

THE OHADA TREATY IN THE CONTEXT OF INTERNATIONAL INSOLVENCY LAW DEVELOPMENTS

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1. INTRODUCTION

It is an accepted fact that with the globalization of world economies the constant flow of people, products and wealth across the globe has become indispensable and this has led to the opening up of continents and the fading out of strict trade barriers. With this development come the attendant effect of trade failures and its consequences on various economies and the need to lay down a standard acceptable at least between trading partners to protect the interests of their investors in such situations.

It is in the light of the above that OHADA, which stands for ‘Organisation pour l’Harmonisation en Afrique du Droit des Affaires’, which translates into English as ‘Organisation for the Harmonisation of Business Law in Africa’ came into being. The African continent in the upsurge of the unavoidable effects of globalization and quest for investment opportunities found the need to update its laws to ensure security among investors and the well being of trade undertakings as a whole and this is only possible through the existence of harmonized system of business laws in the region, to avoid multiplicity of laws. OHADA aims at creating an enabling business environment and legal certainty. This is a long overdue initiative which is supportive of commercial transactions that will in the longer term generate wealth and social stability for its market. The major instrument available for the harmonization of the various business laws of all the Contracting States is the Uniform Acts covering areas such as economic interest groups, recovery procedures and enforcement measures, arbitration, accountability and collective insolvency proceedings. These Uniform Acts are directly applicable in all the states and overrules all existing laws of the Contracting States in cases of conflict.

This work focuses on the Uniform Act on collective insolvency proceedings in the context of international insolvency law developments. In making this assessment other international or regional treaties or conventions of similar forms are compared.

1.1 Background

The OHADA Treaty was signed in 1993 and entered into force in 1995 with the main objective being the harmonization of African business law. The organization now has sixteen members from Franco-phone part of Africa namely: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. The Democratic Republic of Congo (DRC) will be the seventeenth member by the end of June 2004 to ensure that the country’s effort towards seeking investment from the Western world will yield results.¹ These are countries that share a common legacy of the French language and legal system.²

OHADA has four major institutions namely the Council of Ministers responsible for administration and legislation; the Permanent Secretariat with a permanent secretary; the Common Court of Justice and Arbitration (CCJA) responsible for settlement of disputes on interpretation and application of Uniform Acts and also for arbitration and the Regional Training Centre for Legal Officers.

Considering the benefits to be derived from a unified business law in Africa efforts are under way to broaden the membership of the organization to incorporate Anglo-phone Africa. This

¹ OHADA Newsletter: at << www.ohada.com >>, visited 24th February 2004.

²It should be noted from the outset that the authentic text of the OHADA Treaty and the Uniform Act are in French.

is a sign that the campaign for reformation of the laws of Africa has gained favour and OHADA has created the desired framework and setting within which such a reform can take place.

The treaty in article 14 provides that any issue regarding the interpretation and enforcement of the Treaty and any of the Uniform Acts shall rest solely with the Common Court of Justice and Arbitration (the Court) in Abidjan. The Treaty also accords the Court an appellate jurisdiction in all business issues pertaining to the application of the Uniform Acts raised in the Contracting States. This presupposes that the enforcement of the Uniform Acts rests with the relevant courts in the various Contracting States. Article 21 of the Treaty makes provision for the referral of any contract litigation in which the parties apply an arbitration clause to the Court if any of the parties is domiciled in a Contracting State or the contract is to be enforced partially or in its entirety in a Contracting State. These provisions, together with the direct applicability provided for in article 10, have established a formidable foundation on which the Continent can develop the much needed uniformity in its diverse legal systems.

1.2 Overview of the OHADA Treaty

The OHADA treaty has sixty-three articles divided into nine chapters or titles with its main objective being ‘the harmonization of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes.’³ The objective of the Treaty therefore is to remedy the legal and judicial insecurity that prevail in Contracting States by modernizing these laws to be in line with international standards. The means for achieving this is through the enactment of Uniform Acts⁴ which are “directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.”⁵

Currently there are seven Uniform Acts in operation covering the areas of: General Commercial Law, Commercial Companies and Economic Interest Groups all of which came into force in 1998. The rest are Uniform Act on Arbitration, which entered into force in June 1999, Uniform Act on Recovery Procedures and Measures of Execution adopted in April 1998 and came into force in July 1998, the Uniform Act on Accountability Law and the Uniform Act Organising Collective Proceedings for Wiping off Debts which entered into force in January 1999. There are three proposed acts, which are to cover the areas of contracts regarding the carriage of goods, employment law and sales to Consumers⁶.

For the purposes of this paper the Uniform Act Organising Collective Proceedings for Wiping off Debts (the Uniform Act) is singled out for discussion.

2. The Uniform Act Organising Collective proceedings for the Wiping off Debts

This Act was adopted in April 1998 and came into force in January 1999. It provides for three types of collective proceedings for individuals and companies as stated in article 1, ‘This Uniform Act organizes collective proceedings for *preventive settlement, legal redress* and *liquidation* of the property of a debtor in order to wipe off his debts.’ (Emphasis added). According to the Act, preventive settlement ‘shall be proceedings aimed at avoiding the

³ OHADA Treaty: Article 1

⁴ *ibid* article 5

⁵ *ibid* article 10

⁶ *Business Law in Africa: OHADA and the Harmonisation Process*. Pp 285-7

cessation of payments or the cessation of activity by a company or at making it possible to wipe off its debts through a preventive composition agreement.’⁷ Legal redress shall be ‘proceedings aimed at safeguarding a company and at wiping off its debts through composition with creditors.’⁸ And liquidation is defined as ‘proceedings aimed at selling the assets of a debtor in order to pay his debts.’⁹ The framework for these three proceedings has been clearly laid down in the act.

The preventive settlement to begin with, is a reorganization measure and it is to be initiated by the debtor who has to attach a composition agreement for redress of the company¹⁰ and according to article 2(1) II the debtor must be ‘facing a difficult but not irremediable economic and financial situation’. The inference here is that the debtor should not wait till it becomes insolvent before applying for preventive settlement. Upon submission of the composition agreement to the competent court, that is, the court within whose jurisdiction the debtor has its registered office or principal place of business¹¹, the court appoints an expert to appraise the economic and financial situation of the company and the prospects for reorganization.¹² The initiation of preventive settlement shall suspend or prohibit all pending lawsuits and this suspension applies to secured and unsecured creditors alike. This rule has only a few exceptions, among which are pending lawsuit ‘of creditors due wages’ and for acknowledgements of rights or disputed debts. There shall be no remedies at law for such suspended lawsuits.¹³ Article 11 prohibits the debtor, under penalty, from making any payments or redeeming any securities during the appraisal by the expert except under the authorization of the President of the competent court. Upon ratification of the composition agreement the role of the expert is terminated and the court appoints receiver and assignee(s) responsible for the supervision of the execution of the composition agreement. An official receiver is also appointed.¹⁴ The duties of the receiver(s) and the official receiver are spelt out in article 20 as being mainly one of co-operation and accountability for the successful execution of the composition agreement.

Unlike the preventive settlement, legal redress which is an administrative proceeding (*redressement judiciaire*) and the liquidation proceedings can only be initiated by the competent court¹⁵ and the debtor must be insolvent to be able to file a petition for these two proceedings.¹⁶ Article 29 of the Uniform Act provides that upon application by the debtor the competent court shall examine the situation based on information provided by the public Prosecutor’s Department and private auditors. The President of the competent court shall then summon the debtor to appear before the court and to be informed on the court’s decision. If the debtor acknowledges being insolvent he is granted a period of thirty days to come up with a composition agreement, that is, if the court decides on legal redress. The court can also decide to initiate liquidation proceedings depending on the outcome of its examination of the debtor’s situation. This is because in these two proceedings the Uniform Act gives the competent court some discretion in determining whether to initiate legal redress or liquidation depending on the financial and economic condition of the debtor and also to convert administration proceedings into liquidation. This discretion is made subject to appeal.¹⁷ The pronouncement of the court shall lead to the appointment of an official receiver

⁷ Article 2(1)

⁸ Article 2(2)

⁹ Article 2(3)

¹⁰ Article 5, 7

¹¹ Article 4

¹² Article 8, 12

¹³ Article 8-9, 22

¹⁴ Article 16

¹⁵ Article 32

¹⁶ Article 25

¹⁷ Article 33

and publication of the decision in the Trade and Personal Property Credit Register and in a newspaper selected for that purpose; these publications should include notice to creditors to file in their claims with the receiver.¹⁸

A legal redress has the effect of placing the debtor under ‘compulsory assistance’ for the disposal and administration of his property except day to day management that fall within the normal course of business.¹⁹ If the composition proposal is ratified the debts are settled and the debtor’s activity continues with or without partial divestiture of assets.

A declaration of a liquidation proceeding of a corporate debtor ‘as of right’ put an end to its existence and divest the debtor of any right to the administration and disposal of already acquired assets and future acquisition. This applies to correspondence addressed to the debtor.²⁰ The responsibility of winding up and realizing the debtor’s assets for the settlement of his debts are therefore wholly placed in the liquidator.

The receiver(s) appointed are to act collectively²¹ and their duties, according to article 39, are verification of the necessary publication of the decisions, overseeing the conduct of the proceedings and representing the interests at stake - of the debtor and creditors.

An important feature of the Uniform Act under discussion is the fact it makes provisions for international collective proceedings which build on article 10 of the OHADA Treaty which makes the Uniform Acts directly applicable in all Contracting States. Articles 247 to 256 are provisions of international insolvency law and it is these articles that place this regional harmonization treaty in the international context in relation to other regional initiatives like the European Union Insolvency Regulation and the more universal initiatives like the UNCITRAL Model Law. These provisions are therefore discussed and assessed vis-à-vis the EU Insolvency Regulation.

2.1 The Uniform Act Organizing Collective Proceedings and EU Insolvency Regulation

The Uniform Act, which entered into force on January 1, 1999, has been said to reflect several issues of the EU Insolvency Regulation.²² A detailed analysis of the Uniform Act reveals that its provisions, especially those on international collective proceedings, are modeled on the EU Insolvency Regulation. Article 247 of the Uniform Act provides that where a decision initiating or closing collective proceedings pronounced in a Contracting State has become irrevocable it shall be *res judicata* in the others thus making recognition mandatory among the Contracting States without any further formalities, a reflection of the principle of recognition in the EU Regulation.²³

Both laws make provisions for main and secondary proceedings and provide the registered office or principal place of business criteria for opening main proceedings with the only difference being the adoption of different descriptive terms, ‘main’ and ‘principal’²⁴. Any other proceedings initiated in a Contracting State apart from the principal proceedings shall be secondary collective proceedings. Article 248 deals with publication of the decision initiating a collective proceeding and appointing a receiver at the request of the latter in other Contracting States for the interests of creditors and, where necessary, enter it in the land, trade

¹⁸ Article 35-36

¹⁹ Article 52

²⁰ Article 53, 56

²¹ Article 43 III

²² Wessels, Bob, Book review of: *Business Law in Africa. OHADA and the Harmonisation Process*, by Boris Martor, Nanette Pilkington, David S. Sellers and Sebastien Thouvenot, in: *International Business Lawyer*, October 2003, p.245

²³ Articles 16, 17 and 25: *EU Insolvency Regulation*
²⁴ *Uniform Act*, Article 251; *EU Insolvency Regulation*, articles 3(1) and 27

and other public register. The EU Insolvency Regulation has the same provision with an extension regarding a mandatory responsibility of the liquidator in the main proceedings to take all necessary measures to ensure such publication when requested by Member States within which the debtor has an establishment.²⁵ Article 249 is a replica of articles 18(1) and 19 of the EU Insolvency Regulation which gives the receiver/liquidator appointed in the main proceedings the authority to exercise his powers in another state so long as no proceedings have been opened and which provides for the appointment of the liquidator to be evidenced by certification.

The Uniform Act makes provisions for return and imputation and for the *pari passu* treatment of creditors by mandating any creditor who obtains payment of their claims on the property of the debtor situated in another Contracting State to return the received claim to the receiver without prejudice to reservation of title and actions for recovery of property.²⁶ A creditor who receives dividend on his claim in collective proceedings takes part in the distribution only where creditors of the same rank have obtained equivalent dividend.²⁷ The EU Insolvency Regulation stipulates the same provisions in article 20.

The duties of the receivers appointed under the Uniform Act are no different from that spelt out in the EU Insolvency Regulation in articles 30 and 31. According to article 252 of the Uniform Act, ‘The receivers of the principal collective proceedings and secondary collective proceedings shall have a duty of reciprocal information.’ And this includes communication of information relevant to other proceedings. There is also the duty of coordination concerning the submission of proposal by the receiver of the principal proceeding relating to the liquidation of assets in the secondary proceedings. Aside the rights granted to creditors to produce their claims in both proceedings the liquidators in the principal and secondary proceedings are mandated to produce the claims of creditors that have been lodged in the proceedings for which they are appointed in other proceedings subject to the *pari passu* principle stipulated in article 255.²⁸ The liquidators are also to return the surplus assets, after settling of claims, to other proceedings and if there are many collective proceedings it shall be distributed equally among them.²⁹ In the EU Insolvency Regulation the surplus assets of other proceedings are to be returned to the liquidator in the main proceedings.³⁰

This analysis brings to light certain aspects of the Uniform Act with regard to the current development trend of insolvency law. The EU Insolvency Regulation, being another regional initiative, proves to be the benchmark for determining whether the Uniform Act is in consonance with current developments in insolvency law and the above analysis reveals that to be the case. Though there is no explicit statement of the aim in the Uniform Act itself the OHADA Treaty spells out the goal as being ‘the adoption of common rules and to harmonize business laws in the Contracting States by the elaboration and adoption of simple modern common rules’ to govern cross-border activities in the region.³¹ This is the same idea behind the enactment of the EU Insolvency Regulation³² and it is the goal it seeks to achieve within the EU. To ensure proper and efficient functioning of the internal market the EU Insolvency Regulation ‘creates certain uniform conflict-of-law rules’ among Member States.³³ With this

²⁵ *Ibid* Articles 21, 22

²⁶ Article 250 I

²⁷ Article 255

²⁸ Article 253

²⁹ Article 256

³⁰ Article 35, *EU Insolvency Regulation*

³¹ OHADA Treaty, articles 1 and 5

³² Recital 2, 3 and 5, *EU Insolvency Regulation*

³³ Wessels, Bob: *European Union Regulation on Insolvency Proceedings: An Introductory Analysis*, p7

common purpose it is therefore not surprising that these two regional laws have almost identical provisions.

One difference is, however, very conspicuous and that is the difference in the number of provisions of these two laws. While the EU Insolvency Regulation has only forty seven articles the Uniform Act has 258 which spell out in great details the functions of participants in collective proceedings and procedural measures to ensure harmonization in all the Contracting States and equal treatment of creditors. This is an indication that the region is a novice in the issue of insolvency law with many grey areas that need to be defined and therefore the need for certain details which are absent in the former due to settled rules in these areas. This ranges from who qualifies to be appointed a receiver, his termination and accountability to the detailed lists of the content of the various composition agreements provided for in the Uniform Act which, for reasons of brevity, could have been annexed. It should however be said that the inclusion of these detailed lists in the main body of the Act might be justified on the grounds of receiving the perceived attention they require.

2.2 Case study: *Air Afrique*

Air Afrique was established in 1961 and until its liquidation was mainly owned by eleven francophone African countries (Benin, Burkina Faso, Central African Republic, Chad, Congo, Ivory Coast, Mali, Mauritania, Niger, Senegal and Togo) who together owned 68.4 per cent, Air France with 12 per cent stake, 9 per cent by the French Development Agency and the rest by three private stockholders. In 1993 the multinational airline started experiencing financial difficulties due, inter alia, to poor management and a badly negotiated airbus lease agreement. Efforts by the eleven countries to devise a strategy to keep the company running yielded no results. In 1998 the representatives of the eleven nation consortium met with the World Bank in Dakar to work out modalities for assistance. The World Bank came up with suggestions of privatization and other restructuring propositions which the nations found unacceptable. In August 2001 Air France offered an agreement in which the company was to be renamed and the swapping of its 12 per cent for 35 per cent holding with the African partners owning 20 per cent and bringing in more investors from the private sector. The implementation of this deal, from the point of view of the eleven nations, was found to be complicated and therefore could not be realized. The airline stopped flying in January 2002 and on 7th February 2002 the company filed for bankruptcy in Abidjan where it had its centre of administration with claims against it estimated at about \$458m.

With all the eleven nations being members of OHADA the applicable law was the Uniform Act article 25 of which stipulates that a debtor who is not able to meet his current liabilities with his available assets shall within thirty days of cessation of payments file for a declaration to that effect, which Air Afrique did. The court has the discretion to declare collective proceedings for legal redress or liquidation³⁴ and considering the extent of indebtedness and the fruitless efforts towards redressing the situation the court decided on liquidation based on the fulfilment of the condition in article 29 of the Uniform Act. In accordance with article 247 which establishes cooperation between courts on the basis of recognition this declaration by the court in Abidjan became binding on all the Contracting States in which Air Afrique had establishments. On the basis of article 251 the relevant courts in the other Contracting States in which the company had establishments, initiated proceedings to liquidate the asset within their territories.

³⁴ Article 32

This could be considered a test case for the Uniform Act since its introduction in 1999 and the success of this case with regard to the cooperation between courts and liquidators is regarded as a landmark victory for the OHADA initiative and marks the beginning of confidence in African business law. It is therefore not surprising that the rest of the Continent, especially Anglophone Africa, are making efforts to see how best they can be integrated into the OHADA framework. The potential of OHADA in unifying and modernizing business law in Africa has attracted the attention of the international community who has been contributing and participating in their seminars. On the 4th November 2003 a seminar was held in Ghana in which the relevant representatives of the World Bank, the European Union, UNDP, USA, UK, Canada and France were present. A similar event was organized in Anglophone Cameroon in September 2003 on the issue of integration into OHADA.

These laudable efforts notwithstanding, the integration of Anglophone Common Law West African countries promises to be very challenging. The official language for OHADA is French according to article 63 of the Treaty. With the entry of Anglophone countries it has to be made a bi-lingual organization which will mean certain modifications in the OHADA Treaty and the various Uniform Acts to accommodate the merging of these two diverse legal traditions. However, considering the fact that the benefits to be derived from this integration far exceed the efforts and adjustments required to eliminate this seemingly insurmountable obstacle it is worth the effort. With enough support from the international community it is envisaged that the integration process will be facilitated with less difficulty.

2.3 The Uniform Act and the UNCITRAL Model Law

Whether considered from the point of view of the EU Insolvency Regulation, the Uniform Act or the UNCITRAL Model Law, cross-border insolvency law has one goal: to create legal certainty by the adoption of common rules for efficiency in cross-border insolvency proceedings. This is what the UNCITRAL Model Law seeks to extend by building a framework for universal approach to achieving this goal. As is the case with the EU Insolvency Regulation, the UNCITRAL Model Law is of no consequence to the Uniform Act as far as proceedings in the Contracting States are concerned. This is because among the members of OHADA the Uniform Act is the applicable law with no exceptions and recognition is mandatory, thus the provisions of the UNCITRAL Model Law that emphasizes the essence of recognition between countries for cooperation and efficient coordination of proceedings is of little relevance.³⁵ The importance of the UNCITRAL Model Law however comes into play when the debtor has establishments in a non-contracting state which calls for cooperation between courts. Irrespective of all these regional initiatives UNCITRAL Model Law is still of significant relevance in situations where proceedings defy the regional boundaries set by these multilateral treaties. It is therefore important that these treaties have provisions in them implementing the UNCITRAL Model Law which will determine how other nations cooperate in universal proceedings for efficient realization of assets. The presence of provisions in the Uniform Act implementing the UNCITRAL Model Law will be very essential in ensuring cooperation in proceedings between the OHADA Contracting States and the non-member African states during the time lapse between negotiation and integration of the rest of the Continent. It will also ensure cooperation between OHADA members and other countries outside the Continent. It is worth mentioning that the implementation of UNCITRAL Model Law by these regional blocks will be an important step in achieving its objectives. This is because such regional multilateral treaties and regulations are directly binding on the member countries; this would ensure easy implementation and applicability.

³⁵ Articles 15, 16 and 20: *UNCITRAL Model Law* © International Insolvency Institute - www.iiiglobal.org

However, the issue of reciprocity is worth considering at this point. One controversial aspect of the Model Law is the fact that it prescribes no applicable law and it is a flexible instrument which affords the implementing States' the liberty to cherry pick proceedings for recognition and cooperation in line with the states' public policy³⁶ or even choose not to implement it at all. It lacks the authority that characterizes laws like the Uniform Act and the EU Insolvency Regulation which assure States of reciprocal treatment. The risk of one-sided cooperation can therefore not be ruled out completely and this really brings into question the South African *quid pro quo* condition on its implementation.³⁷ Though it might not be the best approach the reality of that proposition cannot be ignored. The implementation of the Model Law by the Uniform Act without its implementation by other states will achieve little success regarding the objectives for which the Model Law was drafted.

Conclusion

OHADA is a modest step that promises to create unity in diversity for the legal and economic development of Africa. The OHADA Uniform Act Organising Collective Proceedings Wiping off Debts is very essential in the series of Uniform Acts enacted to set a framework for the regulation of African Business. It is not the expectation of society that businesses fail but the corporate scandals of recent times involving one-time corporate giants have made it imperative that laws regulating failed corporate entities are as important as the ones ensuring their existence and this is the relevance of the Uniform Act. It is against this background that the effectiveness of the Uniform Act is assessed.

However, with regard to the issue of whether the Uniform Act conforms to current developments in international insolvency law, the best yardstick is the EU Insolvency Regulation. The contents of these laws are almost identical and so are their objectives. Both promise within the brief period of their existence to fulfil the aims for their enactment. The OHADA Treaty is a reaction to the global developments in business law and the Uniform Act is the Continent's contribution to the development of insolvency law.

³⁶ *ibid* Article 6

³⁷ R. W. Harmer, *UNCITRAL Projects; Insol International*, in: I. F. Fletcher, L. Mistelis and M. Cremona (eds.), *Foundations and Perspectives of International Trade Law* (2001), p. 480
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