

OHADA LAW – IMPACTS OF THE DEMATERIALISATION OF SECURITIES

The recent dematerialisation of securities in OHADA law jurisdictions has raised an array of questions. This note aims at explaining, in practical terms, the impacts of the dematerialisation of securities and, in particular, the impact that such reform has on the type of security which can be granted over such assets.

Key issues

- Dematerialisation of securities has been adopted in OHADA law countries.
- Cameroon has been at the forefront of the implementation of this reform.
- Practical challenges remain.

1. THE ROAD TO DEMATERIALISATION OF SECURITIES IN OHADA LAW COUNTRIES

The Uniform Act on Commercial Companies and Economic Interest Groups (the “**Uniform Act on Commercial Companies**”), as revised on 30 January 2014 brought about substantial changes to securities law. In particular, the Uniform Act on Commercial Companies, in its article 744-1 recognised the principle of dematerialisation of securities. All securities, regardless of their legal form, must be registered into a securities account opened in the name of their owner and transfers of securities may only be done from one account to another. The Uniform Act on Commercial Companies does not, however, provides any further practical details on the implementation of these rules. National legislators of the OHADA member states have been left to fill the legal void.

Cameroon has been at the forefront of the implementation of this reform. Only a few months after the Uniform Act on Commercial Companies was adopted, Cameroon passed Law No. 2014/007 of 23 April 2014 (the “**Law**”) and its implementing decree No. 2014/3763 dated 17 November 2014 (the “**Decree**”) (together the “**Cameroonian Legislation**”) to set the terms of the dematerialisation of securities in Cameroon. Since 23 April 2016, all securities issued in Cameroon, whether registered or bearer securities, whether listed or unlisted securities, must be registered in a securities account opened in the name of their owner and held either by the issuer of the securities or by a custody account holder approved by the *Commission des Marchés Financiers*. Issuance of securities in any other form in Cameroon is now prohibited¹ and holders of existing securities face the following penalties if they fail to present their securities registered in a securities account:

- the suspension of all shareholders' rights attached to these securities (*i.e.* voting rights, right to dividends, preferential subscription rights) after 23 April 2018; and
- the sale by the issuer of the securities of the shareholders' rights corresponding to these securities² after 23 April 2019.

¹ Article 13 of the Law provides the following provisions: "(1) Upon the expiry of a period of two (2) years from the enactment of this Law, it is prohibited to issue in the territory of the Republic of Cameroon securities in non-dematerialised forms. (2) The Financial Markets Commission shall ensure the smooth process of the operations of dematerialisation of the securities."

² The proceeds of the sale will be held into a specific account in the name of the owners of the securities or their successors which can claim the proceeds of the sale within a thirty year period.

However, we understand that, at the moment, due to practical obstacles preventing the dematerialisation process from being completed at the level of the competent authorities, a certain tolerance is applied.

Similar legislation was recently passed in Gabon, and we can reasonably expect that the generalisation of the dematerialisation regime will, in time, be adopted throughout the remaining OHADA member states.

2. DEMATERIALISATION OF SECURITIES IN PRACTICE

From a practical standpoint, the transition to dematerialised securities is however challenging and continues to be work in progress in OHADA law jurisdictions. For example, share certificate registers which are essential to allow the dematerialisation process to take place cannot always be retrieved or **recovered**. Moreover, registering securities in securities accounts, handling their management post-dematerialisation and supervising the dematerialised securities requires the creation of tools which need to be adapted for these purposes (e.g. computer softwares to process data for these securities).

Furthermore, this dematerialisation requirement has prompted an array of questions pertaining to the types of security instruments to be used in OHADA law jurisdictions. The dematerialisation of securities raises, for example, the question of the articulation between the pledge of shareholder rights and securities (*nantissement des droits d'associés et valeurs mobilières*) (more commonly known as pledge of shares) and the pledge over securities accounts (*nantissement de compte de titres financiers*), two security interests which can capture essentially the same asset (e.g. shares) but whose respective application depends on the way the dematerialisation regime is implemented.

Indeed, the Uniform Act on the Organization of Security Interests (the "**Uniform Act on Security**"), as revised on 16 May 2011, introduced the legal framework³ pertaining to pledges over securities accounts in addition to the pledge of shareholder rights and securities. This regime, largely inspired by French law, presents various original characteristics which render it a highly efficient and secure tool for lenders. Firstly, the scope of the pledge includes all the securities credited to the securities account, those which are substituted for them or supplement them in any way, as well as their "fruits and products" (e.g. dividends, repayments, repurchase value of the securities, etc.)⁴ which are held on a related pledged bank account. Thus, the pledge relates to the entire securities account, the composition of which may change overtime. Another attractive aspect is the conditions of creation of this security, which, as in French law, depend on the account holder issuing a signed and dated declaration containing certain basic mandatory information⁵: the identity of the parties, the number and nature of the securities, the elements allowing their individualization and those allowing the identification of the securities account⁶. Moreover, no filing with the Registry of Commerce (RCCM) is required to perfect the pledge. Finally, the parties may agree on the conditions of operating the securities account, notably the pledgor's right to dispose freely of the securities credited to the securities account and the related amounts⁷.

However, in practice, until now such a pledge has been rarely implemented in OHADA law countries. This is because initially, the dematerialisation of securities, which is a prerequisite to any pledges over securities accounts, only applied to companies admitted to the listing on one of the three stock exchanges operating in the OHADA zone.⁸

3. PLEDGE OF SHAREHOLDER RIGHTS AND SECURITIES VS. PLEDGE OVER SECURITIES ACCOUNTS

Now that the dematerialisation regime has been extended to non-listed companies, the question therefore becomes whether the generalisation of this regime creates any legal obligation to have recourse to pledges over securities accounts instead of pledges of shareholder rights and securities which have been commonly used to secure financings up to now. Indeed, one may consider that once dematerialised and registered, the securities can no longer be subject to pledges of shareholder rights and securities but rather solely to pledges over securities accounts. The two security interests however do not seem

³ Articles 146 to 155 of the Uniform Act on Security.

⁴ Article 148 of the Uniform Act on Security.

⁵ Without which the pledge may be void.

⁶ Article 147 of the Uniform Act on Security.

⁷ Article 151 of the Uniform Act on Security.

⁸ The Cameroon Stock Exchange for Cameroon, the Regional Stock Exchange for the eight member states of the West African Economic and Monetary Union (WAEMU) and the Central African Securities Exchange for the member states of the Economic and Monetary Community of Central Africa (CEMAC).

to be mutually exclusive of one another and pledges over shareholder rights and securities may continue to be used for dematerialised shares.

Indeed, firstly, the validity of the pledges of shareholder rights and securities pre-existing any dematerialisation is unlikely to be questioned given that such validity is assessed as at the date on which the security interest is created. In the event of a subsequent dematerialisation and registration of such securities, any pre-existing pledge of shareholder rights and securities would typically continue to be attached to the securities. Therefore, there seems to be no legal obligation to create a pledge over securities accounts instead of the pledge of shareholder rights and securities for these securities.

Secondly, if a pledge over securities accounts were nevertheless to be created to replace any existing pledge of shareholder rights and securities for precautionary purposes, it should be noted that this is likely not to result in resetting the hardening period⁹. According to the Uniform Act on Collective Proceedings for the Wiping Off of Debts (the “**Uniform Act on Collective Proceedings**”), as revised on 10 September 2015, certain transactions and payments made during the hardening period (*i.e.* the time period between the date on which the debtor becomes unable to repay his debt and the date of the court’s judgement to open insolvency proceedings) may be declared null if they are found to be prejudicial to the creditor mass¹⁰. However, on the basis of a ruling of the French Cour de cassation¹¹, OHADA law jurisdictions may take the view that the granting of a pledge over securities accounts *in lieu* of a pledge of shareholder rights and securities would not raise any hardening period risk in the context of existing financings.

Finally, the dematerialisation of securities results in the disappearance of physical title and the disappearance of the numbering of each of the securities which are typically used to identify securities in a pledge of shareholder rights and securities (and which is a matter of validity of pledges of shareholder rights and securities). Given that the reference to the number of securities is only one element, among others, allowing for the identification of the securities, existing pledges of shareholder rights and securities should continue to be valid and enforceable provided that the new elements of identification of the securities are notified among the parties to the pledge. Furthermore, new pledges of shareholder rights and securities should still be capable of being granted provided that the pledged securities remain identifiable and individualised.¹²

Legally speaking, both of pledges of shareholder rights and securities and the pledges over securities accounts therefore appear available even with the generalisation of the dematerialisation of securities. However, from a purely practical standpoint, it seems more likely that, as and when the practical impediments of the dematerialisation of securities disappear, parties will choose to create pledges over securities accounts to benefit from the simplicity of their creation and the security which the regime provides.

⁹ Article 67 of the Uniform Act on Collective Proceedings.

¹⁰ Article 69 of the Uniform Act on Collective Proceedings.

¹¹ Cass. com. 20-1-1998 no 95-16.402 P : RJDA 5/98 no 625 states that the creation of a new security as collateral for a previously granted credit is not subject to nullity where that security merely replaces a pre-existing security interest, and is no greater than the latter neither in its extent nor in its effects.

¹² Articles 141 of the Uniform Act on Security.

How to proceed with the dematerialisation of registered securities in Cameroon?

Drawing inspiration from foreign legislation, and particularly from article L. 228-1 of the French Code de commerce, the Uniform Act on Commercial Companies organizes the dematerialisation of securities (*i.e.* the operation by which the securities' physical certificates are substituted by an electronic registration in a Securities Account held in the name of their owner).

According to Cameroonian Legislation, applications for dematerialisation of securities are to be filed before the *Caisse Autonome d'Amortissement* (the "**CAA**") which is the entity in charge of the control, monitoring and supervision of the dematerialisation operations until the designation of a central securities depository (*dépositaire central*).

The steps for dematerialisation of registered securities are as follows:

1. Application for codification and registration of securities in securities account

The application must contain the following¹³:

- (i) the request for codification and registration of the securities to be addressed to the managing director of the CAA;
- (ii) an up-to-date copy of the company's articles of association;
- (iii) an up-to-date extract from the Registry of Commerce (RCCM);
- (iv) an up-to-date company share register;
- (v) the name of two persons authorised by the company to interact with the CAA in its capacity as central securities depository (*dépositaire central*);
- (vi) the Activity Code (*Code d'Activité*) with respect to the Nomenclature of Activities in Cameroon (*Nomenclature des Activités du Cameroun*), which is available at the *Institut National de la Statistique*.

2. Collection of registered securities' physical certificates held by shareholders

Companies are required to inform their shareholders (through a notice published in the *Journal Officiel* or in another legal publication) of their obligation to deposit their securities' physical certificates with them or with a custody account holder (*teneur de compte-conservateur*), to proceed with the dematerialisation of their registered securities.

Each shareholder will receive a certificate of ownership ("**Certificate of Ownership**") from the company or the custody account holder (*teneur de compte-conservateur*), which must contain certain mandatory information¹⁴:

¹³ Section VI.1 of the Instruction N°19 (*Comptabilité titres des émetteurs*) from the CAA dated 2015.

¹⁴ Section 18 of the Decree and Section 6 and Annex 2 of the Instruction N°5 (*Procédures de collecte et de dématérialisation des titres physiques*) from the CAA dated November 2015.

3. Destruction of the securities' physical certificates by CAA

Upon receipt of the Certificate of Ownership, the shareholder shall sign an authorisation to be given to the CAA in its capacity as central securities depository (*dépositaire central*) for the destruction by the CAA of his securities' physical certificates.

The company shall send the securities' physical certificates to the CAA for destruction within a maximum of ten (10) days.

The company shall register the dematerialised registered securities into the relevant securities accounts.

4. Management of dematerialised securities

The securities may be transferred from one account to another. In the absence of details concerning this matter in the Uniform Act on Commercial Companies, it appears that transfers should only be recorded following written instructions provided by the holder of the debited account via documents equivalent to the "*bordereau de transfert*", "*déclaration de transfert*" or "*ordre de mouvement*".

Regarding joint stock companies (*sociétés anonymes*), there is a mandatory requirement to maintain a record of all the registered securities. The Uniform Act on Commercial Companies also requires directors to issue a certificate confirming the correct recording. That certificate must be attached to the annual report of the external auditors, who are responsible for ascertaining the existence of the recording and for giving their opinion on its conformity (articles 746-1 and 746-2 of the Uniform Act on Commercial Companies).

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