

OHADA

UNIFORM ACT RELATING TO COMMERCIAL COMPANIES AND ECONOMIC INTEREST GROUPS

Secretariat of the Organization for the Harmonization
of Business Law in Africa

The Uniform Act Relating to Commercial Companies which was adopted by the Council of Ministers on 17 April 1997, like the Uniform Act Relating to General Commercial Law and the Uniform Act Organizing Securities, entered into force on 1 January 1998.

In accordance with the provisions of the Treaty on the Harmonization of Business Law in Africa, the provisions of this Act are directly applicable and binding in the sixteen Contracting States (subject to the deposit of their instruments of ratification in Senegal, the depository State of the Treaty), namely:

Benin, Burkina Faso, Cameroon, Central African Republic, Comoros,, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

This Uniform Act is applicable to every commercial company, including those in which a State or a corporate body governed by public law is a partner, whose registered office is located on the territory of one of the Contracting States.

The Uniform Act is divided into four parts dealing respectively with general provisions governing commercial companies, provisions specific to each form of commercial company, penal provisions and final and transitory provisions.

GENERAL PROVISIONS

The first part comprises nine books dealing respectively with:

- the formation of a commercial company;
- the functioning of a commercial company;
- the civil liability of company executives;
- legal links between companies;
- merger-scission and partial transfer of assets;
- the dissolution-liquidation of a commercial company;
- the nullity of a company and company acts; and
- formalities - publication.

I - FORMATION OF A COMMERCIAL COMPANY

Definition of a commercial company

A commercial company shall be formed by two or more persons who agree, by contract, to assign assets in cash or in kind to an activity for the purpose of sharing profits or benefiting from savings that may derive therefrom.

A commercial company may also be formed by a single person.

Articles of Association

Persons desiring to carry on a commercial activity in the form a company shall establish by a notarial deed or by any other instrument that ensures legal validity Articles of Association containing, inter alia, the following mandatory information:

- the form of the company, which shall be one of those forms provided for by the Uniform Act;
- the name of the company;
- the objects of the company, which shall be lawful;
 - the company's registered office which shall be located either at the company's principal place of activity or at the place where its administrative and financial services are concentrated; the registered office may not consist solely in a postal address;
 - the identity of contributors and the amount of their contributions: each partner shall make a contribution in cash, in labour or in kind to the company;
 - the number and value of shares handed over in exchange for each contribution made by the partners.

Declaration of regularity and conformity or notarial statement of subscription and payment - Registration.

The founders of the company shall deposit at the Trade and Personal Property Credit Register a declaration in which they certify having carried out all the operations necessary for the formation of the company. The declaration shall be presented under penalty of rejection of the application for registration of the company in the Trade and Personal Property Credit Register; all companies, with the exception of joint ventures, shall be registered in the Trade and Personal Property Credit Register in order to have legal personality.

Public calls for capital

The procedures for making a public call for capital are the subject of a separate title. Companies whose shares are listed on the stock exchange of a Contracting State as well as companies which, in order to offer any type of shares to the public in a Contracting State, resort to credit establishments or stock brokers, or use any form of publicity or canvassing shall be deemed to be making a public call for capital.

II - FUNCTIONING OF A COMMERCIAL COMPANY

Powers of company executives

The management organs of the company shall have full powers to commit the company with respect to third parties. Any limitation of their legal powers shall not be demurrable to third parties.

Control of the management of a company by company executives

The management of the company shall be controlled by the auditor and partners:

- **the alert procedure** shall be initiated by the auditor and partners with a view to asking for explanations from the manager, who shall be bound to respond, on any matter likely to jeopardize the continued operation of the company;

- **management evaluation:** partners holding at least one-fifth of the company's authorized capital may, either individually or as a group, petition to the president of the competent court to designate one or more experts to make a report on one or more management operations.

III - CIVIL LIABILITY OF COMPANY EXECUTIVES

The Uniform Act makes a distinction between two types of suits:

- an individual suit which is an action for damages for an injury suffered by a third party or by a partner, where the latter suffers injury distinct from that which might be suffered by the company as a result of a tort committed by company executives in the performance of their duties;

- an action in the interest of the company which is an action for damages suffered by the company as a result a tort committed by company executives in the performance of their duties.

IV - CONSORTIUMS

A consortium is a group formed by companies bound to one another by various relations which allow one of them to control the others. To have control over a company means to effectively hold decision-making power within the company. Such control shall be presumed where a company holds more than half of the voting rights of another company either directly or by virtue of an agreement concluded with other partners of the company.

V - TRANSFORMATION OF A COMMERCIAL COMPANY

The transformation of a company, that is the change of its legal form, shall not entail the creation of a new corporate body, except in the case where the liability of the partners becomes unlimited.

- the transformation of a commercial company;

VI - MERGER-SCISSION-PARTIAL TRANSFER OF ASSETS

A merger shall be the operation whereby two companies merge to form a single company either by creating a new company or by one company acquiring the other.

A scission shall be the operation whereby the assets of a company are shared among several existing or new companies.

These two operations shall entail the dissolution without liquidation of companies which shall cease to exist and the universal transfer of their assets.

The partial transfer of assets which shall be an operation whereby a company transfers an autonomous branch of activity to a pre-existing or future company shall be governed by the scission provisions.

VII - DISSOLUTION OF A COMPANY

Causes of dissolution

The Uniform Act provides for many causes of dissolution of a company:

- expiry of the period for which it was formed;
- realization or extinction of its object;
- annulment of the company's partnership deed;
- a court judgement;
- any other reason provided by the Articles of Association.

Effects of dissolution

The dissolution of a company shall have effect on third parties only with effect from its publication in the Trade and Personal Property Credit Register. The legal personality of the company shall continue to exist for liquidation purposes until the liquidation procedure is completed.

The company shall be under liquidation as soon as it is dissolved. Liquidators shall be appointed.

VIII - NULLITY OF A COMPANY AND COMPANY ACTS

Nullity of a company or of all acts, decisions or deliberations amending the Articles of Association may only result from an express provision of the Uniform Act. An action for nullity shall be extinguished where the cause of the nullity has ceased to exist on the day the court gives a ruling on the merits of the case at first instance, unless such nullity is based on the unlawful nature of the company's object. Action for nullity shall lapse after three years following registration of the company in the Trade and Personal Property Credit Register unless the nullity is founded on the unlawfulness of the company's object:

IX - FORMALITIES - PUBLICATION

Apart from special formalities relating to public limited companies, the Uniform Act provides for a series of formalities to be fulfilled during the formation, amendment of the Articles of Association, transformation and liquidation of a company.

SPECIAL PROVISIONS RELATING TO COMMERCIAL COMPANIES

Any person, whatever his nationality, wishing to engage in a commercial activity in the form of a company in one of the Contracting States shall choose one of the forms of company provided for by the Uniform Act.

PRIVATE COMPANY

Definition

A private company shall be a company in which all the partners are traders and have unlimited liability for the company's debts. The registered capital, the minimum and maximum amounts of which have not been fixed, shall be broken down into shares of the same face value.

Management

The Articles of Association, which shall be established by an instrument drawn up by a notary and signed by all the partners, may appoint one or more managers who may be partners or not, natural persons or corporate bodies, failing which all the partners shall be deemed to be managers.

The manager may perform all acts of management in the company's interest falling within its objects. In the event of several managers, each shall have the same powers. Any objection made by a manager to the action of another manager shall have no effect on third parties who are not aware of such objection.

Control by partners

In addition to the right of communication during annual general meetings, partners may consult twice a year all the documents and decisions that they desire.

Termination of a private company

Unless otherwise provided for by the Articles of Association, a private company shall terminate either upon the death of one partner or upon a judgment to liquidate property,

declare bankruptcy or forbid the exercise of a commercial activity. It shall also terminate in the usual cases applicable to all companies.

SLEEPING PARTNERSHIP

Contrary to a partnership limited by shares which has been eliminated by the Uniform Act, the sleeping partnership still exists though it had been eliminated in Senegal and Mali.

Definition

A sleeping partnership is a partnership in which one or more partners indefinitely and jointly and severally liable for the company's debts, referred to as "active partners", coexist with one or more partners liable for the company's debts up to the limit of their shares, referred to as "sleeping partners".

Registered capital

The registered capital is divided into partnership shares which are not negotiable and whose transfer, recorded in a written document, may be effected only with the unanimous consent of all the partners, unless otherwise provided by the Articles of Association.

Articles of Association

The Articles of Association of a sleeping partnership shall contain the following information:

- the amount and value of all the partners' contributions;
 - the fraction of this amount or value belonging to each active or sleeping partner;
- the share of the active partners and sleeping partners in the profit-sharing.

Management

All the active partners of a sleeping partnership shall be managers, except in the case where managers are designated in the Articles of Association. In contrast, the sleeping partners may not perform any act of external management, even by virtue of a power of attorney.

Control by partners

Sleeping partners and active partners who are not managers shall have the right of access to the company's books and documents and the right to ask questions on the management of the partnership.

Dissolution of a sleeping partnership

The death of a sleeping partner shall not entail the dissolution of the partnership. The Articles of Association may provide that the partnership shall continue with the rightful claimants of an active partner who is deceased.

PRIVATE LIMITED COMPANY

Definition

A private limited company shall be a company in which the partners are liable for the company's debts up to the limit of their contributions and their rights are represented by company shares. It may be formed by a natural person or a corporate body or by two or more natural persons or corporate bodies.

A notary is required to draw up the Articles of Association and to establish contributions in cash.

Registered capital

The minimum registered capital of a private limited company shall be one million CFA francs. It shall be divided into equal shares whose face value may not be less than five thousand CFA francs.

Though the transfer of shares between partners is free, transfer to third parties shall be authorized by the majority of non-transferor partners holding at least three-quarters of the company's shares. The Uniform Act gives the partners the possibility to provide for other conditions of transfer in the Articles of Association.

The decision to increase capital through the capitalization of profits or reserves shall be taken by the partners holding at least half of the share capital. In the case of increase of capital by contributions in kind, such contributions shall be evaluated by a shares auditor where the value of each contribution exceeds five million CFA francs, as during the formation of the company.

The reduction of capital, which in no case shall affect the equality between partners, may be achieved by reducing the face value of shares or by reducing the number of shares.

Management

A private limited company shall be managed by one or more natural persons, whether or not they are partners of the company, appointed by the partners in the Articles of Association, or in a subsequent instrument. In the absence of provisions in the Articles of Association, managers shall be appointed for four years. Their term of office shall be renewable, but they may be removed from office by decision of the partners holding more than half of the company shares.

In relations between partners, the manager may perform all management acts in the interest of the company. Where there are several managers, they shall have the same powers and may object to acts done the other managers; such objection shall have no effect on third parties.

In his relations with third parties, the manager shall be vested with the widest powers to act under all circumstances on behalf of the company which shall be bound even by those acts of the manager which do not fall within the scope of the company's objects.

The managers shall be liable, severally or jointly and severally, to the company and to third parties for violations of legal and statutory provisions and for mistakes made during their management.

Collective decisions of the partners

Each partner shall have the right to take part in general meetings and shall have a number of votes equal to the number of company shares that he holds. A unanimous decision shall be required in the case of increase in the commitment of partners and transformation of the company into a private company.

Partners' rights

Partners shall have the following rights:

- right of being invited to general meetings; and
- right of communication: during the fifteen days preceding the holding of general meetings, the partners have the possibility of asking written questions and they can at any time consult the financial statements, the management report, etc.

Audit of the company

Private limited companies whose registered capital exceeds ten million CFA francs or which fulfil either of the following two conditions: the annual turnover exceeds two hundred and fifty million CFA francs and the permanent staff exceeds fifty persons shall be required to designate at least one auditor. For other private limited companies, the appointment of an auditor shall be optional.

PUBLIC LIMITED COMPANY

Definition

A public limited company shall be a company in which the liability of each shareholder for the debts of the company is limited to the amount of shares he has taken and his rights are represented by shares. A public limited company may have only a single shareholder.

Authorized capital

The minimum authorized capital of a public limited company shall be fixed at ten million CFA francs, with shares of a face value of not less than ten thousand CFA francs. At least one-quarter of the face value of shares representing contributions in cash shall be paid up during capital subscription. In contrast, shares representing contributions in kind shall be fully paid up during capital subscription.

Management

The method of administration of a public limited company shall be determined by its Articles of Association which shall choose between a public limited company with a board of directors and a public limited company with a managing director.

A public limited company with a board of directors shall be managed either by a chairman and managing director or by a chairman of the board of directors and a general manager.

Public limited companies with not more than three shareholders may not form a board of directors and may appoint a managing director who shall be responsible for administering and managing the company.

Meetings

The extraordinary general meeting of shareholders shall alone be empowered to amend the Articles of Association of the company, to authorize mergers, scissions, transformations and partial contributions of assets, to transfer the registered office and to wind up the company prematurely or extend the duration of its life.

The ordinary general meeting of shareholders, which shall be convened by the board of directors or by the managing director, shall take all decisions apart from those that are expressly reserved for the extraordinary general meeting of shareholders.

Audit of public limited companies: the increased role of auditors

One or more auditors shall be responsible for auditing and certifying the summary financial statements as well as verifying the accounting documents of the company. The role of

the auditor shall be to audit, without any interference in the management of the company. He shall be convened to all general meetings of the board of directors or of the managing director and particularly to that adopting the accounts of the fiscal year.

The auditor shall be liable to both the company and third parties for the torts and negligences of which he is guilty in the exercise of his duties, but shall in no case be liable for damages resulting from offences committed by the members of the board of directors, unless he fails to disclose the offences where he has knowledge of them.

The Uniform Act makes special provisions for companies calling for public capital.

JOINT VENTURE

A joint venture shall be an entity whose partners agree not to register it in the Trade and Personal Property Credit Register and not to give it a corporate personality. The partners shall freely agree on the object, duration, conditions of functioning, rights of partners and termination of the joint venture, subject to there being no derogation from the mandatory rules of the provisions common to companies. The existence of a joint venture may be proved by any means: a written document is not necessary to establish it.

Each partner shall contract in his personal name and shall be solely liable to third parties, unless he acts expressly in his capacity as partner towards third parties.

Because the joint venture has no legal personality, it has no assets, no registered capital and no registered office.

DE FACTO PARTNERSHIP

A de factor partnership shall exist where two or more natural persons or corporate bodies act as partners without having formed between themselves one of the companies described above.

ECONOMIC INTEREST GROUP

An economic interest group shall be one which has the exclusive object of putting in place for a specific duration all the means necessary to facilitate or develop the economic activity of its members and to improve or increase income from the said activity. It shall not by itself give rise to the realization or sharing of profits.

The economic interest group shall be administered by one or more natural persons or corporate bodies, provided that in the case of a corporate body, such corporate body shall designate a permanent representative who shall incur the same civil and criminal liabilities as if he were a director in his own name. The contract forming the economic interest group shall freely determine its organization and functioning.

PENAL PROVISIONS

This part defines the various offences relating to the formation of companies, to the management, administration and directing of companies, to general meetings, to variation of the capital of public limited companies, to the audit of companies, to the dissolution of companies, to the liquidation of companies and to public calls for capital.

The Uniform Act does not deal with penalties to be imposed as they have to be determined by the various national legislations.

FINAL AND TRANSITIONAL PROVISIONS

The provisions of this Uniform Act shall be applicable immediately for companies formed from the date of entry into force of the Uniform Act and within a period of two years for companies formed before this date and which have to harmonize their Articles of Association either through amendments to their former Articles of Association or by adoption of new Articles of Association.

UNIFORM ACT RELATING TO COMMERCIAL COMPANIES AND ECONOMIC INTEREST GROUPS

This Uniform Act is divided into one preliminary chapter which defines the scope of the provisions of the Act and form parties dealing respectively with general provisions governing commercial companies, special provisions relating to commercial companies, penal provisions, and final and transitory provisions.

SCOPE OF THE PROVISIONS OF THE UNIFOR ACT

Every commercial company, including those in which the State or a corporate body governed by public law is a partner, whose registered office is located on the territory of one of the Contracting States shall be subject to the provisions of this Uniform Act.

GENERAL PROVISIONS GOVERNING COMMERCIAL COMPANIES

The first part comprises nine books dealing respectively with:

- the formation of a commercial company;
- the functioning of a commercial company;
- the civil liability of company executives;
- legal links between companies;
- the transformation of a commercial company;
- merger-scission and partial transfer of assets;
- the dissolution-liquidation of a commercial company;
- the nullity of a company and company acts; and
- formalities-publication.

This part contains important innovations, namely:

- a commercial company may be formed by a single person, referred to as a "sole proprietor", on the basis of a written document: a private limited company and a public limited company may therefore have a single shareholder;
- the registered office may not consist solely in a postal address, but shall be localized by an address or a specific and adequate geographic indication;
- the procedures for making a public call for capital are the subject of a separate title. Companies whose shares are listed on the stock exchange of a Contracting State as well as companies which, in order to offer any type of shares to the public in a Contracting State, resort to credit establishments or stock brokers, or use any form of publicity or canvassing shall be deemed to be making a public call for capital;

- auditors henceforth play an important audit role in the functioning of commercial companies: an auditor may ask for explanations from the manager, who shall be bound to respond, in respect of any matter likely to jeopardize the continued operation of the company and which he noticed while examining documents forwarded to him or those he had access to in the performance of his duties.
- the notion of consortium is acknowledged: control shall be presumed where a company holds more than half of the voting rights of another company either directly or by virtue of an agreement concluded with other partners of the company.

SPECIAL PROVISIONS RELATING TO COMMERCIAL COMPANIES

Any person, whatever his nationality, wishing to engage in a commercial activity in the form of a company in one of the Contracting States shall choose one of the forms of company provided for by the Uniform Act.

Private Company

A private company shall be a company in which all the partners are traders and have unlimited liability for the company's debts. The registered capital shall be broken down into shares of the same face value.

Sleeping partnership

A private limited company shall be a company in which the partners are liable for the company's debts up to the limit of their contributions and their rights are represented by company shares. It may be formed by a natural person or a corporate body, or by two or more natural persons or corporate bodies. The minimum registered capital of a private limited company shall be one million CFA francs.

Public limited company

A public limited company shall be a company in which the liability of each shareholder for the debts of the company is limited to the amount of shares he has taken and his rights are represented by shares. A public limited company may have only a single shareholder. The minimum authorized capital of a public company shall be fixed at ten million CFA francs, with shares of a face value of not less than ten thousand CFA francs.

Joint Venture

A joint venture shall be an entity whose partners agree not to register it in the Trade and Personal Property Credit Register and not to give it a corporate personality. The partners shall freely agree on the object, duration, conditions of functioning, rights of partners and termination of the joint venture, subject to there being no derogation from the mandatory rules of the provisions common to companies.

De factor partnership

A de factor partnership shall exist where two or more natural persons or corporate bodies act as partners without having formed between themselves one of the companies described above.

Economic interest group

An economic interest group shall be one which has the exclusive object of putting in place for a specified duration all the means necessary to facilitate or develop the economic activity of its members and to improve or increase income from the said activity. It shall not by itself give rise to the realization or sharing of profits.

PENAL PROVISIONS

This part defines the various offences relating to the formation of companies, to the management, administration and directing of companies, to general meetings, to variation of the capital of public limited companies, to the audit of companies, to the dissolution of companies, to the liquidation of companies and to public calls for capital.

The Uniform Act does not deal with penalties to be imposed as they have to be determined by the various national legislations.

FINAL AND TRANSITIONAL PROVISIONS

The provisions of this Uniform Act shall be applicable immediately for companies formed from the date of entry into force of the Uniform Act and within a period of two years for companies formed before this date and which have to harmonize their Articles Association through amendments to their former Articles of Association or by adoption of new Articles of Association.