RECENT DEVELOPMENTS IN THE LAW OF SECURITIES UNDER OHADA LAW: A LEGAL APPRAISAL

Written By ***Dr. Nwandum Buma Gabriel***

PhD. in Law, Graduate Assistant, Faculty of Law and Political Science, Department of English Law, University of Douala, Republic of Cameroon

ABSTRACT

Security law is an essential piece of legislation providing for various guarantees protecting creditors by securing the enforcement of the debtors' obligations. The revised OHADA Uniform Act on security law has been adopted on 15 December 2010, but it became effective in each of the then 16 member states on 16 May 2011[i].The main object of a security is to protect the creditor against the debtor's bankruptcy or where the debtor is a body corporate, in the event of its liquidation. While a security becomes particularly attractive if it further protects the creditor against the debtor's fraud, this does not form a major object of the arrangement. This article explores the changes earmarked in the new Uniform Act in terms of classification and existing challenges and proposes prospects to meet up with current exigencies within and out of the OHADA Zone

Keywords: securities, guarantees, OHADA, Uniform Act, mortgage, pledge, surety bond, challenges and prospects.

INTRODUCTION

The backbone of any nation is the enterprising activities of its populace and the greatness of nations are measured by how enterprising its citizens and, in fact, inhabitations are. Enterprises live (and sometime die) by credit. The question which any lender has to consider is whether he can be sure that his loan will be repaid on the date. For this, the proven quality of the debtor company's management over the years may be sufficient assurance without the need for any special safeguards, but even well-run companies can be seriously affected by events over which they have little control. If a borrower is unable to trade out of his difficulties and is forced into liquidation and liabilities substantially in excess of assets, how is the lender to ensure that he or it will nevertheless be paid in full? It is precisely to this end that security[ii] is taken[iii]. Therefore, a security is expected to give the lender protection, assurance and indemnification.

The Council of Ministers of the member states of the Treaty for the Organization for the Harmonization of Business Law in Africa ("OHADA") adopted a new uniform act on security on 15 December 2010 (the "New Uniform Act"). Published in the OHADA Official Journal on 15 February 2011, the New Uniform Act entered into effect automatically in each member state, without any further formalities, on 16 May 2011.[iv] The New Uniform Act governs all security created on or after 16 May 2011. All security created before 16 May 2011 will continue to be governed by the uniform act on security dated 17 April 1997 (the "Former Uniform Act").[v]

The reform of the Former Uniform Act is one of the latest chapters in the history of the various OHADA uniform acts (the "OHADA Uniform Acts").[vi] The OHADA Uniform Acts cover a wide range of areas of business law from security to bankruptcy to general commercial law and are aimed at promoting a harmonized legal system throughout the OHADA member states. In addition to the efforts to revise and update certain of the existing OHADA Uniform Acts, the Permanent Secretary of OHADA[vii] is also busy working on new uniform acts in relation to labour law, consumer contracts and general contract law.

According to the **New Webster's Dictionary of the English Language**[viii] the meaning of the word security includes, *inter-alia*, something given or pledged as a guarantee, especially for the payment of a debt; a person who stands as a guarantor; ….a bond, stock, certificate, etc., given as evidence of a debt or of a property. This gives a general meaning of the word security which may even include other meanings outside the scope of this paper[ix]. But for our specific

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purpose, a peep into the definitions proffered by legal authorities and scholars of secured credits is pertinent.

The **Black's Law Dictionary** gives its definition as follows:

"Collateral given or pledged to guarantee the fulfillment of an obligation; especially the assurance that a creditor will be repaid (usually with interest) any money or credit extended to the debtor; A person who is bound by some type of guaranty; the state of being secured esp. from danger or attack; An instrument that evidences the holder's ownership rights in a firm (e.g. a stock), the holder's creditor relationship with a firm or government (e.g., a bond), or the holder's other rights (e.g., an option).[x]

In the words of **Sykes,**[xi] a security can be defined as an interest vested in a person called "the creditor" in certain property owned by another called "the debtor" whereby certain rights are made available to the creditor over such property in order to satisfy an obligation personally owed or recognized as being owed to the creditor by the debtor or some other person. As rightly observed by **Otubu** in his article[xii], this definition is restricted to security right against the property of the debtor leaving out third party guaranty or indemnity which is also a form of security.

There are two major types of securities[xiii] i.e. personal securities and real securities. A personal security is a personal guarantee given by a third party called the guarantor or surety that he will discharge the obligation. Personal Security[xiv] gives the creditor a secondary contractual action against the surety should the principal debtor defaults[xv]. A personal security on the other hand is a personal guarantee given by a third party called the guarantor or surety that he will discharge the obligation. Personal Security gives the creditor a secondary contractual action against the surety should the principal debtor defaults[xvi].

The New Uniform Act implements certain fundamental changes in the landscape of security law in OHADA jurisdictions, including:

- Amending the legal regime applicable to certain existing types of security (including notably certain perfection formalities);

- Creating new types of security interests; and

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- For the first time in these jurisdictions, instituting a legal regime for the taking of security by a security agent – a significant step forward in the context of multi-lender financings and syndications.

We set out below an overview of some of the highlights of this new legislation and its impact on secured financings in OHADA jurisdictions. Other segments of this paper deal with the reasons for classification, its prospects on one hand and the challenges posed is on the other hand.

THE MAIN IMPROVEMENT AND INNOVATIONS OF THE REFORM RESULTING FROM THE NEW ACT ON SECURITY[xvii]

1. *The Security Agent*[xviii]

One major innovation in the New Uniform Act is the institution of a legal regime for the granting of security to a security agent[xix]. In multi-lender and syndicated financings, the ability to grant security in favour of a third party (such as a trustee under English law) greatly facilitates the creation, management, perfection and enforcement of security for the syndicate of lenders and their successors since it permits one party to receive and manage collateral and security rights for multiple lenders and permits the lenders to transfer and assign their rights under the loan without having to transfer the corresponding collateral and security rights (which, notwithstanding the transfer or assignment, remain in the hands of the security agent).

In jurisdictions that recognise the concept of trusts (such as England)[xx], lenders use trust arrangements in order to take security in favour of a security agent/trustee in its own name but acting in its capacity as trustee for the benefit of a pool of multiple lenders that may change over time. In certain other jurisdictions where the concept of trusts is not recognized (especially in certain civil law jurisdictions), the market has developed the practice of so-called "parallel debt" to achieve essentially the same result. In a parallel debt structure, the borrower assumes a payment obligation in favour of the security agent that is separate and independent from the borrower's payment obligations to the lenders but which exactly mirrors those latter obligations. The borrower then gives security not for its obligation to the lenders but instead for this parallel debt obligation, and thus, the lenders can change but the obligation secured by

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the collateral and the beneficiary remain the same (the parallel debt obligation owed by the borrower to the security agent/trustee).

Trusts arrangements and parallel debt structures have been used sparingly in the context of syndicated financings in OHADA jurisdictions since almost none of the OHADA member states recognises the concept of trusts, and local counsel were seldom entirely comfortable with the parallel debt structure. The result was many financings in which individual lenders took security and were required each to sign the security documents and, for certain security interests, be designated by name as beneficiaries under filings at the competent Trade and Personal Property Credit Register (the "RCCM"). This situation in turn meant that additional steps and formalities (some of which are cumbersome, such as the cancellation of the existing filing at the RCCM and new filing, amendments the benefit of creditors of the secured obligations that have appointed it". Once appointed, the security agent can represent secured creditors for virtually all matters related to the secured obligations and can make the various required filings at the RCCM in the sole name of the security agent. When so acting and for such filings, the security agent must clearly indicate its capacity as security agent.[xxi]

In some cases, the New Uniform Act provides that the creation or enforcement of the security leads to a transfer of ownership of collateral in favour of the secured party. In the case of a security agent, the new law provides that such collateral will constitute a dedicated estate (*patrimoine d'affectation*) of the security agent solely for the purpose of its mission as security agent, and that such property must be segregated from the agent's own assets. The segregated collateral is protected in case of bankruptcy of the security agent and more generally from foreclosure by creditors of the security agent (with a few relatively minor exceptions). Secured creditors have the right to replace the security agent if the latter does not satisfactorily perform its duties or is declared bankrupt. In case of replacement, all the rights and actions belonging to the former security agent are transferred by operation of law to the new security agent.

2. *Surety-bonds[xxii], autonomous guarantees and counter-guarantees[xxiii]*

The New Uniform Act, like the Former Uniform Act before it, provides a framework for personal guarantees, such as surety-bonds, and autonomous guarantees and counter-guarantees. In and of itself, this is an advantage over the laws of a number of jurisdictions where, until recently, the latter were often creatures of contract without a specific underlying legal regime.

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a. Surety-bonds

The New Uniform Act has improved the regime for surety-bonds (essentially, guarantees of a third party's obligations akin to the French c*autionnement)* on several important points[xxiv]:

- It clarifies that a surety-bond can secure future obligations and that it can be a general surety-bond, automatically covering – unless provided otherwise – all principal, interest and incidental costs up to a maximum amount guaranteed.

- New rules have been introduced for the formal requirements for an obligation to be a surety-bond.

- The beneficiary of a surety-bond is obliged to provide information concerning the guaranteed obligations only semi-annually, rather than quarterly as was formerly the case.[xxv]

b. Autonomous guarantees and counter-guarantees[xxvi]

Unlike the surety-bond, these Guarantees create obligations that are autonomous and independent from the relationship between the instructing party (often a debtor) and the beneficiary of the Guarantee.

Here again, the New Uniform Act has clarified and simplified the regime on several important points:

- The New Uniform Act defines Guarantees as "undertakings", while the former Uniform Act defined them as "agreements". This distinction would presumably mean that a beneficiary does not need to sign a Guarantee for it to be valid.

- Also, the New Uniform Act clarifies the distinction between the rights of beneficiaries under Guarantees and their rights over the proceeds that may arise from Guarantees, with the former not being assignable while the latter are.

- Under the New Uniform Act, instructions in relation to Guarantees with a fixed term are now irrevocable, while instructions in relation to Guarantees with an indefinite term are revocable (formerly, the instructing party could revoke all Guarantees).

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- Finally, where a written demand is made to the guarantor for payment and the supporting documents are provided to it, the New Uniform Act specifies that the guarantor has 5 business days to examine the demand, as opposed to the reasonable period of time available under the Former Uniform Act.

3. *General Considerations on Security Interests*

Before looking at issues related specifically to different types of security, we set forth below certain issues that arise under the new law with respect to security in general.

a. Securing future debts and security over future assets

The New Uniform Act clarifies a certain ambiguity that existed under the Former Uniform Act as to the scope of security interests by providing that they can guarantee future, conditional, unconditional, fixed and floating obligations. Also, since the grant of a pledge no longer requires possession of the collateral to pass to the beneficiary (as explained more fully below), it is now possible to take a pledge over future assets, as long as those assets are sufficiently identified. In this case, the right of the secured creditor will attach to the new assets immediately upon the pledgor[xxvii] becoming the owner of those assets (certain questions may remain about perfection in such case, including if formalities different from those originally undertaken are necessary to the future collateral). Under certain conditions, future buildings and fixed structures can also be subject to a mortgage, and a mortgage can also secure future debts.

b. Creation of security interests[xxviii]

All security whether a mortgage or a pledge, whether over tangible or intangible assets, present or future can now be created by a written document containing the required information, and failure to comply with this requirement will result in the security being void. Under the Former Uniform Act, specific formalities existed for the creation of pledges of receivables and share pledges in addition to a written document. Moreover, an important simplification of the new law is the removal of the need to indicate in the security agreement itself the conditions under which the secured obligations (and the related interest) would become due and payable (conditions d'exigibilité de la dette principale et des intérêts). Because the scope of this requirement was considered uncertain, it became customary under the Former Uniform Act to attach to security documents a summary of all the events of default and prepayments, etc. set forth in the loan agreement, which was often cumbersome and impractical.

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c. Enforcement of security interests

In the event of non-payment by a pledgor, the New Uniform Act provides that a secured creditor can resort to forced sale at a public auction or can request the judicial attribution of the pledged assets up to the amount of the secured obligations, which are essentially the remedies available under various civil law systems. However, in a departure from (and some believe a welcome modernisation of) civil law practice, Article 104 of the New Uniform Act has abandoned in certain circumstances the Former Uniform Act's prohibition on "self-help" for enforcement. Such self-help is often found in the form of a clause that permits a secured creditor to appropriate to itself the pledged asset upon default of its debtor a so-called "contractual attribution clause" or "*pacte commissoire".* Accordingly, if the property pledged is a sum of money or property whose value is the subject of an official quotation, the New Uniform Act provides that the "parties" can now freely agree that in the event of non-payment, the secured creditor would become the owner of that asset. Moreover, when the "debtor of the secured obligations" is a professional debtor as defined in the New Uniform Act (that is, a debtor whose debt arises out of the exercise of its business or is in direct relation with one of its business activities, even if it is not its principal activity), the "parties" can agree to a contractual attribution clause for all types of "tangible" assets (not just sums of money or an asset subject to an official quotation).

The reference in Article 104 to "tangible" assets", "parties" and the focus on the "debtor of the secured obligations" (as opposed to the pledgor) gives rise to certain questions:

Article 104 permits all tangible assets to be subject to a contractual attribution clause where the "debtor of the secured obligations" is a professional. We believe that such Article is seeking to limit recourse to contractual attribution clauses to the professional context, and thus to protect consumers. In doing so, however, the law seems to be assuming that the pledgor and the debtor of the secured obligations are one and the same person. This is not always the case since one person can provide a pledge for the debts of another. In such a situation, the pledgor is a third party and thus not the "debtor of the secured obligations", and it is not clear why the New Uniform Act would permit a nonprofessional pledgor to agree to the contractual attribution clause for any pledged tangible asset (belonging to it, and not to the "debtor of the secured obligations") on the basis that the "debtor of the secured obligations" is a professional debtor.

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In addition, in situations where the pledgor is different from the "debtor of the secured obligations", which "parties" must agree to the contractual attribution clause – is it all three (pledgor, debtor and secured creditor) or only the secured creditor and the pledgor?

Another more general question about Article 104 is whether the parties to a pledge of receivables can include a contractual attribution clause and on what basis. Indeed, Article 104 refers, on the one hand, to a "pledged asset which is a sum of money or subject to an official quotation" (in this case, no restriction exists as to the "debtor of the secured obligations") and, on the other hand, to "other tangible assets" (in this case, the "debtor of the secured obligations" must be a professional debtor). If we consider that receivables are not tangible assets, then the question remains whether they can be considered a sum of money for the purposes of Article 104. To the extent that the creation of the cash collateral requires a transfer of ownership of the pledged funds to the secured creditor (see below for more details on the cash collateral), Article 104 is not applicable to the cash collateral. Therefore, we query whether the reference to "pledged asset which is a sum of money" might also extend to and be construed to include receivables?[xxix]

A contractual attribution clause can also be inserted in a mortgage if the mortgagor is a legal entity and the building is not used for habitation.

In the case of the enforcement under the contractual attribution clause, the value of the pledged or mortgaged asset is to be estimated by an expert, and if it exceeds the secured obligations, the excess must be paid to the pledgor. The contractual attribution clause must be "published" by a filing at the competent RCCM in order to be effective as against third parties.

d. Perfection of security interests

The New Uniform Act has opted for a system of perfection by filing. Accordingly, except for cash collateral and the pledge of securities accounts, all the security interests are now perfected as against third parties by a filing at the appropriate RCCM and for mortgages in accordance with local laws. The New Uniform Act sets out a general rule that the competent RCCM for the filing of all pledges is the RCCM of the place of incorporation of the pledgor. There are also specific rules – as exceptions to the general rule – for certain types of security interests (such as the pledge of receivables, the assignment of receivables, the pledge of shares and financial instruments, and the pledge of business as a going concern). The former law's

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cumbersome and expensive requirement to register pledges with the tax authorities has been abandoned (but local authorities will still be free to charge for filings at the RCCM), and the list of the parties who can carry out perfection formalities has been extended to cover not only the secured creditors, but also the security agent and the pledgor.

Specific additional perfection formalities are required for certain pledges (such as pledges of receivables, share pledges, and the pledge of intellectual property rights) as outlined below. Perfection will preserve the rights of secured creditors for an agreed period, which cannot exceed 10 years (as opposed to 5 years under the Former Uniform Act). The general rule on perfection by filing at the RCCM appears to raise certain practical difficulties, for instance if the pledgor is not located in an OHADA country (as the new law offers no clear guidance as to where the filing should be made in this circumstance) or if the pledgor is an individual or government or other entity not listed in the RCCM.

4. *Specific Key Issues on Security Interests*

The New Uniform Act has modernised the existing types of security and has created new security interests.

a. Existing Security Interests

i. Pledge[xxx] of tangible movable assets

The creation of pledges of tangible[xxxi] movable assets has been greatly simplified and now only requires a written contract containing certain mandatory information. The New Uniform Act has abandoned the requirement of an effective and continued dispossession (either physical or constructive) of collateral from the pledgor, since dispossession is no longer a condition of the validity of the pledge (gage). Under the New Uniform Act, the dispossession requirement is merely an alternative method for the perfection of the pledge of tangible assets. In addition, pledges can now be created over future assets, as long as they are sufficiently identifiable.

ii. Pledge[xxxii] of receivables

The pledge of receivables also no longer requires dispossession. Again, it is simply created by a written contract containing certain mandatory information. The previous cumbersome obligation to deliver "title" to the pledged receivables (titre de créances) to the secured creditors and to notify the pledge to the pledged debtor by bailiff (huissier) has been abandoned. This

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will greatly simplify the creation of this security because in many cases the title to the pledged receivables (titre de créances) were either destroyed or lost, or the claim was simply not documented. Future and conditional receivables can also be pledged, as long as they are sufficiently identified and individualised. Under the New Uniform Act, by derogation to the general rule for perfection (which as noted above requires filing in the RCCM of the pledgor), a pledge of receivables is perfected by a double formality it must be notified to the pledged debtor to be valid against it and the pledge must be filed at the RCCM of the domicile of the pledged debtor to be valid as against other third parties. While the abandonment of dispossession is welcome (greatly simplifying the formalities and increasing certainty), the choice of perfection by filing at the RCCM of the pledged debtor and notice may raise certain new practical difficulties: in cases where there are a large number of pledged debtors, it will require a filing at the RCCM of, and notice to, each pledged debtor; and, for creditors wishing to check the security given by a party to others, it would require the creditor to verify the filings in every RCCM of possible pledged debtors. Also, as noted above more generally, the case of pledged debtors located outside an OHADA country and those not listed in the RCCM appear to be open issues.

iii. Pledge of shares and financial instruments[xxxiii]

There have not been fundamental changes to this security. The New Uniform Act now allows the proceeds of shares or financial instruments to be included in the scope of the pledge[xxxiv]. Under the New Uniform Act, by derogation to the general rule for perfection, pledges of shares and financial instruments are perfected as against third parties by a filing at the RCCM of the issuing company. Additional perfection formalities that were specific to the pledges of shares and financial instruments under the Former Uniform Act (such as the recording in the issuing company's share registry and the approval of the pledge by the appropriate corporate body) are unchanged, but the New Uniform Act now gives the secured creditor an option between a notification of the pledge to the issuing company by bailiff (signification) and a simple notification.

iv. Pledge of securities account[xxxv]

This pledge existed under the Former Uniform Act for listed companies, whose securities were dematerialised and represented by inscription in a securities account. The regime has been modernised and clarified by largely replicating the French law provisions on the subject. The

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pledge is created by the signature of a statement of pledge containing the required information. The scope of the securities account pledge includes the initial securities credited to the securities account, those that may be substituted in place of them or may supplement them and any cash proceeds(such as dividends and other cash distributions). This pledge is not filed at the RCCM, but is recorded in the securities account holder's registries. In practice, this security will concern few corporations because under the relevant OHADA law only listed companies can dematerialise their securities.

v. Pledge of business[xxxvi] as a going concern

While there have been no fundamental changes to this security, one improvement is that the mandatory information required to be included in the pledge agreement has now been limited to what is strictly required for the identification of the pledged assets (names of the parties, designation and address of the *fonds de commerce*, identification of the elements composing the *fonds de commerce*, and the elements that will permit the determination of the secured obligations). Under the New Uniform Act, by derogation to the general rule for perfection, the pledge of business as a going concern is perfected as against third parties by a filing at the RCCM of the owner of the *fonds de commerce* and at the RCCM of the various branches where the *fonds de commerce* is operated. As under the Former Uniform Act, intellectual property rights and professional equipment and vehicles can still be included in the scope of the pledge of business as a going concern, and such inclusion will require additional perfection formalities specific to them.

vi. Pledge of inventory

Security over inventory can be subject to the general regime of the pledge of tangible assets, or creditors can turn to a specific regime for the pledge of inventory. There have been no major amendments to the specific regime. It should, however, be noted that the New Uniform Act expands the mandatory insurance requirements for pledged inventory to cover "partial or total deteriorations", in addition to "destruction" of the stocks.

vii. Pledge of professional equipment and vehicles

The fundamental change here is the expansion of the parties that can be beneficiaries of this type of pledge. Under the Former Uniform Act, only a seller of equipment, a guarantor of the purchase price and/or a lender granting a loan used for the purchase of professional equipment

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and vehicles could benefit from this specific security interest over such assets (as opposed to any party that could benefit from a pledge of *fonds de commerce* when professional equipment and vehicles are included in it). Under the New Uniform Act, any party can now benefit from this pledge. This is a vast improvement. Due to the former limitations, professional equipment was generally included in the pledge of *fonds de commerce*. Where there was no *fonds de commerce* such as the financing of new or future businesses – it was not possible for general creditors to benefit from security over the professional equipment (unless paid for out of the financing). By expanding the scope of potential beneficiaries of this pledge, the New Uniform Act has greatly facilitated the taking of security over professional equipment.

viii. **Mortgages**[xxxvii]

A mortgage involves the transfer of ownership in an asset to a creditor by way of security for borrowing upon the condition that on the full discharge of the debtor's obligation, there would be a re-transfer of the mortgaged asset to the mortgagor. A mortgage does not at law require the delivery of possession for it to be valid. As such, both tangible and intangible assets can be mortgaged. A mortgage could either confer a legal or an equitable interest. While the legal mortgage require perfection by stamping and registration an equitable mortgage would ordinarily be complete upon delivery of title document and the execution of a memorandum of deposit[xxxviii].

Mortgages have always been the least harmonised of the OHADA law security interests. Their creation and perfection formalities are still very much dependent on local laws and customs in each member state, but in general their creation requires a notarised act and they are perfected by a filing at the competent mortgage registry. That said, the New Uniform Act has modified and harmonised the regime on mortgages on at least one significant point. It is now possible to take a mortgage over future buildings and fixed structures under certain circumstances (including new fixed structures and buildings on land falling under public domain and national domain categories) (although one needs to see how this new feature will work when implemented in the context of the various national rules and requirements on mortgages)[xxxix].

ix. Retention Rights (Possessory Lien)

Retention rights or possessory liens have not been fundamentally modified. It should, however, be noted that when the same tangible asset is subject to a pledge without dispossession and a retention right, the New Uniform Act resolves the conflict between them by giving priority to

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the beneficiary of the pledge if the pledge was filed at the RCCM before the beneficiary of the retention right came to possess the asset.

b. New Security Interests

The New Uniform Act of Security creates several new types of security

i. Cash collateral

The new law creates a specific regime regulating the taking of cash collateral. For this type of security to be taken, cash collateral must be held in a blocked account opened with a credit institution licensed to hold deposits. The blocked account must be in the name of the secured creditor, who will become the owner of the funds deposited on the blocked account until the debt becomes due and payable. This security interest is not filed at the RCCM; rather, its perfection is achieved by a notification to the account bank. In case of non-payment of a due and payable secured amount, then, eight days after the pledgor is duly informed by the secured creditor, the secured creditor may simply collect the funds deposited in the blocked account up to the amount of the secured obligations. However, until the secured obligations become due and payable, the secured creditor cannot use the funds deposited in the blocked account. It should be noted that the New Uniform Act does not address the question of whether such segregated funds can be seized by creditors of the secured creditor or whether they fall into its estate in case of insolvency of the secured creditor.

ii. Assignment by way of security

In addition to the specific regime for cash collateral, a second method of transfer of ownership by way of security is the assignment of receivables. Such assignment can cover present or future receivables (as long as they are sufficiently identified and individualised). The assignment is created by a written contract containing specific mandatory information. The New Uniform Act provides that "a claim against a third party can be assigned by way of security for any credit extended by national or foreign legal entities, which carry out on a habitual basis and on their own account banking or credit activities". Unlike the French law Daily assignment on which it is largely based the New Uniform Act does not specify that the assignment must be "in favour of" the credit institution that has extended the credit nor that the assignment must be made "by the beneficiary" of the credit. Emphasis is rather on the nature of the secured obligations. As a result, unlike French law, this may mean that any third party

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(for example, a parent company) should be able to assign its receivables by way of security to guarantee the credit extended to the underlying debtor (for example, its subsidiary). However, we query whether this provision would allow that same parent company, when issuing a first demand guarantee for a subsidiary's obligations, to assign the parent's receivables to secure the parent's guaranteed obligations, which are autonomous and independent from the credit extended to the subsidiary.

Similarly, confirmation will be required as to whether hedging providers can benefit from such an assignment because the secured obligations arise out of hedging arrangements. Are hedging arrangements "credit extended" as such term is used in this new provision? Finally, there will inevitably be debate about characterising potential secured parties as "national or foreign legal entities, which carry out on a habitual basis and on their own account banking or credit activities".

While this assignment can cover all types of receivables (which is convenient), by derogation to the general rule for perfection and in a manner similar to the pledge of receivables, it is perfected as against third parties by a filing at the RCCM of the domicile of the assigned debtor and against the assigned debtor by a simple notification to it (which is not so convenient, as noted above in relation to pledges of receivables). Also, if the assigned debtor accepts the assignment, the assigned debtor cannot raise against the beneficiary personal defences arising from the assigned debtor's relationship with the assignor (subject to fraud).

iii. Pledge of bank accounts

Under the Former Uniform Act, there was no specific regime for the pledge of bank accounts. Following the traditional practice under French law, security over bank accounts was taken as a pledge of receivables where the pledged receivables were considered to be the credit balance standing on the account on the day of enforcement of the pledge. The New Uniform Act now creates a specific regime for pledges of bank accounts. The approach adopted is essentially the same as before, but the new law clarifies issues specific to pledges of bank accounts. For example, the new law clarifies the date on which the credit balance of the bank account crystallises for the purpose of the pledge and specifically permits multiple enforcements of the pledge if, on an enforcement date, the credit balance of the bank account is not sufficient to fully discharge the secured obligations. This pledge is perfected in the same manner as a pledge of receivables.

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Although both the cash collateral and the pledge of bank account involve a bank account, there are clear differences between them, namely, with cash collateral, the ownership of the funds held in the blocked account is transferred to the secured creditor, while in the pledge of bank account the pledgor remains the sole owner of the funds held in the account until the enforcement of the pledge. Also, in cash collateral situations, neither party (other than the secured creditor if the secured debt is due and payable but not paid) can use the funds held in the blocked account, while with the pledge of bank account, the pledgor can freely use the account (until it is blocked).

iv. Pledge of intellectual property rights

Under the Former Uniform Act, there was no specific regime for the pledge of intellectual property rights. Creditors could take security over such rights only within the scope of a pledge of a business as a going concern. Under the New Uniform Act, intellectual property rights can still be included in a pledge of *fonds de commerce*, but there is also now a specific security regime available. If the pledged intellectual property right is registered on one of the special registries, the publicity requirements set forth in the applicable regulation must be complied with in addition to the filing at the competent RCCM in order to perfect the pledge. Unless provided otherwise, the pledge of intellectual property rights does not extend to accessories and proceeds resulting from the exploitation of the pledged intellectual property rights[xl].

v. Retention of title[xli]

Under the Former Uniform Act, there was no specific regime governing cases of sales where the seller retained title to the asset being sold until such time as the purchase price was paid. There was instead a regime in the Uniform Act on General Commercial Law for sales agreements. The New Uniform Act creates a specific regime akin to that existing under French law and applicable to all contracts, not only to sales contracts.

CHALLENGES OF CLASSIFICATION

The various Classifications of securities have their own peculiar challenges. Where one is able to combine forms of securities that will avoid the challenges to attendant to each form, the better secured credit facilities are, the better for the economy[xlii].

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But this is only possible where a practitioner in the world of security is able to see through the maze that the various classifications will constitute to the unwary. This paper therefore seeks to examine these challenges inherent in such forms of classification under the OHADA Law with a view to identifying the prospects of classification of securities for the future and if need be, proffer some others[xliii].

1. *The Use of Nomenclature*[xliv]

Thus, it has been argued that the classification of the traditional securities could have been but a mere employment of nomenclature. This, it is further argued, is because the nomenclature by which certain features are embodied and classified into the four forms of securities have betrayed their traditional definitions and connotations. Their application in unfamiliar terrains by legislature and the courts have brought confusion into this branch of the law, posing a torment to legal experts and constituting a trap for the unwary.

Waldock[xlv] succinctly captured this as follows:

"But although the correct classification of securities is important and fundamental, it must once again be admitted that there is now a considerable laxity in the use of technical expression relating to securities. The student must be warned against supposing that the word mortgage, charge, lien, and even pledge are used in practice with meanings always in accord with our definitions. This laxity is sometimes found in judicial utterances, but is also common in modern statutes in which it is found convenient to use for the purposes of the particular statute a single expression to embrace several different legal transactions".

An overview of the various classifications as set out above will no doubt get the unwary into a sort of maze. The gravamen of this complexity is the overlapping of different types of securities within the classifications especially those subdivisions under the real security, inter se, and particularly with the quasi securities, a hybrid of sort.

This is so much the case that the situation has drawn the following reaction from **Smith**[xlvi]:

"…, it is clear that the various nomenclatures in ascertaining and defining the type of security cannot be placed in a watertight compartment; circumstances have shown that they either overlap or provide alternative ways of referring to an encumbrance. This situation is unhealthy; creating doubts in many cases, misdirecting our judges in the dispensations of justice, and

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resulting more often than not in strange results from what parties contemplated. Unsettled application of nomenclature in the law of secured credit is fast becoming the legal practitioner's nightmare and a trap for the unwary.

While some of these nomenclatures are related to one another, an indiscriminate application may lead to a mode of enforcement not contemplated by parties. For example, a creditor who deposited title deeds as security would be disappointed to know that he cannot foreclosure because the transactions is construed, contrary to his expectation, as an equitable charge."

2. *Definition of the rights and duties of security agents*

Many scholars will justly view the new security agent regime as comprehensive and innovative. That said, there are still several issues to be resolved, including defining the rights and obligations of security agents (presumably left to the parties to decide by contract), better understanding the nature of the security agent's role (is it akin to a trustee, an agent or is it sui generis?), determining how security agents will function in practice (how, for instance, will they account for assets held by them? what will the tax treatment be?) and how courts will view them (will lenders continue to have direct rights to security or rights of action?).

PROSPECTS

Tackling the above-stated problems and challenges would mark the prospects of classification of securities.

A viable way out of the problem of overlapping characteristics would be a mastery of the various types of security. Not only is it necessary to grasp the credentials of each one in relation to the subject matter of security, the substance and the forms of every type of security should be properly construed when the need arises[xlvii] .

Yes, the potentialities of being able to study the forms of security are inestimable as had been proffered herein above. This may also be without shutting eyes to a possibility of looking at the substance of each to see whether there is a need to prune the number of varied classification to one that is easily manageable. This may involve discarding those that are on all fours to one another or merging some leaving out their shortfalls.

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It is noteworthy that a great challenge in classification of security, choice of security and the place of security interest is the fact that countries lack statutory laws that define and regulate dealings in particular securities stipulating their specific features and distinct principles. That is why the characteristics of the securities overlap and that is why achieving strict compartmentalization of real security is an uphill task.

With globalization of commerce, international harmony in laws dealing with secured transactions is also essential. Therefore, multi-lateral institutions such as IMF, EBRD[xlviii], ADB[xlix] also took it upon themselves to have a model law for secured transactions internationally.

CONCLUSION AND RECOMMENDATIONS

Conclusively, in line with the goals of the OHADA Uniform Acts, one of the main objectives of the New Uniform Act was to make OHADA jurisdictions more attractive environments for doing business, particularly for secured financings. On the whole, the New Uniform Act succeeds, offering more flexibility and a wider range of security options to creditors. In investing the considerable time and effort required to enact the New Uniform Act, the OHADA member states have sought to respond to criticisms of the Former Uniform Act by improving the efficiency of OHADA security interests and simplifying their creation, perfection and enforcement. This achievement can be summarised in the following key issues

Needless to say, like any effort at significant law reform, the adoption of the New Uniform Act brings with it a degree of uncertainty in relation to new or revised provisions and a number of questions that will eventually need to be resolved by the establishment of common practices and/or decisions from national courts as well as those of the Common Court of Justice and Arbitration

However, some core principles in the form of recommendations of law on securities and guarantees, as they are referred to, will be invaluable asset to guiding on the quest for the best classification of securities under the OHADA system. These ten principles are as stated bellow:

1. Security should reduce the risk of giving credit leading to an increased availability of credit on improved terms.

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2. The law should enable the quick, cheap and simple creation of a proprietary security right without depriving the person giving the security of the use of his assets.

3. If the secured debt is not paid the holder of security should be able to have the charged assets realized and to have the proceeds applied towards satisfaction of his claim prior to other creditors.

4. Enforcement procedures should enable prompt realization at market value of the assets given as security.

5. The security right should continue to be effective and enforceable after the bankruptcy or insolvency of the person who has given it.

6. The costs of taking, maintaining and enforcing security should be low

7. Security should be available (a) over all types of assets (b) to secure all types of debts and (c) between all types of person.

8. There should be an effective means of publicizing the existence of security rights.

9. The law should establish rules governing competing rights, of person holding security and other persons claiming rights in the assets given as security.

10. As far as possible the parties should be able to adapt security to the needs of their particular transaction.

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ENDNOTES

[i] It specifies that the security granted before 16 May 2011 will continue to be governed by the former Uniform Act on security dated 17 April 1997. Since 12 September 2012, the revised OHADA Uniform Act on security law also applies (together with all the other OHADA Uniform Acts) to the Democratic Republic of Congo.

[ii] The Black's Law Dictionary gives its definition as follows: "Collateral given or pledged to guarantee the fulfilment of an obligation; especially the assurance that a creditor will be repaid (usually with interest) any money or credit extended to the debtor; A person who is bound by some type of guaranty; the state of being secured esp. from danger or attack; An instrument that evidences the holder's ownership rights in a firm (e.g. a stock), the holder's creditor relationship with a firm or government (e.g., a bond), or the holder's other rights (e.g., an option)." Byian A, Garner 8th ed., West Publishing Company, USA, 2004

[iii] Roy Goode, Commercial Law (3rd ed. LexisNexis UK and Penguin Books, London 2004) P. 577.

[iv] The New Uniform Act provides that it will come into effect ninety days from its publication in the OHADA Official Journal. No national enacting legislation is necessary.

[v] It specifies that the security granted before 16 May 2011 will continue to be governed by the former Uniform Act on security dated 17 April 1997. Since 12 September 2012, the revised OHADA Uniform Act on security law also applies (together with all the other OHADA Uniform Acts) to the Democratic Republic of Congo.

[vi] The OHADA Uniform Acts are: Commercial Companies and Economic Interest Group dated 17 April 1997, Security dated 17 April 1997, Simplified Procedures for Debt Recovery and Enforcement Measures dated 10 April 1998, Collective Proceedings for Wiping Off Debts dated 10 April 1998, Arbitration dated 11 March 1999,

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Accounting dated 23 March 2000, Carriage of Goods by Road dated 22 March 2003, General Commercial Law dated 15 December 2010, and Cooperative Companies dated 15 December 2010. Together with the New Uniform Act, the OHADA Council of Minister have also adopted on the same date the revised Uniform Act on General Commercial Law and the Uniform Act on Cooperative Companies.

[vii] Claire Moore Dickerson, Harmonizing Business Laws in Africa: OHADA Calls the Tune, 44 Colum. J. Transnat'l L. 17, 59 (2005) E

[viii] International ed., Lexicon Publication Inc. New York, 2004

[ix] According to R.M. Goode, the term security is not ideal, since it is used in so many senses, being applied indifferently to describe the interest acquired in the asset, the instrument creating that interest and the asset which is the subject matter of the interest. It is also unhappily contiguous to 'securities', that is, investment securities such as shares and bonds. There would be much to be said for substituting the word 'collateral'- despite our distaste for converting English adjectives into American nouns-but for the fact that in the securities industry the term is also used to include interests acquired by outright transfer under sale and repurchase ('repo') and similar sell/buy arrangements.

[x] Byian A, Garner 8th ed., West Publishing Company, USA, 2004; See also, Advances Law Lexicon, The Encyclopedic Law Dictionary with Legal Maxims, Latin Terms and Words & Phrases, (P. Ramanatha Iyar, Justice Y.V. Chandrachud, Gen. ed.) 3rd Edition, Book 3, Reprint 2007, Book 3. This confirms the position of R.M. Goode in note 3 above.

[xi] The Law of Securities, 5th edition, by Edward I. Sykes and Sally Walker (Law Book Company Limited, Sydney, 1993) pages i-cxxii, 1-1030, Index 1031-1070, p 248

[xii] Security other than land: Wither Nigeria? Secured Credit in a Global Economy-Challenges and Prospects, I.O. Smith, ed., University of Lagos, 2003 Pg. 2; A. Flemming, Globalisation and the Economy (London), 1999.

[xiii] I.O. Smith, Nigerian Law of Secured Credit, ECOWATCH PUBLICATIONS (NIGERIA) Limited, Lagos, Nigeria, 2006 pg. 8 – 9.

[xiv]Jelili Omotola, The Law of Secured Credit, (Evens Brothers Nigeria Publishers) Limited, Ibadan, Nigeria, 2006, pg. 20 – 21

[xv] I.O. Smith: Nigerian Law of Secured Credit supra

[xvi] I.O. Smith, Nigerian Law of Secured Credit, ECOWATCH PUBLICATIONS (NIGERIA) Limited, Lagos, Nigeria, 2006 pg. 8 – 9.

[xvii] A security shall be the allocation of an asset or property in favour of a creditor to guarantee the discharge of an obligation or obligations, whatever their legal nature, provided that such obligation or obligations is existing, prospective, ascertained or ascertainable, conditional or unconditional and of a fixed or changing amount.

[xviii] See article 5 of the OHADA Uniform Act Organising Securities Adopted On 15 December 2010 At Lomé. Hereafter referred to as the UA.

[xix] Lecture notes of Dr Edie Diabe Pascal, 'Securities and Guarantees' University of Douala, Faculty of Law and Political Science, Department of English, 2020/2021 academic year, p.86(unpublished)

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[xxi] Ibid

[xxii] See article 13 of the UA

[xxiii] See article 39 of the UA

[xxiv] Anoukaha (F.), les droits de Sûretés dans l'Acte Uniforme, OHADA, 1st Edn, PUA, Yaounde, 1998.

[xxv] Such information includes the consideration for the obligations of the guaranteed obligor, their maturity, and their amount (principal, interest and otherwise).

[xxvi] The regime applicable to autonomous guarantees and counter-guarantees (essentially, so-called "first demand guarantees" or "independent guarantees") ("Guarantees") under the New Uniform Act is inspired by the Uniform Customs and Practice for Documentary Credits (UCP 600) prepared and published by the International Chamber of Commerce (the "ICC"), the ICC Uniform Rules for Demand Guarantees (URDG 758), the UNCITRAL principles for the International Independent Guarantees and Stand-by Letters of Credit and the practices of international standby letters of credit.

[xxvii] a person who deposits something as security for the fulfilment of a contract or the payment of a debt."legal title to the collateral remains with the pledgor"

[xxviii] Security interest is an enforceable legal claim or lien on collateral that has been pledged, usually to obtain a loan. The borrower provides the lender with a security interest in certain assets, which gives the lender the right to repossess all or part of the property if the borrower stops making loan payments. The lender can then sell the repossessed collateral to pay off the loan.

[xxix] Such information includes the consideration for the obligations of the guaranteed obligor, their maturity, and their amount (principal, interest and otherwise).

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[xxx] Roy Goode, Commercial Law (3rd ed. LexisNexis UK and Penguin, Landon 2004) pg. 584-585
[xxxi] See article 92 to 98 of the UA
[xxxii] The earliest form of security is the Pledge, in which the creditor took possession of the debtor's asset as security until payment of the debt. The common law understandably attached great significance to possession, for this was the principal indicium of ownership, and to allow the debtor to grant security over his assets while remaining in possession was the surest way to facilitate a fraud on his other creditor, who might be led to lend money on the strength of the debtor's apparent continued ownership of the assets in question. Hence in the early days of the common law the taking of possession by the creditor was almost a sine qua non of a valid security interest. Even the mortgage of land was originally in the nature of a pledge, the mortgagee taking possession until payment, and it was not until the sixteenth century that the practice developed of leaving the mortgagor of land in possession. A further two centuries were too elapsed before this could safely be done by the mortgagee of goods. With the development of documentary intangibles, the scope of the pledge increase. It could now be applied not only to goods but also to documents of title to goods and instruments embodying a money obligation. Further, it was not necessary for the creditor to take or retain physical possession: it suffice that he had constructive possession through a third party or through even the debtor himself, a particular useful rule for banks financing the import of goods against a pledge of the shipping document, for these could safely be released to the buyer against a trust receipt
[xxxiii] Roy Goode, Commercial Law (3rd ed. LexisNexis UK and Penguin, Landon 2004) pg. 584-585.
[xxxiv] The earliest form of security is the Pledge, in which the creditor took possession of the Debtor's asset as security until payment of the debt. The common law understandably attached great significance to possession, for this was the principal indicium of ownership, and to allow the debtor to grant security over his assets while remaining in possession was the surest way to facilitate a fraud on his other creditor, who might be led to lend money on the strength of the debtor's apparent continued ownership of the assets in question.
[xxxv] (comptes de titres financiers)
[xxxvi] Fonds de commerce
[xxxvii] See article 190 to 202 of the UA
[xxxviii] Oluwatoyin Sanni, Securities in a Global Economy: New Trends, Secured Credit in a Global Economy-Challenges and Prospects, I.O. Smith, ed., University of Lagos, 2003 pg. 26. The implication of an equitable mortgage is that the Mortgagee can proceed to sale without court's order to that effect.
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[xlv] Waldock, Law of Mortgages 2nd ed. Pg. 14, I.O. Smith Nigerian Law of Secured Credit, ECOWATCH PUBLICATIONS (NIGERIA) LIMITED, Lagos, Nigeria, 2006 p.g. 12.
[xlvi] Ibid
[xlvii] .O. Smith, Nigerian Law of Secured Credit, ECOWTCH PUBLICATIONS (NIGERIA) LIMITED, Lagos, Nigeria, 2006 pg. 16.
[xlviii] The European Bank for Reconstruction and Development (EBRD) took an early lead and initiated a project for a harmonized law on secured transactions soon after it was established in 1991. the EBRD model law was formulated in 1994.
[xlix] The Asian Development Bank (ADB)'s project for Asian countries in 2001, also did a comparison of security interest law in some key Asian countries (China, India, Indonesia, Pakistan and Thailand) and deliberated extensively on the options for reform and gave suggestions on a model security enforcement law

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