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Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law

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Introduction

Two of the grand themes to pervade insolvency law within the 20th century have been the development of corporate rescue regimes designed to offer an alternative to the liquidation of enterprises and the provision of measures to assist co-operation between courts in insolvency cases with a cross-border element. The literature is rich and diverse in each of these fields and identifies the elements necessary for the success of measures in these areas, many of which revolve around the twin principles of efficiency and effectiveness. It is noteworthy, however, that the presence of these features is now considered indispensable for jurisdictions that claim to have modern insolvency rules and systems. Nevertheless, not all jurisdictions have yet to adopt fully-fledged procedures incorporating these themes and development, even in jurisdictions that have had comparable procedures for some time, is still ongoing. There is recognition, however, that progress in these fields is necessary in order to safeguard economic development. Nowhere is this truer than in the case of newly emerging and developing economies, where hitherto, the lack of a comprehensive legal framework has been an obstacle to business.

Transition from Domestic to International Initiatives

Within the field of international insolvency, there is a further question of the appropriate level at which initiatives aimed at co-operation should be developed. Many countries have cross-border measures facilitating mutual assistance and containing rules on the recognition and enforcement of judgments in insolvency. Examples in the developed world include the United States,[1] Australia[2] and the United Kingdom.[3] The effectiveness of these measures is debatable, with some systems affording better co-operation than others. Commentators have long preached the merits of uniformity of rules at the international level, avoiding uncertain application of purely domestic laws and potential conflicts with jurisdictions applying different rules of treatment, an illustration of which being the dichotomy between universality and territoriality principles, by which courts claim to assert title to deal with assets located within or outwith their jurisdictions.[4]

One of the traditional methods of achieving consensus has been through the agreeing of conventions covering situations of conflict and providing for the allocation of jurisdiction and rules governing the resolution of differences in

[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.

approaches for the management of insolvency proceedings.[5] This approach has the advantage of avoiding a traditional obstacle, where national authorities agree to harmonise the conduct of insolvency proceedings across borders without, however, consenting to any substantial impact on domestic legal rules. Acceptance of this type of convention may in the long run create auspicious conditions for and lead towards gradual rapprochement of fundamental rules, but this is by no means a certainty, particularly between jurisdictions with very different legal ancestries and cultures. Examples of this type of convention include the 1928 Bustamante Code, the 1933 Nordic Convention and the 1990 Council of Europe (or Istanbul) Convention. Of a similar genesis is the European Council Regulation on Insolvency Proceedings, whose provisions are nearly identical to its 1995 predecessor convention, although regulations are by their nature binding instruments within the European Union.

A later evolution of the international form has been the utilisation of model laws. Chiefly found in the context of work by UNCITRAL, model laws are aimed at avoiding lengthy convention adoption and ratification procedures before conventions come into force by leaving the enactment of provisions set out in model form to individual jurisdictions. These model laws are often accompanied by a guide to enactment covering the questions resolved by UNCITRAL working groups as to the interpretation of provisions with view to enactment. The advantage of model laws is also that they leave the format of adaptation to domestic legal systems a matter for domestic rules, thus respecting the individuality of legal traditions. In international insolvency co-operation, there is the 1996 UNCITRAL Model Insolvency Law, the only initiative that has a truly global remit, the convention examples previously cited being initiatives on an exclusively regional basis.

The model law format has been used in other instances, this time at regional level, chiefly in the 1997 Commonwealth of Independent States ('CIS') Model Law and in the 1998 OHADA Uniform Law. There are, however, significant differences in the contents of these measures when juxtaposed with the UNCITRAL Model Law. The UNCITRAL measure is designed, rather like the conventions, to regulate instances of conflict of laws by installing co-operation measures between courts called upon to manage international insolvency procedures. The 1997 CIS Model Law, intended for adoption by member states of that organisation, is limited in its coverage to the introduction of uniform procedures in member states and little is known at present about the likelihood of its success as a measure or the parallel existence of any co-operative framework. The 1998 OHADA Uniform Law, organised on a similar basis, also introduces new rules into the domestic legal systems of member states of the organisation. However, analogous to the UNCITRAL text, it also regulates situations of conflict of laws. For that reason, this hybrid text is sufficiently a rarity in international measures and constitutes an event meriting comment.

[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.

The OHADA Framework

OHADA is the acronym in French of the Organisation for the Harmonisation of Commercial Law in Africa.[6] This body was founded by treaty, signed in Port Louis, Mauritius on 17 October 1993, and has as its main purpose the reform and harmonisation of law in member states belonging to the organisation. Although most of the current member states of OHADA were formerly associated with 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 with the unanimous consent of existing OHADA member states. There are at present sixteen member states of the organisation, which, with limited exceptions, form a contiguous geographical zone located in Western and Central Africa. [7]

The overall objective of OHADA is 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 aimed at updating laws in line with economic progress and the internationalisation of trade between OHADA member states and third parties. The difficulty of access to legal texts is seen as an impediment to the modernisation of law in these states as is the low level of training for professionals and the overall lack of resources. The principal aim of OHADA is to make available to member states common and simplified rules geared to economic needs and to encourage harmonisation of legal rules as far as possible. 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 and, through its role, to encourage the development of foreign investment and to prepare the way for regional economic integration.

OHADA acts through a number of bodies. There is a Council of Ministers, which adopts harmonisation measures, called Uniform Laws, by unanimous agreement and which measures are intended to apply directly in the internal legal systems of member states. A Permanent Secretariat located in Cameroon has the task of preparing the uniform laws and to follow up implementation of the measures. A Common Court of Justice and Arbitration sited in the Ivory Coast is intended to oversee the application of the laws and the uniform interpretation of the rules that are harmonised. Finally, a Regional Judicial College in Benin acts as a focus for the training for judges and other legal professionals in the application of the framework for the new commercial rules introduced by the Uniform Laws.

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,

[6]Organisation pour l'Harmonisation en Afrique du Droit des Affaires.

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

adopted on 10 April 1998, dealing with enforcement and recovery measures as well as the organisation of insolvency proceedings. The Uniform Insolvency Law, in derogation of the terms contained in Article 9 of the OHADA Treaty, came into effect on 1 January 1999.

The Pre-Existing 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.[8] In fact, the majority of OHADA member states had the insolvency framework first introduced in 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 that survives in modern law through the introduction of two types of proceedings: winding up (faillite) and an embryonic rescue regime (enigmatically titled liquidation judiciaire) that permitted the insolvent debtor to agree an arrangement with creditors for the rescheduling of debts.

Two of the OHADA member states, Mali and Senegal, had adopted texts reproducing in literal terms the French Law of 1967,[9] considered to be the beginnings of the modern French law of insolvency. 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.[10] 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 is seen as the inspiration for the draftsmen of the OHADA Uniform Law. Nevertheless, in seeking to introduce new procedures, the Uniform Law does pay attention to the problems of adapting the model to the particular legal, economic and social conditions within OHADA member states.

Modernisation of Insolvency Procedures

The Uniform 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

[8]See Sorensen & Omar, Corporate Rescue Procedures in France (1996) Kluwer in Chapter 3.
[9]Law no. 67-563 of 13 July 1967.
[10]Law no 84-148 of 1 March 1984, Law no. 85-98 of 25 January 1985.

choice between rescue (redressement judiciaire) and liquidation (liquidation des biens).[11] The three procedures resemble their counterparts found in French legislation and in fact work along very similar principles, including being dependent for their application on whether the debtor has entered a formal state of insolvency (cessation de paiements). Alongside the three procedures is a framework to cater for necessary sanctions in the case of those contributing to mismanagement or the insolvency of entities for which they are responsible as well as a framework governing the resolution of conflicts of law likely to arise in the context of insolvencies with an international dimension.

The Uniform 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 that is often found in other insolvency regimes. The purpose of including all such bodies is because of the relative ease of tracing their assets and the desirability of liquidating unviable incorporated bodies. Similarly, the exclusion of public bodies is not seen as justified in light of the need to instil trust in the overall insolvency framework and because any exclusion would not be compatible with the notion of risk inherent in any economic activity.[12]

The Pre-Insolvency Regime

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.[13] There is a separate diagnostics procedure available in the Uniform Law dealing with commercial companies and economic interest groupings, although there is no particular requirement that resort is had to this internal diagnostics procedure before the assistance of the courts can be sought. Conversely, not all use of the internal diagnostics procedure is likely to lead to the seeking of an order opening pre-insolvency proceedings. The debtor is simply required to make a request to the court to which certain financial and legal information must be appended.[14] A draft scheme of arrangement designed to help extricate the business from its problems must then follow within fifteen days of the request being made.[15]

In order to allow time for an agreement between the debtor and creditors and also to permit any liquidator appointed to investigate the proposals or act as

[11]Preliminary Title, Articles 1-4. (references to Articles below are to articles of the Uniform Insolvency Law).
[12]Article 2.
[13]Title 1, Articles 5-24.
[14]Articles 5-6.
[15]Article 7.

intermediary between the parties, a court will order a moratorium and invite an insolvency practitioner to report on the business within two months of proceedings being opened.[16] The scheme of arrangement may contain proposals for the waiver and/or rescheduling of debts with different treatment for categories of creditors.[17] Where the court is of the mind that the scheme has a realistic prospect of success, it may then give effect to the scheme of arrangement.[18] The court also has the power to enjoin dissenting creditors from proceedings with any action for a period of up to two years, this being reduced to one year in the case of debts owed to employees. Where, 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 normally opened.[19]

Insolvency Regimes: Definitions

The use of the twin insolvency regimes is predicated on the debtor being in the formal state of having ceased to make payments (cessation de paiements). This is defined as being the inability to pay debts due with the assets available at the debtor's disposal. A petition must be filed within thirty days of the above, in default of which the debtor may be deemed a contributory to any further losses suffered by creditors.[20] Apart from the debtor, parties entitled to bring a petition include creditors, the debtor and the court itself.[21] Where proceedings are opened, the debtor is required to furnish all necessary information to the court and submit a rescue plan containing proposals for the restructuring of the insolvent enterprise within fifteen days if the debtor himself has petitioned or within a month if the petition has been filed by another party.[22].

The emphasis on rescue as having priority over liquidation is contained in the Uniform Law.[23] Rescue proceedings are ordered if the rescue plan has a realistic prospect of success.[24] Liquidation is ordered where no rescue plan is submitted, where the court is of the view that proposals would not lead to the rescue of the debtor and also where the debtor fails to honour obligations as part of any rescue plan.[25] The creditors are treated together as a collective body (masse) where debts arise lawfully before proceedings are opened or from obligations arising from the authorised continuation of activity by the debtor or liquidator. Certain creditors are excluded where debts owed them arise from an unlawful transaction occurring before or during the currency of

[16]Articles 8 et seq. and 13.
[17]Article 18.
[18]Article 15.
[19]Article 33, 139.
[20]Article 25, which echoes the definition contained in Article 3, Law no. 85-98 of 25 January 1985.
[21]Articles 28-29.
[22]Articles 27-29.
[23]Title II, Articles 25-193 (procedure) and Title IV, Articles 216-225 (appeals).
[24]Article 33.
[25]Articles 33, 141-2.

proceedings. Powers are contained in the law to attack transactions occurring during the relation-back period (période suspecte).[26]

The Role of Participants in Insolvency

The personnel of insolvency proceedings under the Uniform Law resemble their counterparts in France. An insolvency professional (syndic) is put in overall charge of the administration of proceedings involving the debtor and is answerable to a supervising judge, whose role is to co-ordinate proceedings and to make necessary orders in furtherance of proceedings.[27] Nevertheless, the debtor remains in charge of business assets and is authorised to continue the activity of the business under appropriate supervision.[28] In addition, the interests of creditors are maintained through the appointment of up to three monitors, who have certain rights to receive information and to represent creditors in court.[29] 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.[30] As in French law, the interests of employees are considered paramount and there is an entitlement to participate through the nomination of an employees' representative as one of the monitors.[31]

Civil and Criminal Sanctions

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.[32] These include a requirement to contribute to the assets of the insolvency where there is proof of acts of mismanagement,[33] the extension of insolvency proceedings covering incorporated bodies to include directors personally where they have acted to control the debtor company or where they have failed to make contributions as ordered[34] as well as a prohibition on exercising rights in relation to company shares.[35] Disqualification from being involved in managing companies and civic penalties including deprivation of the right to stand for public office are also a feature where there has been a finding of personal bankruptcy and may last for between three and ten years.[36] Criminal sanctions are also provided in cases of criminal bankruptcy, including the misuse of assets, falsification of information and fraudulent behaviour leading to imprisonment and fines in cases of proven criminal conduct.[37]

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[26]Article 67 et seq.
[27]Articles 39, 42.
[28]Article 112.
[29]Articles 48-49.
[30]Article 47.
[31]Article 48 al. 3.
[32]Title II, Articles 180-193 (sanctions affecting assets).
[33]Article 183.
[34]Article 189.
[35]Article 57.
[36]Title III, Articles 194-215 (personal bankruptcy).
[37]Title V, Articles 226-246 (criminal offences).

The Cross-Border Element

An interesting feature of the Uniform Law is the inclusion of a section on insolvency proceedings with a cross-border element.[38] 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.[39] These judgments are considered res judicata but may need to be published in the public registers of member states where enforcement is sought.[40] 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 proceedings elsewhere, as the law provides a creditor in that position with an amnesty with regard to property obtained through such measures.[41]

Insolvency professionals may, under the Uniform 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.[42] 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.[43] 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.[44]

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.[45] Pre-eminence is, however, given to the insolvency professional in charge of main

[38]Title VI, Articles 247-256.
[39]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 that can only be heard by these courts.
[40]Article 248.
[41]Article 250.
[42]Article 249.
[43]Article 251. These definitions are very reminiscent of those in Article 3, European Council Regulation on Insolvency Proceedings 2000.
[44]Article 255.
[45]Article 253.

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.[46] Furthermore, a rescue plan in secondary proceedings can only be adopted with the consent of the main insolvency professional, although consent cannot be validly withheld unless he proves that the plan will materially affect the financial interests of creditors claiming under main proceedings.[47] 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.[48]

Summary

The success of insolvency treaties and conventions has been traditionally dependent on the willingness of signatory states to implement its terms and give effect to the text in the spirit in which it was adopted. There have been many attempts at seeking an international consensus on the right type of instrument and the right terms under which co-ordination of proceedings taking place on the international plane should be possible. Regrettably, successes have been few and texts never reaching the stage of implementation are a-plenty. The change in emphasis to the production of Model Laws, pioneered by UNCITRAL, has meant that adoption of texts can be simplified and need not mean too much adjustment for domestic legal systems. This type of instrument has so far been produced in two varieties, the conflicts of law convention-type and the procedural harmonisation type.

The OHADA Uniform Law is intended to operate as 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. This Uniform Law avoids the difficulties inherent in the traditional conflicts approach and 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. The uniformity achieved by this method is further enhanced by the availability of co-ordinated interpretation of the law. A one-stop shop treaty of this type is novel and for that reason merits attention as it develops in use, particularly as it may prove to be a model that is more durable than the pure conflicts-resolution type, especially where it is adopted as a regional initiative among a small group of nations sharing common legal, social and economic features and where procedural reforms are perceived to be of necessity.

5 August 2000

[46] Article 252.
[47] Article 254.
[48] Article 256.