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Critical Reflection on the Rights of Creditors in Case of Insufficiency of Assets in OHADA Collective Procedures Law

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Abstract: The procedure of liquidation of assets can be closed for the extinction of liabilities or for insufficient assets. The court may then, at the request of any interested person or ex officio, at any time during the proceedings and after a report by the official receiver, close the proceedings. In case of insufficiency of assets, the business disappears and, perhaps, the hope of any payment to creditors as well. For a long time, it was accepted that the closure for lack of assets allows creditors to resume individual proceedings against the debtor, especially if the latter returns to better circumstances. This traditional solution has been abandoned. According to OHADA Uniform Act on the organisation of collective procedures for the settlement of liabilities, revised on 10 December 2015, closure for insufficiency of assets no longer automatically gives creditors the right to take individual action. Thus, when a liquidation leads to a shortage of assets, the satisfaction of creditors remains uncertain. The objective of this study is to show that despite this reform, the protection of creditors' rights has not changed significantly in the event of insufficient assets. Indeed, any possible recourse to the recovery of their claims remains paralysed by certain measures that infringe their rights. The infringements can be described as severe or moderate depending on the case.

Keywords: Creditors, Insufficiency of Assets, Liquidation, Collective Proceedings

1. Introduction

The main purpose of business law is to set the rules of conduct to follow the business [1] through all stages of its operation. It is essentially responsible for creating the conditions necessary for investments to flourish [2], but also, as far as possible, for ensuring that the enterprises created are viable. The idea of viability suggests that the enterprise may, at some point in its existence, need particular attention. This is specially the case when it faces difficulties that may sometimes lead to its inability to pay off its liabilities. Hence, there is need to set up the appropriate collective procedure for its survival when in difficulty.

The legal system must then provide means of safeguarding the company in the event of a crisis in order to avoid its disappearance. The prevention and treatment of companies in difficulty is ensured by the OHADA Uniform Act on the organisation of collective procedures for the settlement of liabilities, revised on 10 December 2015. Until 10 September 2015, collective procedures were governed in the OHADA area by the Uniform Act of 10 April 1998, which instituted three collective procedures: preventive settlement, legal redress and liquidation of assets. With the advent of the new Uniform Act, four new procedures have been introduced: conciliation, simplified preventive settlement, simplified receivership and simplified liquidation of assets.

The liquidation is a collective procedure intended to realise the assets of a debtor company in cessation of payments whose situation is irremediably compromised in order to clear its liabilities. The procedure can be closed for the extinction of liabilities[1] or for insufficient assets. Closure for insufficiency occurs when there are insufficient funds to undertake or continue the liquidation operations. The court

[1] It intervenes when all the liabilities due have been paid or when the liquidator has sufficient funds to do so or when the capital, interest and costs of the sums due have been deposited

may then, at the request of any interested person or *ex officio*, at any time during the proceedings and after a report by the official receiver, close the procedure [3]. This situation leaves creditors in serious insolvency [2] : the business disappears and, perhaps, the hope of any payment to creditors as well. For a long time, it was accepted that the closure for lack of assets allows creditors to resume individual proceedings against the debtor, especially if the latter returns to better circumstances. This traditional solution has been abandoned. Closure no longer automatically gives creditors the right to take individual action. This provision of the Uniform Act leads us to ask whether the 2015 reform has improved the protection of creditors' rights in the event of insufficient assets. The objective of this study is to show that despite this reform, the protection of creditors' rights has not changed significantly in the event of insufficient assets. Indeed, any possible recourse to the recovery of their claims remains paralysed by certain measures that infringe their rights. The infringements can be described as severe (2) or moderate (3) depending on the case.

2. Severe Infringements of Creditors' Rights in the Event of Insufficient Assets

The impairment of creditors' rights in insolvency proceedings is usually manifested in the prohibition of payments and the prohibition of proceedings [4]. This impairment is particularly noticeable in joint stock companies where creditors remain dissatisfied. It is therefore of undeniable interest to analyse the question of the manifestations of serious infringements of creditors' rights in this type of company. Closure for lack of assets is a disastrous outcome of the proceedings. Not only does the company disappear for good, but also its creditors inevitably lose any possible recourse to their rights. This dissatisfaction shows that creditors lose out at the end of the procedure, even though it was set up to protect them and secure their claims.

However, these serious infringements of creditors' rights are the result of the legal regime [5]. Now applicable in the event of insufficient assets. We analyse these infringements successively in the pre-liquidation phase (2.1.) and in the post-liquidation phase (2.2.).

2.1. In the Pre-Liquidation Phase

Beyond the will of the shareholders or partners, the end of a commercial company may be due to the insurmountable economic difficulties it faces. This will be a specific procedure called the liquidation of assets. To organise a certain justice in the process of reimbursement of creditors and to avoid the price of the race, this procedure sets out a certain number of procedural rules, including the representativeness of the creditors through the trustee[3] (2.1.1) who alone acts on their behalf in the interest of the collective of creditors whose rights are tightened by the judicial stranglehold of their transformation into a mass (2.1.2).

2.1.1. Subordination of Creditors to the Receiver

An analysis of the position of the liquidator[4] reveals that the liquidator is a central figure in the implementation of collective procedures in the OHADA area. On the one hand, the liquidator, who represents the court for the administration of the procedure, is also invested with a dual mission of representing both the creditors and the debtor. This ambiguous posture has some consequences: while it may appear to be geared towards efficiency, this Janus-like posture has the major disadvantage of concentrating in the hands of the same person functions of a different nature for which the liquidator does not, in practice, have the necessary qualifications.

On the other hand, this legal representative[5] is invested with very important prerogatives regarding both the debtor who has been relinquished and the creditors, but also the procedure since his role is decisive in the implementation and execution of the reorganisation agreement, or in the achievement of the debtor's assets in the event of the liquidation of property. The powers of the liquidator appear even more important as the control of his action is inoperative in practice. Indeed, the sporadic control of the creditors suffers both from weaknesses in its conception and from a large ineffectiveness in its application because of the delegation of the creditors' prerogatives to the receiver. Moreover, judges are often insufficiently equipped to exercise effective control, not to mention the public prosecutors taking few initiatives in this area and the judge-commissioners being sometimes accused of laxity or even collusion with the trustee.

The development of OHADA criminal law has led to legislative gaps that are conducive to the impunity of liquidators. All in all, the controls instituted are not sufficient to counterbalance the powers of the liquidator, so that the latter appears to be the main player and the real conductor of the implementation of collective procedures. A critical look at the actual action of the liquidator in terms of achieving the objectives assigned to collective proceedings is called for. The evaluation of the insolvency representative's intervention leads to a finding that collective proceedings have failed, both in their function of safeguarding re-organisable companies and in their function of making substantial payments to creditors. Companies that recover through collective proceedings are rather rare; the duration of the

[2] Serious insolvency is an alarming economic situation in which a natural or legal person is financially unable to repay its creditors. As a result of serious insolvency, the probable risk for the company is liquidation.

[3] In the OHADA area, the liquidator is at the heart of receivership and liquidation procedures, so that he appears to be an essential player in the development of collective procedures.

[4] Article 4-4 of the Uniform Act Organizing Collective Proceedings and the Settlement of Debts provides that the liquidator must present all guarantees of independence, neutrality and impartiality in any collective procedure.

[5] No person may be appointed as an expert in preventive settlement or as a liquidator in preventive settlement, receivership or liquidation proceedings unless he is registered on the national list of judicial agents.

proceedings is extremely long, the recovery costs are excessively high and the payments made to creditors insignificant. The proven inefficiency and ineffectiveness of the procedures seem to be largely attributable to the liquidator, the shortcomings of the control exercised over his action being aggravated by the inadequacy of his status.

In spite of the important progress made by the OHADA legislator through the new Uniform Act of 10 September 2015 on the organisation of collective procedures for the settlement of debts, the detailed regulations relating to access to the functions of judicial representatives, the conditions for exercising these functions as well as the framework of their remuneration, concerns and regrets nevertheless remain: the referral, to the competence of national legislators, of questions as important as the determination of the detailed scale of remuneration, the regulation of training obligations or the establishment of a body for the control and supervision of judicial representatives raises some concerns in view of the inconclusive experience recorded in the enactment of complementary domestic law by OHADA Member States. It is also regrettable that the OHADA legislator has not clearly taken a stand for the specialisation and professionalisation of the function of liquidator, and that it has not chosen to change its perspective by relieving the liquidator, to the benefit of the supervisors, of the function of representing creditors, but above all by granting creditors more guarantees of payment of their rights of claim.

2.1.2. The Judicial Stranglehold of the Transformation of Creditors into a Mass

The estate is made up of all the creditors whose claim precedes the decision to open the proceedings, even if the due date of this claim was set after this decision, provided that this claim is not unenforceable[6] to creditors prior to the decision to open the collective procedure, what Professor CORRE describes as a "regime of mistreatment" is applied [6]; unlike later creditors who, according to the same author, benefit from the regime of "attentive care" in return for their indispensable contribution not only to the normal course of the procedure's operations, but also to the preservation or increase of the debtor's assets. From the combination of Articles 72 and 117 of the Uniform Act on Collective Proceedings, it formally emerges that only prior creditors are subject to collective discipline on an equal basis. The identification of these creditors requires considering the generation and the legal nature of the claim. The body of creditors is made up of all unsecured creditors prior to the opening judgment, not forgetting creditors with general privileges and even those with special securities [7].

In any event, it is not the nature of the claim that is important, but the date of its creation. Therefore, the determination of the creditors grouped within the estate will be made on a chronological basis by observing the event that gave rise to the claim. These different procedures already point to the total forfeiture of creditors' rights, hence the need to analyse the post-liquidation phase.

[6] Under Articles 68 and 69 of the Uniform Act Organizing Collective Proceedings and the Settlement of Debts.

2.2. In the Post Liquidation Phase

The post-liquidation phase refers to the period that puts an end to the company's activity through the sale of the last assets. Indeed, when the insufficiency of assets is proven, the creditor is disarmed because he has no way to assert his prerogatives. Liquidation in the event of insufficient assets renders null and void any possible recourse for payment. This can be seen in the absence of recourse to individual proceedings (2.2.1.) and the preservation of the debtor's personal assets (2.2.2.).

2.2.1. Ineffectiveness of Personal Lawsuits

Almost universally, the rights of creditors in collective proceedings are limited and impaired. Indeed, the very interest of collective proceedings lies in the organisation of a class action by the creditors against the debtor to maintain a "civilised" aspect in the recovery of the claims at stake. Article 75 AUPC states that the decision to open the bankruptcy proceedings suspends or prohibits all individual proceedings to obtain recognition of rights and claims, as well as all enforcement measures to obtain payment, exercised by the creditors making up the estate on the movable and immovable property of the debtor. This is truly a common discipline [8] against a background of equality. The French legislator agrees with this. The only difference is that it speaks of a provisional suspension of proceedings[7]. It has thus been ruled that the recovery of the claims of a debtor who has been the subject of collective proceedings belongs to the competent bodies. The principle of equality of creditors prevents one of them from taking an indirect action to protect a right belonging to its debtor in liquidation [9]. Originally, this suspension was not general; it targeted certain categories of creditors. In this respect, the Senegalese legislator, for example, distinguished unsecured creditors from creditors with securities. Thus, creditors with securities were exempted.

By now, community law has innovated considerably by re-establishing strict equality between all creditors[8]. In addition to this suspension, there is also a ban on registrations accompanied by a halt in the interest rate. Very often when a debtor is placed in collective proceedings, his creditors are tempted to take enforcement measures to recover their claim or to take legal action to assert their rights. Traditionally, the principle of equality between creditors requires that such proceedings be stopped. However, when the liquidation results in a lack of assets, the rights of the creditors are irremediably compromised by the limited liability of the shareholders as well as the weight of the regulation of collective discipline which is the corollary of the procedure

[7] The interest of the suspension is to interrupt all actions that were initiated before the opening of the collective procedure. In other words, the creditor will no longer be able to request the enforcement of court decisions that he obtained before the opening judgment.

[8] The equality of creditors, which is a special rule of equality in relation to the general principle of civil equality, is based on Article 2093 of the Civil Code, according to which "the debtor's assets are the common pledge of his creditors.

of lack of assets, particularly in capital companies. As a result, these creditors cannot get the judge to order a payment.

2.2.2. Preservation of the Debtor's Personal Assets

The patrimony [10] is defined as the set of rights and obligations of a person considered as a universality; that is to say, a container in which assets and liabilities are linked, the first being responsible for the second and all future elements being called upon to enter [11]. In other words, it is a set of assets and obligations of the same person, assets and liabilities, considered as a universality of right, a set including not only his present but also his future assets [12]. This conception of heritage faithfully restores the meaning of the rule of uniqueness of patrimony [13] that complies with the idea that patrimony has as its sole and unique support the person; and the person in this case cannot have more than one patrimony.

For this purpose, Article 2284 of the Civil Code states that anyone who has obliged himself personally is bound to fulfil his commitment on all his movable and immovable property, present and future'. This is not the case in joint stock companies because the system of liability limited to the contributions spares them the grievances of legal proceedings in their own assets and therefore limits the actions of creditors in recovering their payment. The protection of personal assets is not the only prerogative of joint stock companies. The OHADA legislator, following the French legislator, has invested in the supervision of entrepreneurship. In principle, an entrepreneur who carries out his activity in the form of a sole proprietorship is liable for his business debts from his entire personal assets.

In concrete terms, in the event of the judicial liquidation of a sole proprietorship, the personal assets of the entrepreneur, such as his or her main residence or real estate, may be sold by the liquidator at judicial auction. On analysis, it appears that creditors' rights are seriously affected in partnerships. However, in companies with a special regime, their rights are preserved, hence the analysis of the seemingly moderate infringements of creditors' rights.

3. Moderate Infringement of Creditors' Rights in the Event of Insufficient Assets

Companies designated as partnerships are structures in which there is a strong link between the partners, known as *intuitu personae*. A public enterprise is an economic unit with legal and financial autonomy, carrying out an industrial and commercial activity, and whose share capital is held entirely or in majority by a legal person under public law. The legal regime of partnerships and the special exemption of public enterprises in the procedure of the insufficiency of assets attenuate considerably the alteration of the creditor's rights of claim. In practice, facts show that the objective of the deficiency procedure is not so much to pay the creditors as to put an end to the business.

In this context, the collective discipline to which all creditors must submit offers a legal environment conducive to the discharge of the liabilities that are being prepared, but an uncertain future for the financial situation of creditors. It should be noted, however, that creditors of public companies and partnerships are protected by the recognition of individual lawsuits in special status companies (3.2.) and the indefinite and joint liability of partners in partnerships (3.1.).

3.1. Indefinite and Joint Liability of Partners in Partnerships

Joint and several liability in partnerships means that all partners are jointly and severally liable for the company's debts. This situation entails the obligation to pay the debt[9] of all creditors. Solidarity is defined by Articles 1200 et seq. of the Civil Code as a guarantee, giving the creditor the right to claim payment of the entire debt from any of his debtors. As a matter of principle, an obligation binding several creditors, or several debtors is divided among them by operation of law. The result is that each creditor is entitled only to his share of the common claim and, correlatively, each debtor is liable only for his share of the common debt. Thus, when several debtors commit themselves to the same creditor, one of them cannot be held alone towards the creditor for the total payment of the debt. The debt is, the law says, "divided by operation of law". However, the situation is different when the obligation is said to be "joint and several". Solidarity is a legal technique which precisely avoids such a division. And so, according to Article 1313 of the Civil Code, joint and several liability between debtors 'obliges each of them to pay the whole debt'.

Where three debtors are jointly and severally liable to the same creditor, one of them is liable to the creditor for the payment of the entire debt, including the share of the debt of the other two debtors. In sum, payment by one of the debtors discharges the others in respect of the creditor. The person who has paid more than his share has recourse against the other debtors, in proportion to their own share. If one of them is insolvent, his share is divided between the solvent debtors and, according to Article 1317 paragraph 3 of the Civil Code, including the one who made the payment. Solidarity can never be presumed. It must be proven by the creditor who invokes it. Solidarity may result from the law, unless the latter concerns modest sums necessary for everyday life. Solidarity thus allows the creditor to demand payment of the entire debt from any of the debtors, since all debtors are liable for one and the same debt [14].

3.2. Recognition of Individual Lawsuits in Companies with Special Status

One can read a will of the Cameroonian legislator to make

[9] The debt obligation determines the extent of the right of action of the company's creditors, during the life of the company, in respect of the claims they have against the company. It thus gives rise to a claim for the benefit of third parties against the company. The rules relating to the obligation to pay a debt govern the relationship between the creditors of the partnership and the partners. However, the implementation of the creditors' right of action is nevertheless conditioned by compliance with the principle of subsidiarity.

the law of public enterprises a law that can both advance and regress the law of commercial companies in the OHADA area through the maintenance of individual lawsuits of creditors and the guarantee of solvency of the State. The Cameroonian legislator provides that in case of closure of the liquidation due to insufficient assets of public companies, creditors whose claims have been verified and admitted, recover their individual rights of action in case of fraud to the rights of creditors against the company's manager or the liquidator [15].

Individual action is an action that can be taken by creditors in the name of the principle of freedom of action, since "anyone who has obliged himself personally is obliged to fulfil his commitment on all his movable and immovable property, present and future"[16]. Collective proceedings derogate from this principle, since creditors are prohibited from acting alone to defend their rights. "Suspension of proceedings". Proceedings cover all procedures and means available to creditors who fail to obtain voluntary performance of their debtors' obligations: formal notice, legal action, protective measures and forced execution. Under ordinary law, in the event of any settlement of the debtor's difficulties, individual creditors' claims compete for the debtor's assets; the quickest creditors will be served first: this is the reign of the "price of the race". Even the intervention of a collective procedure cannot be fully conceived without the maintenance or resumption of proceedings by some or all creditors.

For the OHADA legislator, the individual exercise of the debtor's actions against the creditor is exercised exceptionally under the following conditions: where the claim results from a criminal conviction of the debtor or from rights attached to the person of the creditor, when the guarantor of another's debt or the co-obligor has paid in place of the debtor. In comparative law, particularly in France, Book 6 of the Commercial Code highlights:

*An individual right of action by the Treasury for its preferential claims and by creditors with security interests, if the liquidator has not undertaken the liquidation of the encumbered assets within three months of the liquidation judgment.

*On the other hand, the Court of Cassation has recognised the freedom of individual lawsuits by creditors whose claim has regularly arisen after the opening judgment for the needs of the procedure or in return for a service provided to the debtor. The use of individual lawsuits by creditors of public companies is conditional on the existence of proof of fraud against the creditor's rights. The proof is made by any means that the debtor is aware of the damage he causes to his creditor who cannot obtain payment of his claim: the creditor does not have to prove an intention to harm his debtor, but he must prove his insolvency. The burden of proof derives from Article 1315 of the Civil Code, which places the burden of proving the claim on the person claiming to be the creditor of an obligation. It is up to the person who is the plaintiff in a legal action to prove his claims.

4. Conclusion

The fate of creditors in the event of a lack of assets is one of the main concerns that arises from an interest in the law on companies in difficulty. Indeed, the procedure of insufficient assets is established when there are no assets at all or when the costs of realising the assets exceed the expected income [17]. OHADA law opts for the extinction of any recourse or individual proceedings that further jeopardise the rights of creditors. Thus, we have explored all the proportions of infringements of their rights. We have looked at both serious and moderate infringements. On analysis, the guarantee of creditors' rights is inherent in the combined efforts of the legislator and economic operators. If one of the objectives of collective proceedings is to protect creditors; the legislator would gain by strengthening their rights in the event of the closure of a liquidation for lack of assets.

References

[1] By definition, an enterprise is an organised structure "bringing together, under common management, both human and material resources with a view to carrying out economic, commercial, industrial or service activities" (see Dictionnaire du vocabulaire juridique, Paris, Litec, 1ère éd. 2002, under the direction of CABRILLAC (R.); Lexique des termes juridiques, under the direction of GUINCHARD (S.) and MONTAGNER (G.), 21ème éd., Paris, Dalloz, 1999, p. 227.

[2] LAMBERT (G.), Introduction *à l'examen de la notion juridique de l'entreprise,* in Mélanges en l'honneur de KAYSER, T. 2, 2003, pp. 77 et S.

[3] KALIEU ELONGO (Y. R.), Le droit des procédures collectives de l'OHADA, PUA, 2016, p. 156.

[4] Art. 109 of Law N°2017/011 of 12 July 2017 on the general status of public enterprises.

[5] MOUHOUAIN (S.) "La réforme du droit camerounais des entreprises publiques et le droit des sociétés commerciales de l'espace OHADA", Revue de Droit, Vol. 24, 2019, p. 7.

[6] LE CORRE (L. M.), «Premiers regards sur la loi de sauvegarde des entreprises» loi n° 2005- 845 du 26 juillet 2005), Dalloz, 2005, supplément au n° 33, p. 2312, n°44. 518 Cité par F. THERA, L'application et la réforme de l'acte uniforme de l'OHADA organisant les procédures collectives d'apurement du passif, Thèse, Université Jean Moulin Lyon 3, Présentée et soutenue à Lyon le 6 décembre 2010, p. 180.

[7] SAWADOGO (F. M.), procédures collectives d'apurement du passif, commentaire de l'acte uniforme portant organisation des procédures collectives d'apurement du passif, Juriscope, collection OHADA, Harmonisation du droit des affaires, Mise à jour 2011, note sous l'article 72, p. 953.

[8] TSAGUE DONKENG (H.), "Le régime de l'insuffisance d'actifs en droit OHADA des procédures collectives", Revue de l'ERSUMA: Droit des affaires-Pratiques Professionnelle, n°4 Septembre 2014, Études p. 3.

[9] C. Paris, 25 June 1996, JURISDATA n° 022505, C. Grenoble, 13 March 1997, Jurisdata n° 044154.

[10] MAZEAUD (H.) and CHABAS (J.), *Introduction à l'étude du droit, In Leçon de droit civil*, 11ème éditions, Montchrestien, n° 280. p. 351.

[11] CABRILLAC (R.) (dir), Dictionnaire du Vocabulaire Juridique, 1ère éd., Litec, Paris, 2002, P. 204; voir dans ce sens, CORNU (G.), Vocabulaire juridique, Association Henri Capitant, Paris-PUF, 2011. p. 174.

[12] CORNU (G) (Dir), Vocabulaire juridique, Association Henry Capitant, 11ème éd. (Mise à jour), Quadrige-PUF, janvier 2016, p. 747.

[13] This rule, which today makes a debtor's patrimony the general pledge of his creditors, was widely developed by AUBRY and RAU. See MAZEAUD (D.) and CHABAS (J.), *Introduction à l'étude du droit, in Leçon de droit civil*, 11ème éditions, Montchrestien, n°283, p. 417.

[14] Art. 1313, para. 2 of the Civil Code.

[15] Art 111 of the law n°2017/11 portant général statut des entreprises publiques.

[16] Article 2284 of the Civil Code.

[17] SAWADOGO (F. G.) commentary on the uniform act on the organisation of collective procedures for the settlement of liabilities, in ISSA - SAYEGH, POUGOUE and SAWADOGO, OHADA: Traité et actes uniformes commentés et annotés, Juriscope, 2ème editions, 2002, p. 811.