6]. In contrast, English corporate law, with its common law heritage, provides a flexible and adaptive system that balances stakeholder rights through judicial interpretation and precedent[7].

It is important to note that, the UK Companies Act and the OHADA UA provides for rights to seek specific remedies. These remedies are aimed at discouraging gross mismanagement and abuse of power, and to uphold the enforcement of stakeholder rights. [8] Of particular interests are the rights of stakeholders to seek specific remedies the common being the statutory derivative action. The statutory derivative action allows certain specified persons to institute proceedings on behalf of a company where the company has been prejudiced by acts of its controlling directors and where the company has failed to take the necessary action to call these directors to account. The 2006 CA provides that, derivative claim under this chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. The cause of action may be against the director or another person (or both). It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company. [9] This provision is in line with section 165(2) of the South African Companies Act and Article 167 of the OHADA UA which provides that, one or several members may file a shareholder derivative lawsuit after a notice to the competent bodies that remains unanswered within a time limit of thirty (30) days. It further provides Petitioners shall be entitled to seek redress for damages suffered by the company. In the event of conviction, damages shall be awarded to the company and not to the petitioner(s). Even though OHADA and English law provides rights to seek specific remedies, enforcement remains challenging due to the obstacles stakeholders encounter under both legal systems. These challenges include Length and Complexity of the Litigation Process, Tight Judicial Control, Different Social and Cultural Norms, Difficulties to Enforce Section 172(1) by

[1] Mahmoud, H. A. (2011). The Reform of Minority Shareholder Protection in Saudi Arabia and Dubai in Private Company Companies. A thesis submitted in accordance with the requirements for the degree of PhD. The University of Leeds School of Law, 14.

[2] Nchofua. A. N. (2020). Shareholders and Stakeholders Theories: Balancing the Conflicting Terms under OHADA and English Corporate Law. *Journal of Capital Market and Securities law*, *3*(2), 11-21.

[3] Mahmoud, H. A. (2011). Op. cit. p. 14.

[4] Boyle, A. & et al. (2007). *Boyle & Bzrds Company Law*. 6th ed. Jordans, Bnstol, 381.

[5] Nchofua. A. N. (2020). The Protection of Stakeholders under OHADA and English Law: A Critical Analysis. *Journal of Corporate Governance & International Business Law*, *3*(2), 33-45.

[6] Organization for the Harmonization of Business Law in Africa. (1993). OHADA Treaty. Retrieved from [OHADA Official Website] (https://www.ohada.org/)

[7] Davies, P. L., & Worthington, S. (2012). *Gower and Davies' Principles of Modern Company Law*. Sweet & Maxwell.

[8] Linda, M. (2014). A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2). *Mediterranean Journal of Social Science*, *5*(1), 70. ISSN. 2039-9340.

[9] Section 260 (3) and (4), of the 2006 CA.

the Non Shareholders Group, Difficulties to Bring a Derivative Claim by the Shareholders amongst others.

This article therefore undertakes a comparative analysis of key remedies available under both legal systems, including the derivative action model, the unfair prejudice remedy, personal right of action, remedies for breach of contract and torts, and representative actions. By examining these remedies, the study aims to highlight the strengths and weaknesses of each legal framework in protecting stakeholder rights and addressing the challenges associated with their practical enforcement. The comparative approach not only elucidates the differences in legal traditions and practices but also offers valuable insights into potential areas for reform and improvement. By understanding the nuances of OHADA and English corporate law, policymakers, legal practitioners, and scholars can better appreciate the complexities of stakeholder protection and contribute to the development of more effective and equitable legal systems.

2. Remedies Under English Law

Directors of companies assume managerial powers as contained in the articles of association of the company. The separation of ownership from control creates a serious agency question, that the possibly of conflict of interest which manifests in a plethora of ways including misappropriation of company funds. [1] This mostly affects stakeholders who do not have powers to change the decisions or to challenge the actions of the directors of the company. Stakeholders under English law have various right and remedies which means that, they have the possibility to bring an action against directors when they fail to follow the correct procedure in reaching their decisions. It is important to bear in mind that any right without a corresponding remedy will be of little or real value, except perhaps as an instrument to allow the right-holders to exert moral pressure nor would it be meaningful to speak of company directors as having a duty towards stakeholders who could not take action to defend their own position, though the board may have moral responsibilities towards such person.[2] This view was corroborated by MW McDaniel who asserted that, a right without a remedy is worthless.[3]

Before discussing the remedies available to stakeholders under English Law, it will be important for us to examine a brief overview of the rule in *Foss V. Harbottle*. The reason for this is because shareholders did not have any right under this rule to bring an action but for the company to pursue its rights and settle its liabilities.

2.1 Brief Overview of Foss V. Harbottle

The rule in *Foss v. Harbottle* outlines that: If a wrong is done to the company, the company itself must take action. If the company fails to act, a member can initiate action on behalf of the company and A company can condone the wrong through a majority decision, preventing individual members from taking action. The two main rules from this case are the proper plaintiff rule, which states the company is the correct party to bring claims, and the internal management rule, which emphasizes shareholders' lack of daily management roles.[4] This was reinforced in *Salomon v Salomon & Co Ltd*, where it was held that a company, once incorporated, is an independent legal entity.[5] Exceptions to this rule allow minority shareholders to bring derivative actions in cases of fraud or where the wrongdoers control the company.

2.2 The Derivative Action Model

Section 260 of the UK Companies Act of 2006 allows shareholders to bring derivative actions on behalf of the company against directors or third parties. [6] This action aims to address situations where the company fails to act against the board of directors for negligence or breach of duty. This statutory derivative claim aims to provide a more modern, flexible, and accessible procedure compared to the rigid rules of *Foss v. Harbottle*.[7] To bring a derivative claim, it must be shown that the wrongdoers are in control and will not act, reasonable notice has been given to

[1] Sani, A. (2017). Derivative Action and Corporate Malfeasance in Uganda. *Kampala International University Law Journal*, *1*(1), 150.

[2] Janice, L. D. (2000). Op. Cit., at, p. 185.

[3] McDaniel, M. W. (1988). Bondholders and Stockholders. *J. Corp. L.*, *13*, 205-309.

[4] Julia, T. (2015). Shareholder Remedies: Demise of the Derivative Claim? *UCL Journal of Law and Jurisprudence*, 179.

[5] *Salomon v Salomon &Co Ltd* [1897] AC 22 (HL).

[6] Vimbainashe, J. M. (2018). Op. Cit., at, p. 2.

[7] Julia, T. (2015). Shareholder Remedies: Demise of the Derivative Claim? *UCL Journal of Law and Jurisprudence*, 178.

the company, and there was fraud by the majority shareholders. Courts will allow a derivative action if it defends the company's interests against those misusing their managerial powers. For a successful claim, the case must be suitable for overturning the norm, and the action must be bona fide for the company's interest. If not, the court may strike it out.[1] Employees, customers, and suppliers may bring actions if managerial wrongdoing threatens the company's solvency, impacting their contractual obligations.

2.3 The Unfair Prejudice Remedy

The use of corporate relief through unfair prejudice petitions, under Section 994 of the UK Companies Act of 2006, has increased, overshadowing the statutory derivative claim. Section 994 allows a company member to apply to the court if the company's affairs are conducted in a way that is unfairly prejudicial to the interests of members.[2] This remedy can stem from derivative claims, as courts consider whether the action subject to a derivative claim could be pursued by the member in their own right, as per Section 263(f). This was illustrated in *Re Charnley Davies Ltd No.2*,[3], where Lord Millett explained that misconduct claims belong to derivative claims, while broader misconduct claims are addressed through unfair prejudice petitions.[4] Minority shareholders often use Section 994 (formerly Section 459 of the Companies Act 1985) as it is flexible and broader in scope. They need to prove that the company's affairs are conducted unfairly to their interests. Courts interpret this section flexibly, granting broad discretion to provide relief under Section 996. However, actions favoring one stakeholder at the expense of another, such as cost-cutting redundancies, will not succeed in unfair prejudice claims.[5]

2.4 Personal Rights of Action

Despite the majority's control over a company's legal actions, individual members can sue in their own names for personal rights violations and losses. When personal rights are established, the principle of majority rule does not apply.[6] This distinction between personal and corporate rights can be confusing, and if courts were to separately address employee, customer, or supplier rights beyond contracts, the situation would become more complex. Primary stakeholders should have their positions examined by the board. Once relations break down, the law often facilitates an exit rather than resolving conflicts. However, it could provide supervision to primary stakeholders, clarifying their legitimate expectations of the board and legal protection. In conflicts among primary groups, it is not enough to focus only on shareholders' interests. Other participants have rights from contracts and legitimate expectations concerning company decisions. Quantifying losses from directorial breaches can be challenging, and personal actions sometimes result in injunctions against company resolutions. Courts must consider fairness and reasonableness in board decisions, considering all affected parties. Judicial reviews address breaches of legitimate expectation and detrimental reliance, providing flexibility according to circumstances. For example, compensation may be awarded when a public body's policy change adversely affects a party who relied on its continuance.

3. Remedies Under Ohadad Law

Similar to English law, OHADA provides remedies for stakeholders when their rights are breached. Those who either invest capital in a company or have an interest in the company are supposed to keep tract of the performance of the company and the management body may be required to act in a way that they won't breach their duties to shareholders, the creditors, employees, amongst other stakeholders. Company directors have as a duty to seek shareholders' approval in certain kind of corporate decision and to act in the interest of the company as a whole. However, this has not always been the case giving the fact that, there has always been a conflict between the directors on one hand and other stakeholders groups like the shareholders and creditors on the other hand.[7] These accounts for the reasons why corporate legislators have provided stakeholders with remedies in case there suffer damage or injury resulting from the management action or

1 Sandra, D.T. (2000). Loc. Cit., at, p. 21.

2 Julia, T. (2015). Op. Cit., at, p. 205.

3 *Re Charnley Davies Ltd (No. 2)* [1990] BCC *605.*

4 Julia, T. (2015). Op. Cit., at, p. 205.

5 Janice, L. D. (2000). Op. Cit., at, p. 196.

6 Janice, L. D. (2000). Op. Cit., at, p. 198. See the case of *Salmon v. Quin and Axtens Ltd [1909] 1* Ch *311* and *Mo: ley v Alston (1847) 1* Ph *790.*

7 Phungeh, A. N. (2011). Op. Cit., at, p. 93.

inaction. Just like English Law, OHADA UA has provided for the rights to seek specific remedies by stakeholder. These remedies are aimed at discouraging gross mismanagement and abuse of power, and to uphold the enforcement of stakeholder rights.[1]

3.1 Derivative Action

A derivative suit, initiated by a shareholder, seeks to rectify wrongs done to a company. While a company should ideally take action against directors who have wronged it, if it fails to do so, shareholders can step in. Article 166 of OHADA UACCEIGs allows shareholders to file a lawsuit for damages the company suffered due to the managers' misconduct.[2] OHADA law differs from English law in that it does not restrict the proper plaintiff to the company. Article 163 states that individual lawsuits do not prevent members from filing derivative suits in the company's interest. This provision simplifies derivative actions and makes them more accessible, protecting stakeholder interests.[3] From the provisions of the UA, it can be submitted that, the problem of assessing the extent of a wrong which really amounts to a fraud on minority face under English Law have to some extend be resolve under OHADA Law since members are given the opportunity to file a shareholder derivative lawsuit. Hence simplifying the derivative actions and improving their accessibility and in turn protecting other stakeholder's interest. To protect shareholders' right to file derivative lawsuits, the UA specifies that the competent court is within the jurisdiction of the company's headquarters. Such lawsuits must be filed within three years of the tort's commission or its disclosure, and for crimes, within ten years.[4] Derivative actions are valuable for recovering company losses and deterring future managerial misconduct.[5] Thomas P.K. argues that derivative litigation reduces agency costs and prevents misconduct,[6] while John C. Coffee Jr. notes that successful actions damage errant directors' reputations and finances.[7] These actions deter wrongdoings within the company and set a precedent for directors of other companies. In cases where the board fails to act against wrongdoers due to conflicts of interest or dominance by shareholders involved in wrongdoing, derivative litigation ensures accountability and prevents corporate injustice and misconduct.[8]

3.2 The Proper Plaintiff Rule as a Remedy

When a wrong has been committed, the company is alleged to be the initiator of legal proceedings against the wrongdoers notwithstanding the fact that the company is itself the wrong doer. This point is corroborated by Lord Davey in the case of *Burland v Earle*, who asserted that, only the company wronged by its directors is the 'proper plaintiff' and not an individual shareholder. In fact, the 'proper plaintiff' rule derives its justification from the fundamental principle that A cannot claim damages from B for the loss B has done to C.[9] Similar to the proper plaintiff rule are the majority rule and the internal management concept, which assert that decisions about the internal affairs of a company should be made based on the majority's decision. Courts generally do not intervene at the request of an individual shareholder in the company's decision-making unless such decisions violate the law.[10] These concepts are encapsulated in the rule in Foss v Harbottle[11], which establishes that the proper plaintiff to seek redress for a wrong done to the company is the company itself.[12] However, over time, exceptions to the proper plaintiff rule have been developed,

[1] Linda, M. (2014). A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2). *Mediterranean Journal of Social Science*, *5*(1), 70. ISSN. 2039-9340.

[2] Artiicle 166 Paragraph (1), (2), of the UACCEIGs

[3] Article 163 of the UACCEIGs.

[4] Ibid Article 164 Paragraph 1 and 2.

[5] Aamir, A. (2017). Op. Cit., at, p. 22. See also the decision held in the case of Richardson Greenshields of Canada Ltd v Kalmacoff (1995) 123 DLR (4th).

[6] Thomas, P. K. (1994). Stockholder Derivative Suits: Demand and Futility where the Board Fails to Stop Wrongdoers. *Marquette law Review*, *78*, p. 175.

[7] John, C. C. (1993) New Myths and Old Realities; The American Law institute faces the derivative action. *The Business Lawyer*, *48*, p. 1409.

[8] Aamir, A. (2017). Op. Cit., at, p. 14.

[9] Lord *Davey in Burland v Earle* [1902] AC 83 PC, 93. See also the case of Wallersteiner v Moir (No 2) [1975] QB 373, 390.

[10] Aamir, A. (2017). Op. Cit., at, p. 14. See also the case of Sammel v President Gold Mining Co Ltd [1969] 3 SA 629 (A), 678.

[11] Foss v Harbottle [1843] 2 Hare 461, 67 ER, 189. See also Wedderburn, K. M., (1957), Shareholders Rights and the Rule in Foss v Harbottle. *Cambridge Law Journal*, *15*(2), 194-215, 198.

[12] Phungeh, A. N. (2011). Op. Cit., at, p. 116.

allowing individual shareholders of a wronged company to initiate litigation against errant directors in certain situations. These exceptions are limited and do not cover all modern managerial transgressions. [1] For instance, a breach of director's duty is not actionable unless the applicant can show fraud against minority shareholders and that the wrongdoers are in control.[2] Determining the extent of a wrong that constitutes fraud on the minority is challenging, leading to conflicting judgments.[3] Also, it is ambiguous whether a wrongdoer who is not in control of a company or a de facto controller can be proceeded against. The exceptions to the Foss Rule do not also include claims of negligence which can provide shelter to errant directors to absolve themselves of their liabilities. [4] To address these limitations, Article 163 of the OHADA Uniform Act (UA) aligns with class action provisions found in India's 2013 Companies Act, specifically Section 245.

This section allows members or depositors to file a class action if the management or conduct of the company's affairs is prejudicial to the company or its members or depositors. [5] However, critics such as Mihir Naniwadekar and Umakanth Varottil argue that Section 245 does not explicitly consider the interests of all stakeholders. They point out that the class action provisions seem to focus on damage to a class of members rather than a broader range of stakeholders. [6] The specific reference to the interests of the company or its members and depositors suggests that the legislature did not contemplate the broader stakeholder interests in crafting this remedy. Subsection (10) of Section 245 allows a person or association representing affected persons to file a class action, but the act or omission specified in subsection (1) does not consider the interests of persons other than members and depositors. [7] As a result, the availability of the class action remedy is limited to members and cannot effectively enforce the rights of other stakeholders, who are the ultimate beneficiaries of directors' duties.

While the proper plaintiff rule and its exceptions aim to protect the company and its shareholders, the limitations and challenges in these rules necessitate broader legal frameworks like those provided by OHADA UA and other modern companies acts to ensure comprehensive protection and enforcement of stakeholders' rights.

3.3 Personal Action

A personal action can be brought when a member's rights are violated. A shareholder has individual rights due to their membership in a company. These rights are protected by law, and if they are violated, the affected member can take legal action without needing approval from other members, since they are the one who suffered the loss.[8] According to the OHADA Uniform Act, a personal lawsuit can be filed if a member suffers a loss distinct from the company due to wrongful acts by the company's managers. This lawsuit is filed by the person who was harmed. [9] If the majority of shareholders act beyond acceptable limits, a member can sue the company personally. This might happen if the member's rights, like the right to vote at meetings or the right to ensure the company follows its own rules, are violated. Such an action can also be brought if illegal conduct or violations of common law occur, such as failing to protect minority shareholders or illegally reducing company capital. [10] The OHADA Uniform Act also states that decisions made by a majority that abuse their power are null and void. If a decision benefits the majority at the expense of the minority, the minority members can sue for damages.[11]

Personal action can also be used if there is fraud

[1] Aamir, A. (2017). Op. Cit., at, p. 15.

[2] Prudential v. Newman Industries (No.2) [1982] Ch. 204, 210-11.

[3] Aamir, A. (2017). Op. Cit., at, p. 15. See also Regal (Hastings) Ltd v. Gulliver [1942] 1 All ER 378; North-West Transportation Ltd v. Beatty (1887), 12 App Case 589; Queensland Mines v. Hudson (1978) 52 ALJR 399; Pavlides v. Jensen [1956] Ch 656.

[4] Aamir, A. (2017). Op. Cit., at, p. 15.

[5] Section 245 of the 2013 India companies Act.

[6] Mihir, N., & Umakanth, V. (2016). The Stakeholders Approach towards Directors Duties under India Company Law: A Comparative Analysis. NUS Centre for Law and business Working Paper 16/03, p. 16.

[7] Ibid.

[8] Phungeh, A. N. (2011). Op. Cit., at, p. 114.

[9] Article 162 Paragraph (1), and (2), of the UACCEIGs.

[10] Ibid at Article 129 which provides that the voting rights of each member shall be proportional to her participation on the capital of the company, unless otherwise provided in this uniform Act. The UA also provide in Article 125 U that, unless otherwise provided for in this uniform Act, any member has the right to vote on collective decisions. Hence in instance where members are denied this right or their right to vote has been violated, they can bring a personal action against the wrongdoer.

[11] Article 130 of the Uniform Act on Commercial Company and Economic Interest Groups.

against minority shareholders, which can include the misuse of company assets, abuse of power, or discrimination. Fraud also includes acts of negligence that benefit the wrongdoer, but not those that don't benefit them.[1] One key use of personal action is to enforce a member's rights under the company's constitution. The relationship between company members is based on a contract, and enforcing these rights is important for protecting not just shareholders but other stakeholders as well. To support this, the OHADA Uniform Act allows three years to file a personal lawsuit from the time of the harmful event or its discovery if it was hidden. For crimes, the time limit is ten years.[2]

Despite the potential of this remedy, courts have been hesitant to enforce members' rights because a member's ability to sue is often determined by whether the majority shareholders can approve or ratify the wrongdoing. Some authors believe this hesitation is due to a fear of overwhelming the courts with shareholder lawsuits.

3.4 Representative Action

When the rights of two or more members are infringed, and the infringement affects other shareholders similarly, a representative action is appropriate.[3] In such cases, one or more shareholders may bring a representative action on behalf of all affected members to enforce their rights.[4] A judgment from a representative action binds all parties involved. The company can defend against a representative action by demonstrating that the plaintiff participated in or acquiesced to the act in question.[5] The wrongful act must affect not just the individual suing but also other shareholders in a similar way. The OHADA Uniform Act (UA) stipulates that shareholders may file a derivative lawsuit against directors either individually or collectively. If shareholders represent at least one-twentieth of the stated capital, they can designate one or more representatives to act in the common interest.[6] The withdrawal of one or more shareholders during proceedings does not affect the continuation of the lawsuit. Plaintiffs can seek compensation for the entire loss suffered by the company, which is awarded as damages. If the payment of damages to the company does not compensate shareholders for their losses due to a breach of directors' duty, a representative action may still be brought. This was demonstrated in the case of Haron International Ltd v. Lord Grade[7]. If a plaintiff decides to discontinue a representative action, any other member can apply to the court to be substituted as the plaintiff. Additionally, represented shareholders who disagree with the plaintiff's action may apply to be joined as defendants.[8]

3.5 Comparative Analysis: OHADA vs. English Law

In comparing the position under OHADA Uniform Act and the UK Companies Act, we have already seen that, OHADA Law does not adopt the have regard to approach or a hierarchical approach that puts shareholder interests on top when it comes to pursue of a personal right of action, but rather give an opportunity for members to bring an action in the interest of the company. At first blush, the textual analyses of the statutory provisions under OHADA and the UK suggest a great deal of disparity in the treatment of this personal right of action.[9] While OHADA appears to have given opportunity to an individual and more members to file a shareholder derivative lawsuit in the interest of the company for damages the company suffered,[10] it follows that courts under UK is entitled to examine the conduct of the person who intends bringing a derivative action to make sure that, the person is doing so in the interest of the company. This has however, bar some stakeholders from bringing derivative lawsuit. On this count, OHADA seems to have granted better protection to stakeholders in comparison with the UK. Also, under English Law, members can only file a shareholder derivative lawsuit in the interest of the company for damages the company suffered not in their own interest and for the damage they suffered whereas under OHADA Law, member can file a

1 In United Kingdom jurisprudence the term 'fraud' in this context has been held to include appropriation of the company property, wrongdoer control of the company and abuse of power, whether unintentional, intentional, negligent, or fraudulent.

2 Article 164 Paragraph (1), and (2), of the UACCEIGs.

3 Stephen, G. (1996). *Company Law Fundamental Principles*, second edition, Pitman Publishing, London Hon Kong Johanesburg Melbourne, Singapore, Washington DC, p. 298.

4 Phungeh, A. N. (2011). Op. Cit., at, p. 115.

5 Stephen, G. (1996). Op. Cit., at, p. 298.

6 Article 741 Paragraphs 1, 2, 3, 4 of the UA.

7 *Haron International Ltd v. Lord Grade*, [1983], BCLC, 244-262.

8 Phungeh, A. N. (2011). Op. Cit., at, p. 115.

9 Mihir, N., & Umakanth, V. (2016). Op. Cit., at, p. 12.

10 Article 163 of the UACCEIGs.

lawsuit in their interest and for the damage they suffered.[1] If we were to dig deeper into the legalities of the enforcement of directors' duties and other operational matters regarding the assertion of rights by stakeholders, an altogether different picture emerges.[2] Despite the textual disparity between OHADA and English Law in the directors' duties to uphold stakeholder interests, we find that a deeper analysis suggests that, the two regimes are not entirely far apart. Several issues relating to the inability of stakeholders to assert their rights and take advantage of a seemingly beneficial regime brings the law in OHADA somewhat closer to English Law than it appears at the outset.

4. Challenges in the Protection of Stakeholders' Interests

The apparent retention of the traditional formulation in regard to directors' duties to act in the interests of the company could be in recognition of the fact that, the inclusion of a range of other stakeholders' welfares under interests that should be protected by directors in discharging their duties[3] to the company is fraught with numerous problems, the most obvious one probably being the difficulty in enforcing such duties. In addition, such an approach would place a burden on directors, who would be required to judge how much weight should be attached to particular interests at any given point in time, so as to steer clear from the increased risk of personal liability.[4] OHADA Law is based on Civil Law and has, to a certain extent, borrowed from the French Business Law even if it does not amount to a mere transplant to the French Law, having several substantial differences.[5] Its poses some trouble to the Anglophone speaking part of Cameroon. The issue of the relationship between OHADA Law and the Common Law is not only theoretical, as it deals only in the perspective of future accessions of countries belonging to Common Law legal tradition; it has also immediate effects since some of the English-speaking provinces of Cameroon still apply their Common Law system with the Cameroonian legal framework.[6]

5. Challenges Under English Law

The major problem faced by aggrieved shareholders in UK is the ambiguity that exists as to grounds on which an action can be initiated. This problem, according to Vimbainashe, J. M., exist because of courts not providing a list of shareholder's personal rights to be protected under s994 and their failure also to draw a distinction between the wrongs that may be remedies under a derivative action and the ones by an unfair prejudice action.[7]

5.1 Difficulties to Enforce Section 172(1) by the Non-Shareholders Group

Section 172 of the UK Companies Act 2006 embodies the concept of "enlightened shareholder value," but its precise meaning is unclear.[8] If this section is to truly benefit stakeholders, enforcement is crucial. As MW McDaniel states, a right without a remedy is worthless.[9] A derivative claim may be brought in respect of breach of duty by a director and so, technically, s172 is potentially enforceable via this procedure.[10] But the question we are tempted to ask as this point is whether stakeholders can bring legal action against directors who breached their duties under s172. The answer according to Andrew k., is no.[11] This answer is no merely for the fact that, the duty under s172 is owed to the company and not to stakeholders as individual. Consequently, only shareholders, who are entitled to bring derivative proceedings on the company's behalf in certain circumstances, are capable of taking action.[12]

Under section 172, the duty is owed to the company, not to individual stakeholders. Therefore, only shareholders can bring derivative proceedings in certain situations.

1 Ibid. at, Article 172.

2 Mihir, N., & Umakanth, V. (2016). Op. Cit., at, p. 12.

3 Nchofua. A. N. (2021). A Critical Analysis of Directors Duty Under Ohada and English Corporate Law. *International Journal of Legal Development and Allied*, *7*(2), 117-132.

4 Sulette, L., & Tronel, J. (2014). Op. Cit, at p. 228.

5 Paulin, H., & Sibao, S. (2013). Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA). *Beijing Law Review*, p. 5.

6 Ibid.

7 Vimbainashe, J. M. (2018). Op. Cit., at, p. 17.

8 Julia, T. (2015). Op. Cit., at, p. 186.

9 McDaniel, M. W. (1988). Bondholders and Stockholders. *J. Corp. L.*, *13*, 205-309.

10 Rachel, C. T. (2017). Op. Cit, at p. 4. See also section 260(3), of the UK Companies Act 2006.

11 Andrew, K. (2007). Section 172(1) of the Companies Act 2006: An Interpretation and Assessment. *Corporate Law Review*, *28*(4), 106-109. See also Rachel C. Tate, Op. Cit, at p. 4.

12 Section 260(3), of the UK Companies Act 2006. See also Rachel, C. T. (2017). Op. Cit, at, p. 4.

However, not all shareholders can act. Institutional shareholders, for instance, are often discouraged from bringing actions even if directorial wrongdoing is evident, as it's deemed the company's decision whether to pursue legal action.[1] Stakeholders rely on shareholders to address noncompliance, which depends on altruistic or activist members willing to represent stakeholder interests.[2] This is rare and usually occurs only when shareholders view their investment as long-term and believe directors are harming business relations, or when shareholders are also employees or community members affected by the company's actions.[3]

This idea of shareholders bringing an action on the behalf of other stakeholders is however not the best. This is so because, employees, for example, may be in a far better position to observe how directors are performing than shareholders.[4] Through the Public Interest Disclosure Act 1998, the legislature has already recognized the value to the public of encouraging those who become aware of wrongdoing within a company to blow the whistle on employer malpractice by protecting the whistle blower.[5] Established customers and suppliers who have doubts about the financial practices or competence of those running a company with which they deal may also wish to take action. In the event of corporate insolvency, it is unsecured creditors who would be likely to suffer financial hardship. In any such case, there would need to be a preliminary process to ensure that there were genuine grounds for the suspicions aired and that the action was not being brought out of personal malice.[6]

There needs to be a preliminary process to ensure genuine grounds for any suspicions raised and that actions aren't driven by personal malice. Additionally, linking Part 11 of the Act to directors' duties is complex.[7] The codification of directors' duties hasn't eliminated the need to refer to past case law, creating ambiguity around the importance of common law rules and equitable principles. This further complicates the enforcement of section 172 by non-shareholders.[8]

5.2 Difficulties to Bring a Derivative Claim by the Shareholders

The Common Law made it very difficult for shareholders to bring a derivative claim.[9] In Salomon v Salomon & Co Ltd, it was decided that a company should be treated as a separate legal entity with its own rights and liabilities.[10] This means that only the company can enforce its rights and settle its liabilities, not the shareholders, as seen in Edwards v Halliwell.[11] This is tied to the majority rule, which means courts generally do not interfere with company management decisions, limiting shareholders' ability to seek remedies. However, an exception to this rule was developed in *Foss v Harbottle*, but it was complicated and unclear.[12]

The Law Commission found the existing procedure unsatisfactory and proposed a new derivative claim with clearer, more flexible criteria. The strict requirements of fraud on the minority and wrongdoer control were replaced with general court discretion, giving shareholders a presumptive right to claim if conditions are met.[13] Despite these reforms, legal remedies for shareholders remain hard to access, and incentives to monitor board performance are weak. Ambiguity remains about the grounds for action under s994, and the difference between derivative actions and unfair

1 Janice, L. D. (2000). Op. Cit., at, p. 191.

2 Andrew, K. (2007). Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'. *Syd LR*, *27*, p. 609.

3 Rachel, C. T. (2017). Op. Cit, at, P.4. See also, Andrew, K., (2007). Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'. *Syd LR*, *27*, p. 609.

4 Janice, L. D. (2000). Op. Cit., at, p. 191.

5 Ibid. she argues that Members have no right to see accounting records and may have to wait for seven months in a public company before the final accounts are laid before them in a general meeting. See also Companies Act 1985 S.222, 242.

6 Janice, L. D. (2000). Op. Cit., at, p. 191.

7 Julia, T. (2015). Op. Cit., at, p. 187.

8 Joseph, L. (2007). Shareholders' Derivative Claims under the Companies Act 2006: Market Mechanism or Asymmetric Paternalism? *International Company and Commercial Law Review*, *18*, 378-380.

9 Rachel, C. T. (2017). Op. Cit, at, p. 5. *Foss v Harbottle,* (1843) 67 All ER 189.

10 Vimbainashe, J. M. (2018). Op. Cit., at, p. 4.

11 *Edwards v Halliwell* [1950] 2 All ER 1064-67.

12 Rachel, C. T. (2017). Op. Cit, at, p. 5. See also, Law Commission, *Shareholder Remedies* (Law Com No 246, 1997) [6.4] http://www.justice.gov.uk/lawcommission/docs/lc246_Shareholder_Remedies.pdfaccessed 12/08/2020.

13 Janice, L. D. (2000). Op. Cit., at, p. 325. See also, Section 459, of the UK CA See the case of *Re. Blue Arro plc [1987]* BCLC *383; Re. Astec BSR,) p/c [199812 BCLC 556 and PrzidenIialAsurance Co. Lidv Newman lnduiries Ltd [1982]* Ch. *204; Smith v Croft (No.2)* [1988] Ch. *114.*

prejudice actions is unclear.[1] A common ground for unfair prejudice is excluding a minority shareholder from management without a fair buyout offer, as in *Crowley v Bessell*.[2]

5.3 Length and Complexity of the Litigation Process

Shareholders in UK public companies have little influence over executive decisions. Financial institutions are trying to change this but are limited by the lack of effective sanctions. The open-ended nature of s263 (3) of the 2006 Act adds uncertainty, making it difficult for practitioners and shareholders to use the remedy. The complexity and length of the litigation process also deter shareholders from bringing claims. They must first establish a prima facie case,[3] and if accepted, seek court permission to proceed, which often fails due to the court's broad discretion and reluctance to second-guess business judgments.[4] This can turn the process into a lengthy preliminary trial.

5.4 Tight Judicial Control

The purpose of derivative actions is to address situations where a company fails to act against its board of directors for not performing their duties. Tang argues that the 2006 UK legislative derivative claim was expected to resolve the confusion caused by the Foss v Harbottle rules. However, it instead increased the complexity of pursuing a derivative claim.[5] Derivative claims remain tightly controlled by the courts and are a last resort.[6] Section 262(1-4) of the UK Companies Act stipulates that a shareholder must apply to the court for permission to continue a derivative claim and if the court finds no prima facie case, it must dismiss the application and may make any appropriate orders. If not dismissed, the court may direct the company to provide evidence and may adjourn the proceedings for this purpose. On hearing the application, the court can grant permission, refuse permission and dismiss the claim, or adjourn and give directions as it sees fit.

Despite these provisions, the process is still biased in favor of management. This discourages shareholders from pursuing derivative claims, potentially allowing corporate wrongdoing to go unchallenged.[7] In contrast, OHADA law does not impose such strict judicial control. It allows shareholders to file a derivative lawsuit after giving notice to the competent bodies, with a 30-day response period. If successful, any damages awarded go to the company, not the petitioner, providing better protection for shareholders.[8] To improve the situation under English law, the complex and cumbersome procedures for derivative claims can be simplified, though not entirely eliminated, to prevent frivolous claims.

5.5 Litigation Cost/Fee

The cost of litigation is a major obstacle for shareholders seeking to bring a derivative claim, often deterring them from taking action.[9] Financial considerations are usually the first factor a shareholder assesses when deciding whether to pursue a derivative claim. Without strong financial backing, even a valid claim is unlikely to proceed, especially since legal aid is not available, and any award goes to the company, not the individual shareholder.[10] The Common Law rules on costs and fees remain unchanged and need re-evaluation for any significant improvement to occur. In most public companies, the potential increase in share value does not justify the time and risk involved in litigation. Shareholders are often dissuaded from pursuing claims due to the possibility of incurring high costs if the case fails. Janice Louise Dean argues that the new procedures do not incentivize shareholders to litigate, and dissatisfied shareholders may prefer to sell their shares and invest elsewhere.[11] However, indemnity costs orders can provide financial incentives, allowing shareholders to be reimbursed for litigation costs if they acted in good faith and on reasonable grounds, as

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1 Vimbainashe, J. M. (2018). Op. Cit., at, p. 17.

2 *Crowley v Bessell,* [2015] EWHC 1518.

3 Rachel, C. T. (2017). Op. Cit, at, p. 5, see also Companies Act 2006, s 261(2).

4 Alan, D., & John, L. (2009). *Company Law,* 5th edn, OUP, P. 190, see also Rachel C. T., (2017), Op. Cit, at, p. 6.

5 Julia, T. (2015). Op. Cit., at, p. 178.

6 Gibbs, D. (2011) Has the Statutory Derivative Claim Fulfilled its Objectives? The Hypothetical Director and CSR: Part 2. Co *Law, 32*(3), 76-82.

7 Rachel, C. T., Op. Cit, at, p. 6.

8 Article 167 of the UACCEIGs.

9 Alan, D., and John, L. (2009). *Company Law*, 5th edn, OUP, pp. 190-191.

10 Julia, T. (2015). Op. Cit., at, p. 201.

11 Janice, L. D. (2000). Op. Cit., at, p. 193.

established in Wallersteiner v Moir.[1]

In Smith v Croft, claimants must also demonstrate a genuine need for indemnity. Recent cases, like Kiani v Cooper, show that courts have taken a pragmatic approach to indemnity costs orders, though some costs must still be borne by the claimants. This balancing act by the courts is delicate, as overly generous indemnity orders could encourage frivolous claims, while strict orders may deter legitimate ones. Critics argue that indemnity costs orders are not automatic or generous, creating uncertainty and potentially deterring shareholders from pursuing derivative claims. The Companies Act 2006 lacks a clear procedure for indemnity costs, leaving shareholders at risk of bearing litigation expenses if the claim fails. Minority shareholders often lack the necessary information to initiate a claim and face significant financial risks.[2] Julia Tang notes that financial disincentives make derivative claims rarely rational. To address this, it is recommended that courts have the power to make indemnity costs orders in derivative claims. Reducing litigation costs is crucial for improving the system, but courts must balance the need to prevent frivolous claims with ensuring genuine claims are not hindered.[3]

In contrast, OHADA Law offers a clearer solution, covering litigation expenses and legal fees for shareholder lawsuits. South Africa also has a broader approach, extending the derivative remedy beyond shareholders and directors to any person with court leave. The UK could benefit from incorporating elements of South African, Australian, Canadian, and OHADA Law systems to develop its derivative action framework.

5.6 Difficulties to Enforce Employees Collective Agreement

In England, a collective agreement is enforceable only if it is in writing and explicitly states that it is legally binding. This reform is a step forward but not foolproof. The law requires an express stipulation that the agreement is legally binding, which can be problematic. For instance, a collective agreement might be created after an employee's contract has begun, as seen in Texaco (Nig) PLC v Kehinde. In this case, the employee's contract started in 1981, but the collective agreement was made later, so the employee's claim under the agreement was not valid since it was not incorporated into the employment contract.[4]

Another issue is employers' reluctance to incorporate collective agreements into contracts to avoid potential liability. Employees in need of jobs often cannot insist on such incorporation, and new job seekers may be unaware of these issues, leaving them vulnerable. To address this, it is recommended that English law adopt US theories on collective agreements' enforceability.[5] The first US theory is "custom and usage," where if an employee sues for breach of a collective agreement, it implies that the terms of employment, by custom and usage, are those bargained by the union. The second theory is the "rule of agency," which considers the union as the employees' agent, thus bargaining on their behalf. Implementing these theories would provide better protection for employees.[6]

5.7 The Rigidity of the Common Law Rules of Privity of Contract

The rigidity of the twin Common Law Rules of privity of contract and intention to create legal relations accounts for the non-enforceability of collective agreements is one of the difficulties faced by corporate employees. This position creates certain setbacks for employees, particularly the fact that it encourages employers to be nonchalant and insensitive to the need for ameliorating the working conditions of employees both as a matter of social welfare and responsible corporate citizenship as Valentine Tebi Mbeli put it.[7] A hidden cost is that employees become less enthusiastic about the enterprise which may lead to turn-over squeeze. The non-implementation of a collective agreement can also induce the spirit of strikes, thus

[1] Ibid. see also the decision held in the case of *Wallersteiner v Moir* [1975] QB 373, No. 2. Julia Tang held that Roth Jin *Stainer v Lee adopted* a slightly more permissive interpretation when he stated that *Wallersteinerv Moir (No. 2)* is clear authority that a shareholder who is granted permission to continue should normally be indemnified as to such reasonable costs by the company for whose benefit the claim is taken.

[2] Julia, T. (2015). Op. Cit., at, p. 20. See also the decision in the case of *Kiani v Cooper* [2010] EWHC 577 (Ch), [2010] BCC 463 [49].

[3] Ibid.

[4] Valentine, T. M. (2017). Disqualification of Company Directors under Nigeria Law: An Overview. *Kampala International University Law Journal*, *1*(1), 3-14.

[5] Ibid.

[6] Ibid.

[7] Valentine, T. M. (2017). Op. Cit, at, p. 8.

disrupting industrial peace which is the most cherished factor of corporate governance. More troublesome is the fact that strikes are capable of creating poor corporate reputations following outcries by employees and their unions.[1] This may result to loss of customers and financial loss may be incurred.[2]

5.8 Difficulties to Prove Breach of Section 172

Proving a breach of Section 172 is expected to be challenging. Directors have significant discretion in deciding what they believe will promote company success and how to consider stakeholders. According to Arad Reisberg, directors' judgments on what constitutes success and how to achieve it are central to their role. Vimbainashe J. M. questions whether decisions made under the business judgment rule will affect interpretations of Section 172, suggesting that this could limit the court's role and make it harder to bring derivative claims. Julia Tang notes that directors might use their good faith judgment under Section 172 to justify their actions, making it tough to prove a breach.[3] Section 172 requires directors to act in what they believe is the best way to promote company success, without a clear standard for judging their actions. Directors will argue that they considered all relevant factors and acted in good faith, which will be hard to dispute. With core terms not well-defined, interpreting and applying the section is difficult.[4] Additionally, while current and future shareholders can bring derivative claims, those doing so merely to challenge management might face skepticism. The procedural requirements and judicial attitudes may deter such claims. Overall, proving a breach of Section 172 will be tough, and it's uncertain if derivative actions will effectively support broader stakeholder interests in corporate governance.[5]

5.9 Difficulties to Bring a Derivative Claim by Other Stakeholders Group

Bringing a derivative claim under Section 172 of the UK Companies Act faces several challenges. Section 172 primarily benefits shareholders rather than other stakeholders, such as employees or suppliers. These other stakeholders lack direct remedies like derivative or class actions. Directors' duties under Section 172 are vague and difficult to enforce, making the provision more rhetorical than practically enforceable. While shareholders can bring derivative actions if the company does not, this usually only applies when the company itself is harmed. Claims based on stakeholder interests are hard to justify under current exceptions to the rule. Creating a new legal remedy for stakeholders would require significant legislative changes.[6] Currently, other stakeholders cannot bring derivative actions due to concerns about case multiplicity and the priority given to shareholders. This hierarchy neglects the financial impact on stakeholders like employees and suppliers who may also suffer from company mismanagement. Unlike UK law, OHADA law allows both shareholders and other stakeholders to bring claims if it benefits the company. English law should consider adopting such an approach to protect stakeholder interests more effectively and improve company governance.[7]

6. Challenges Under OHADA Law

The Organization for Harmonization of African Business Laws (OHADA) was created to address the legal uncertainties that discouraged international investment in Africa. This treaty aims to provide a modern, unified legal framework for business laws to foster investment and economic growth. Most OHADA members share a Civil Law tradition, but Cameroon has both French-speaking and English-speaking regions, with the latter following Common Law. OHADA Law relies on general rules and principles found in its Codes, while Common Law uses judicial precedents and only includes necessary pre-determined rules.[8] The Uniform Acts of OHADA are drafted in French and translated into English, but these translations are often inaccurate or unclear, making it difficult for English-speaking investors to rely on them.[9] This language barrier limits the encouragement for English-speaking investors compared to their French-speaking counterparts. Although OHADA aims to include other African countries beyond the original

[1] Ibid. at, p. 9.

[2] Jimmy, W. (2017). Corporate Governance and Ethical Standards in Business: The Ugandan Experience. *Kampala International University Law Journal*, *1*(1), 98.

[3] Valentine, T. M. (2017). Op. Cit, at, p. 8.

[4] Vimbainashe, J. M. (2018). Op. Cit., at, p. 9.

[5] Vimbainashe, J. M. (2018). Op. Cit., at, p. 9.

[6] Mihir, N., & Umakanth, V. (2016). Op. Cit., at, p. 13.

[7] Janice, L. D. (2000). Op. Cit., at, p. 190.

[8] Mohammed, B. I. (2009). Op. Cit., at, p. 22.

[9] Ibid.

Francophone members, challenges remain, such as language barriers, enforcement issues, lack of corporate management expertise, and political pressures. In this area, will focus on the difficulties of applying OHADA Law in Cameroon's Anglophone region and other non-French speaking OHADA countries. In Cameroon, particularly in the Anglophone regions, these challenges are pronounced due to the dual legal systems and language differences. Efforts to expand OHADA's membership to include non-French-speaking African countries and beyond could help address these issues, but substantial hurdles remain.

6.1 Different Social and Cultural Norms

In Africa, social and cultural norms often take precedence over legal rules, including those established by OHADA. Unlike the UK, where laws have evolved to align with cultural practices, African countries are still working to harmonize their legal systems with diverse cultural traditions. OHADA, based on the French Civil Law model, faces challenges in persuading African countries with different legal traditions to follow its rules. When OHADA laws conflict with local cultural norms, cultural norms usually prevail.[1] This makes it difficult for OHADA to enforce its policies on corporate governance effectively. The diverse cultural landscape in Africa complicates the application of OHADA's standards, leading to uncertainty and limiting its impact on business practices. In contrast, the UK has achieved greater legal certainty and predictability, which supports business development. OHADA still needs to assert its authority and enforce its laws over local cultural practices to improve its effectiveness.[2]

6.2 Language Barrier

Since its establishment in 1993, OHADA (Organization for the Harmonization of African Business Laws) has faced challenges, particularly with language barriers. Originally, OHADA laws were drafted only in French, creating difficulties for English-speaking countries like Ghana and Cameroon, which argued that French dominance marginalized other languages. Although amendments in 2008 added English, Spanish, and Portuguese as working languages, translations of OHADA Uniform Acts into these languages have often been criticized for inaccuracies and lack of clarity. This has led to a preference for conducting business in French and created obstacles for English-speaking investors and jurisdictions.[3]

In Anglophone Cameroon, this language issue has led to significant legal challenges. Courts have questioned the applicability of OHADA laws in English-speaking regions, viewing them as instruments of French influence. As a result, the OHADA Treaty's French version remains the authoritative text, despite efforts to include other languages. The situation highlights the need for better translations and a more inclusive approach to ensure OHADA's effectiveness across its diverse member states.[4] Developing a consistent OHADA lexicon and improving translation quality could help address these challenges and support better integration of OHADA laws.

6.3 Lack of Expertise in the Management of Corporations

In Africa, the management of corporations often suffers from a lack of expertise. Business decisions are frequently influenced more by family connections than by professional qualifications. Managers may not fully understand or apply fiduciary duties outlined by OHADA because family ties and ownership take precedence over expertise.[5] This contrasts with the UK, where expertise is a primary criterion for selecting managers. In the UK, the constant search for skilled management and the potential for management changes are seen as beneficial for corporate governance. This dynamic ensures that fiduciary duties, which are crucial for protecting shareholders' interests and enhancing corporate management, are more effectively enforced.[6] In Africa, however, the preference for family-based management and the lack of awareness or application of fiduciary duties mean that OHADA's provisions often fail to create a productive corporate environment. This situation highlights the need for a shift towards expertise-driven management to

[1] Zachée, P. T. (2010). Op. Cit., at, P. 27.

[2] Zachée, P. T. (2010). Op. Cit., at, P.27.

[3] Martha, S. T. (2009). OHADA as Experienced in Cameroon: Addressing Areas of Particular Concern to Common Law Jurists. In *Unified Business Laws for Africa: Common Law Perspectives on OHADA*, p. 71. GMB Publishing Ltd. Hereford House, London.

[4] Ngaundje, D. L. (2018). Op. Cit., at, p. 111.

[5] Zachée, P.T. (2010). Op. Cit., at, p. 27.

[6] Ibid.

improve adherence to fiduciary duties and corporate governance standards.[1]

6.4 Incomplete Integration Challenge

OHADA's current scope does not cover all areas of business law, such as mergers and acquisitions, investment, or employment. As a result, where OHADA has not yet adopted a Uniform Act (UA) for a specific area, national laws still apply. This leads to a mix of modern OHADA laws and outdated national regulations, creating legal uncertainty. For instance, aspects like asset seizures and employee wage claims during insolvency are governed by national laws rather than OHADA's modern provisions.[2] This incomplete integration can cause confusion and uncertainty for investors and businesses. Although OHADA is working on new UAs, such as those for contracts and employment, the current gaps create challenges. Additionally, extending OHADA's scope could conflict with other regional organizations, like CEMAC. To address these issues, regional bodies in Africa need to collaborate to harmonize their laws and reduce conflicts.

6.5 Poor Corporate Governance

Poor corporate governance is a significant challenge in OHADA, overshadowed by more effective regimes like the OECD, King Code III of South Africa, and the 2006 UK Companies Act. OHADA's corporate governance provisions, such as voting rights and statutory auditors, are inadequate compared to these systems.[3] For instance, OHADA does not address the rights of employees or other stakeholders, allowing for potential abuse. Additionally, there is no clear separation between the roles of chairman and chief executive officer, as OHADA combines these roles into a single position called the Administrator General.[4] The absence of independent directors further weakens oversight of CEOs, and the disclosure mechanisms are deficient, relying on manual, offline company registries. Therefore, we recommend that OHADA member states adopt a principle-based approach to corporate governance, providing flexibility to develop appropriate structures and adapt gradually, learning from robust systems in other countries.

6.6 Political Pressures

Political pressures also significantly impact corporate performance in Africa. OHADA law emerged in an environment marked by corruption, leading some corporate managers to engage in unethical behavior without facing consequences.[5] Political pressures can lead to prioritizing political interests over legal compliance, making the enforcement of harmonized laws challenging. In countries like Cameroon, Senegal, and Côte d'Ivoire, bribery and other corrupt practices are not uncommon, as seen in cases like the Airfare Agency, which maintained close ties with the government while avoiding punishment for illegal activities.[6] In contrast, the UK demonstrates a clearer separation between political and economic power, with businesses operating independently of political influence. Although African governments create appealing laws, they sometimes encourage practices that undermine legal compliance, creating a business environment focused on satisfying political powers rather than adhering to legal standards. Despite these challenges, some large companies continue to operate within OHADA countries.

6.7 Gaps in the Regulatory Framework

In OHADA states, the regulation of the insolvency profession is a key issue, with each state allowed to set its own rules for regulating legal representatives. According to Article 4 of the Revised Insolvency Act (RIA), member states have the authority to establish rules and supervise legal representatives. However, this could lead to inconsistencies and weaken the binding nature of the RIA, contrary to OHADA's goal of unity and harmony.[7] Article 4(1) of the RIA outlines the conditions for appointing legal representatives. Candidates must be on the national list, hold full civil rights, not have faced disciplinary actions, and be accounting experts. They must also have a domicile in the relevant state and provide sufficient guarantees to the court. However, the term "sufficient guarantee" is vague and could lead to confusion and corruption. Furthermore, there are no specific qualifications or experience required for the role, leading to poor understanding and application

1 Ibid.

2 Irene F. S., &Lang Abel Z.N. (2016). Op. Cit., at, p. 106.

3 Emmanuel, T. J. M. (2015). Op. Cit., at, p. 58.

4 Ibid.

5 Zachée, P. T. (2010). Op. Cit., at, p. 28.

6 Ibid.

7 Ngaundje, D. L. (2013). Op. Cit., at, p. 36.

of the law. For example, in the case of *SOH Cameroon S.A v. UDEC,* the judge declared bankruptcy without specifying the type of procedure, reflecting the poor quality of legal representation and resulting in prolonged insolvency proceedings. This uncertainty reduces asset value and creditor recovery chances. To address these gaps, references to the UNCITRAL Legislative Guide on Insolvency and the Model Law on Cross-Border Insolvency could be beneficial.[1]

6.8 Lack of Diversity

OHADA Law faces criticism for its lack of diversity, particularly regarding its application in non-Francophone African countries. The main issue is the predominantly Civil Law approach in OHADA's Uniform Acts, which contrasts with the Common Law systems of countries like Cameroon and Guinea-Bissau. Civil Law interprets statutes based on legislative intent, while Common Law relies on judicial precedents.[2] OHADA's strong French Civil Law influence makes it challenging for countries with different legal traditions to fully integrate. For example, SADC countries need a more flexible system to accommodate various legal traditions, but OHADA's one-size-fits-all approach does not cater to these differences, hindering broader adoption and integration.[3]

6.9 Institutional Challenges

OHADA was designed to provide a secure and reliable legal framework for its member states, aiming to attract investment and foster economic development.[4] Its institutions include the Council of Ministers, the Permanent Secretariat, the Common Court of Justice and Arbitration (CCJA), and the Regional Training Centre for Legal Officers (ERSUMA). Despite their establishment, these institutions face significant challenges due to inadequate funding and staffing issues. Contributions from member states have been insufficient, leaving OHADA underfunded, despite the creation of a 12 billion CFA capitalization fund and a proposed community tax on imports.

ERSUMA, located in Porto-Novo, Benin, struggles with budget constraints and cannot fully meet the training needs for legal officers, particularly in English. The CCJA, in particular, faces challenges due to financial limitations and a shortage of staff, which affects its ability to manage increasing caseloads. Anglophone judges are often hesitant to refer cases to the CCJA due to its Civil Law orientation and the associated costs for non-Ivorians. As a result, many cases from English-speaking regions, like those involving SOCINCAM and Michel Ngamko, are less likely to reach the CCJA, potentially depriving Anglophone Cameroonians of justice. To address these issues, it is recommended that Common Law judges from Anglophone countries receive training in OHADA Law. This would encourage more Anglophone lawyers to engage with the CCJA and ensure fair representation. Moreover, although cases from French-speaking regions also face challenges, especially with enforcement at national levels, further reforms to the OHADA treaty may be necessary.[5]

Article 19 of the CCJA Rules of Procedure addresses the court's location, stating that it is based in Abidjan but may meet in other member states with prior consent. However, the article lacks specific conditions for such meetings, which needs clarification. Tumnde suggests establishing circuit or permanent courts in each member state to bring the court closer to the people, though this could lead to inconsistent interpretations of the law. Alternatively, training judges from each member state to represent clients at the CCJA might be a viable solution. OHADA's Uniform Act on Debt Recovery and Enforcement includes procedures for order to pay and restitution of goods, as well as simplified enforcement rules. While the CCJA has improved transparency, local corruption and inconsistent enforcement remain issues. To address these problems, OHADA could advocate for a uniform enforcement method across member states. Although this is a challenging task, initiating such reforms is essential for improving the effectiveness and predictability of the legal system.[6]

7. Conclusion and Recommendation

The comparative analysis of remedies and challenges in the protection of stakeholder rights

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[1] Ibid.

[2] Enonchong, N., (2007), The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem? *Journal of African Law*, p. 97.

[3] Emmanuel, T. J. M. (2015). Op. Cit., at, p. 58.

[4] Jonathan, B. R. (2017). OHADA and the Making of Transnational Commercial Law in Africa. Law and Development Conference Paper Draft, Cape Town, South Africa, p. 7.

[5] Ngaundje, D. L. (2013). Op. Cit., at, p. 44.

[6] Ibid. at, p. 113.

under OHADA and English corporate law reveals both similarities and differences in how these legal systems address corporate governance and the protection of minority interests. While both frameworks provide mechanisms like derivative actions, personal actions, and remedies for unfair prejudice to safeguard stakeholder rights, they also face significant challenges in implementation.

In English corporate law, the enforcement of section 172 of the Companies Act 2006 by non-shareholder groups, difficulties in bringing derivative claims, and the high costs and complexity of litigation are notable obstacles. Furthermore, the rigid application of common law rules and the lack of flexibility in addressing evolving corporate governance issues present additional challenges. Similarly, OHADA law, despite its intent to harmonize business law across member states, grapples with incomplete integration, language barriers, and differences in social and cultural norms that hinder the uniform application of remedies. Additionally, poor corporate governance, political pressure, and a lack of diversity and expertise in corporate management further complicate the protection of stakeholder rights under OHADA.

Given these challenges, it is crucial to recommend several measures to improve the protection of stakeholder rights in both legal systems. Firstly, there should be a concerted effort to simplify and streamline litigation procedures, making it easier and less costly for stakeholders to bring claims. This could involve revising judicial control mechanisms and providing clearer guidelines on the application of derivative actions and other remedies. Secondly, enhancing judicial and legal expertise in corporate governance issues, particularly under OHADA law, is essential to ensure that judges and lawyers can effectively interpret and apply these remedies. Thirdly, both systems should prioritize the development of alternative dispute resolution mechanisms to reduce the burden on courts and offer quicker resolutions to disputes. Moreover, to address the social and cultural barriers in OHADA jurisdictions, there should be a focus on education and awareness campaigns to align local practices with the principles of corporate governance. Finally, improving corporate governance standards through stricter enforcement of existing laws and promoting diversity and inclusion within corporate management could lead to better decision-making and fairer outcomes for all stakeholders. By addressing these challenges through targeted reforms and enhanced legal frameworks, both OHADA and English corporate law can more effectively protect stakeholder rights and promote sustainable corporate governance.

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