INTERNATIONAL INSOLVENCY INSTITUTE

Out of Africa: The OHADA Uniform Insolvency Law

Paul J. Omar

From

The Paul J. Omar Collection

in

The International Insolvency Institute

Academic Forum Collection

http://www.iiiglobal.org/component/jdownloads/viewcategory/647.html

International Insolvency Institute
PMB 112
10332 Main Street
Fairfax, Virginia 22030-2410
USA
Email: *info@iiiglobal.org*

Out of Africa:
The OHADA Uniform Insolvency Law

by
Paul J. Omar
of Gray's Inn, Barrister

Introduction

A significant feature of the development of modern insolvency law has been the introduction as part of the reform process of corporate rescue regimes into those jurisdictions where these have previously been unknown. Furthermore, given the international nature of business, the provision of measures to assist co-operation between courts in insolvency cases with a cross-border element has also proved indispensable for jurisdictions which claim to have modern insolvency rules. Countries which have cross-border measures include the United States,[1] Australia[2] and the United Kingdom.[3] The effectiveness of these measures is debatable, with some systems experiencing better co-operation rates than others.

Commentators have long preached the merits of uniformity of rules, avoiding uncertain application and potential conflicts.[4] For that reason, there has long been a case for an insolvency convention reaching beyond national boundaries and thus avoiding the perils of conflicts of laws.[5] One of the major obstacles before a convention is the desire by national authorities to harmonise the conduct of insolvency proceedings across borders without, however, bringing about a substantial impact on domestic law. A compromise is to provide the means for mutual assistance and co-operation in insolvency while retaining domestic rules.[6] Acceptance of such a convention may in the long run still pave the way towards gradual rapprochement of fundamental rules, but this is by no means a certainty.

The recent appearance of a convention which regulates both conflicts of law while introducing new rules into domestic legal systems is sufficiently a rarity, thus an event that merits some remark. A Uniform Insolvency Law produced by a grouping of African states is noteworthy for providing a framework for the wholesale reform of insolvency procedures and regulations for the inevitable conflict between these measures at a cross-border level.

The Work of OHADA

OHADA is the acronym in French of the Organisation for the Harmonisation of Commercial Law in Africa.[7] This body was founded by a treaty, signed in Port Louis, Mauritius on 17 October 1993, and has as its main purpose the reform and

---

[1] s304, Bankruptcy Code.
[2] ss580-581, Corporations Law 1990.
[3] s426, Insolvency Act 1986.
[4] See Jitta, International Bankruptcy Codification (1895) 7 Juridical Review 305 at 309-313.
[5] See Nadelman, An International Bankruptcy Code: New Thoughts on an Old Idea (1961) 10 ICLQ 70 and Graham, Cross-Border Insolvency [1989] CLP 217.
[6] The approach taken in the Bustamante Code 1928, Copenhagen Convention 1933, Istanbul (Council of Europe) Convention 1990, European Insolvency Convention 1995 and UNCITRAL Model Law on Cross-Border Insolvency 1997.
[7] Organisation pour l'Harmonisation en Afrique du Droit des Affaires.

harmonisation of law in member states belonging to the organisation.[8] Although most of the member states of OHADA were members of the French colonial empire, the organisation is open to membership by any state which is a member of the Organisation for African Unity or any other states invited to join by existing OHADA member states.

The task of harmonisation is part and parcel of the overall objectives of OHADA to remedy the legal insecurity in member states caused by the desuetude of legal texts and the lack of overall reform initiatives in these jurisdictions. The principal aim of OHADA is to make available to member states common and simplified rules geared to economic needs with view to regional economic integration. OHADA also sees as part of its purpose the promotion of arbitration as a means of resolving commercial disputes as well as the training of judges and professionals in the legal sector. OHADA acts through a Council of Ministers, which adopts harmonisation measures, a Permanent Secretariat located in Cameroon, a Common Court of Justice and Arbitration sited in the Ivory Coast and a Regional Judicial College in Benin.

Harmonisation measures in OHADA chiefly consist of the production of Uniform Laws which have direct force on the territory of member states. Uniform interpretation of the laws is further aided by the existence of the Common Court. The work of OHADA has so far produced Uniform Laws in two tranches. On 17 April 1997, the Council of Ministers adopted three major texts dealing with, in order, general commercial law and principles, corporate structures and economic interest groupings as well as security interests. These texts entered into force on 1 January 1998. The second tranche consisted of two texts, adopted on 10 April 1998, dealing with enforcement and recovery measures as well as the organisation of insolvency proceedings. The Uniform Insolvency Law, adopted pursuant to Article 9 of the OHADA Treaty, came into effect on 1 January 1999.

Genesis of the Uniform Insolvency Law

The Uniform Insolvency Law replaces a confused mass of legislation previously in force in member states. Many of these texts were modelled on French insolvency law measures, illustrating the shared legal antecedents of most of the OHADA member states. Depending, however, on when the member states adopted their laws, these texts represented almost all of the stages French insolvency law had passed through since the creation of the Napoleonic Codes during the era of codification immediately after the French Revolution.[9] In fact, most of the OHADA member states had rules which dated to the Commercial Code of 1808, as amended by later laws of 28 May 1838 and 4 March 1889 as well as the decree-law of 8 August 1935. This regime created the twin-track approach which survives in modern law through the introduction of two types of proceedings: winding up (faillite) and an embryonic rescue regime (enigmatically titled liquidation judiciaire) which permitted the insolvent debtor to agree an arrangement with creditors for the rescheduling of debts.

[8] Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comores, Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

[9] See Sorensen & Omar, Corporate Rescue Procedures in France (1996) Kluwer in Chapter 3.

Two of the OHADA member states, Mali and Senegal, had adopted texts which are considered to be the beginnings of the modern French law of insolvency, first promulgated in 1967. This kept the twin-track approach, with a confusing change in terminology, consisting of a rescue regime (règlement judiciaire) and a winding up procedure (liquidation des biens), but also tacked on a penalty regime applying to insolvent debtors and directors of insolvent companies (faillite). Four other member states, Benin, Cameroon, Gabon and Guinea, had adopted or were in the process of adopting texts based on the later reforms of 1984-1985. These added a pre-insolvency diagnostics and rescue regime (règlement amiable) and recalibrated the twin-track approach within insolvency, giving the procedures new titles emphasising court control over the process (redressement judiciaire, liquidation judiciaire). This tripartite approach now forms the foundation of modern French insolvency law and may be seen to have inspired the draftsmen behind the OHADA text.

Modernisation of Insolvency Procedures

The Uniform Insolvency Law introduces three procedures, one designed to offer businesses facing financial difficulties a means of pre-insolvency rescue (règlement préventif) and two designed to offer the insolvent business a choice between rescue (redressement judiciaire) and liquidation (liquidation des biens).[10] The three procedures resemble their counterparts found in French legislation and which in fact work along very similar principles. The Uniform Insolvency Law is designed to work in a commercial context and affects chiefly economic entities. The self-employed and traders are covered by the law only where they are considered to be businesspersons (commerçants). Farmers and craftsmen are not subject to this law, although member states may at their discretion enact rules applying the Uniform Insolvency Law to these categories of persons. Incorporated entities are subject to the law, whether or not they have an economic purpose and whether or not they are private or public enterprises, a distinction which is often found in other insolvency regimes.[11]

The pre-insolvency rescue procedure is designed to afford debtors going through a difficult, but not entirely hopeless, financial or economic situation the means of organising their affairs so as to avoid the onset of insolvency.[12] There is no requirement that there be any internal diagnostics procedure before the assistance of the courts is sought. The debtor is required simply to deposit information with the court and a draft scheme of arrangement designed to help extricate the business from its problems. The scheme of arrangement may contain proposals for the waiver and/or rescheduling of debts with different treatment for categories of creditors. If the court is of the mind that the scheme has a realistic prospect of success, it will order a moratorium and invite an insolvency practitioner to report on the business. The court may then give effect to the scheme of arrangement. If, however, the debtor is in a more hopeless financial situation than was thought to be the case or defaults on payments under the scheme, formal insolvency proceedings are opened.

[10]Preliminary Title, Articles 1-4. (references to Articles below are to articles of the Uniform Insolvency Law).
[11]Article 2.
[12]Title 1, Articles 5-24.

The use of the twin insolvency regimes are predicated on the debtor being in the formal state of having ceased to make payments (cessation de paiements).[13] The emphasis on rescue as having priority over winding up is maintained in the Uniform Insolvency Law.[14] The debtor is required to petition for the opening of insolvency proceedings, provide all necessary information to the court and submit a rescue plan containing proposals for the restructuring of the insolvent enterprise. Rescue proceedings are ordered by court if there is a realistic prospect of success. Liquidation is ordered if the debtor fails to submit any rescue plan or if the court does not accept the proposals have any chance of restoring the debtor to financial health. Liquidation can also occur when, during the implementation of the rescue plan, the debtor fails to honour any of his obligations.

The personnel of insolvency proceedings under the Uniform Insolvency Law resemble their counterparts in France. An insolvency professional is put in overall charge of the proceedings and is answerable to a supervising judge. In addition, the interests of creditors are maintained through the appointment of monitors, who have certain rights to receive information and to represent creditors in court. The interest of the State is reflected in the role given to the Public Prosecutor's office to act in proceedings and there is also a right to be kept informed of all stages in proceedings. In addition, the emphasis found in French law on directors' liability is also to be found in the Uniform Insolvency Law with mismanagement by the debtor or directors of insolvent enterprises being met with an array of sanctions. These include the extension of insolvency proceedings personally to directors, disqualification from being involved in managing companies and civic penalties including deprivation of the right to stand for public office. Furthermore, personal bankruptcy is a potential threat as well as imprisonment and fines in cases of proven criminal conduct.[15]

The Cross-Border Element

An interesting feature of the Uniform Insolvency Law is the inclusion of a section on insolvency proceedings with a cross-border element.[16] According to this, judgments of courts in any member state have full effect in other member states where these judgments deal with the conduct of the procedure, settle any question relating to elements of the procedure and claims brought by interested parties as well as where judgments have arisen in proceedings other than insolvency proceedings but on which the latter have had an effect.[17] These judgments are considered res judicata but may need to be published in the public registers of member states where enforcement is sought.[18] This is a practical measure which avoids the prospect of a creditor exercising recovery proceedings or executing a judgment obtained regularly and successfully claiming no knowledge of

[13] Article 25, which echoes the definition contained in Article 3, Law no. 85-98 of 25 January 1985 (French Law of Insolvency).
[14] Title II, Articles 25-193 (procedure) and Title IV, Articles 216-225 (appeals).
[15] Title III, Articles 194-215 (personal bankruptcy) and Title V, Articles 226-246 (criminal offences).
[16] Title VI, Articles 247-256.
[17] Article 247. Presumably, these judgments include those of criminal courts, social security and employment tribunals as well as family courts where insolvency proceedings have given rise to claims which can only be heard by these courts.
[18] Article 248.

proceedings elsewhere, as the law provides a creditor in that position with an amnesty with regard to property obtained through such measures.[19]

Insolvency professionals may, under the Uniform Insolvency Law, exercise powers in any member state available under the law until such time as proceedings have been opened in that state, subject to providing evidence of a qualification to act, translated where necessary.[20] Although judgments obtained in one member state are given full effect in other member states, this does not of itself prevent the opening of insolvency proceedings affecting the same debtor in that state. Regulating the potential for conflict in cases where a number of proceedings are likely, the Uniform Insolvency Law adopts definitions of main and secondary proceedings. Main or principal proceedings occur in the member state where the debtor has its main establishment, headquarters or centre of real management (siège), secondary proceedings being those taking place in any other member state.[21] Creditors are entitled to take part and prove in any proceedings they choose, although the pari passu principle is respected in that creditors must account for any dividends and may not participate in other distributions until creditors of an equivalent rank have received the same amount of dividend.[22]

Remaining provisions in this section place the emphasis on co-operation. The insolvency professionals in charge of main and secondary proceedings are required to share any information, particularly that which could be useful to other proceedings. Insolvency professionals may also prove in other proceedings debts admitted to proof in their own proceedings.[23] Pre-eminence is, however, given to the insolvency professional in charge of main proceedings in some instances. For example, insolvency professionals in secondary proceedings should allow sufficient time for those in charge of main proceedings to present proposals for the use of assets in secondary proceedings.[24] Furthermore, a rescue plan in secondary proceedings can only be adopted with the consent of the main insolvency professional, although consent can not be validly withheld unless he proves that the plan will materially affect the financial interests of creditors claiming under main proceedings.[25] Finally, any surplus from proceedings after the payment of creditors in that jurisdiction is to be transferred for the use of other proceedings, although no priority is given to main proceedings in this respect. Indeed, if more than one set of proceedings is still open, the surplus is divided equally between all remaining proceedings.[26]

Summary

Traditionally, the success of any insolvency treaty has been dependent on the willingness of signatory states to implement its terms and give effect not just to the text but to the spirit in which it was adopted. The by-ways of insolvency law are regrettably littered with failed attempts seeking to influence the conduct of

[19] Article 250.
[20] Article 249.
[21] Article 251. These definitions are very reminiscent of those in the European Insolvency Convention 1995.
[22] Article 255.
[23] Article 253.
[24] Article 252.
[25] Article 254.
[26] Article 256.

international insolvency. In some ways, the OHADA method avoids the difficulties inherent in this traditional approach by enacting uniform laws applicable in the domestic legal systems of its member states. The uniformity achieved by this method is further enhanced by the availability of co-ordinated interpretation of the law. This Uniform Insolvency Law differs from previous cross-border attempts in that it is predicated on first creating new insolvency procedures for all jurisdictions concerned. Only subsequently does it deal with the regulation of cross-border issues. A one-stop shop treaty of this type is novel. It, however, deserves some success, particularly as it is forms part of an overall attempt to ameliorate the commercial justice system in some of the world's least developed countries, where instruments of this type are vital in ensuring that the stability of the legal framework for commercial transactions is enhanced.

27th July 1999