The application of international insolvency law within and outside the OHADA space: issues and challenges

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Abstract:

Currently, there is no international law to govern cross-border insolvency on a global basis. Instead, the international landscape is characterised by patchwork of national and regional insolvency laws to accommodate cross-border insolvencies. These differences can lead to difficulties in dealing effectively with insolvencies that have a cross-border dimension. As a matter of fact, the development of the international insolvency provisions within the Organisation for the Harmonisation of Business Law in Africa (OHADA)'s Insolvency Act (OIA) provides clarification of the law to be applied in respect of cross-border insolvency within and outside the OHADA space. This paper seeks to tackle four important aspects: OHADA's international insolvency rules; its application and shortcomings. The paper ends with a proposal for reform of OHADA's current international insolvency law and the development of a cross-border insolvency regulation within the European Union. For a region where the practice of insolvency is relatively low, an article of this kind would contribute to the development of the practice of insolvency in the OHADA region. Theoretically, it would add to the existing body of knowledge and serves as a guide for future research in Cameroon in particular and the OHADA region in general.

Keywords: OHADA, Insolvency Act (OIA), UNCITRAL, EIR, cross-border insolvency (CBI), intra-OHADA cases; third-country relations, recognition, settlement, enforcement

A. Introduction

The global culture of business has culminated in the enactment of international business laws by States and organisations. As a matter of fact, the Organization for the Harmonisation of Business Law in Africa (OHADA) has enacted several commercial laws;[1] one of which is the Uniform Act organising Collective proceedings for the Wiping off of Debts otherwise known as the 'OHADA Insolvency Act-OIA'.[2] The OIA contains both national and international insolvency provisions. The international insolvency provisions regulate the financial distress of a debtor who has assets in more than one Member States of OHADA. Generally, when this happens, it leaves one to wonder about the applicable law. Undoubtedly, differing substantive laws will lead to some problems. First and foremost, it will lead to the opening of diverse insolvency proceedings as it will not be practical to introduce insolvency proceedings with universal scope. Also, it will be costly and very difficult for insolvency representative to administer the insolvent estate.

In my considered opinion, until the laws on insolvency are harmonised or uniformed, there will be problems in the administration of insolvent estates and in the distribution of bankrupt debtor assets; an indication that a uniform approach in relation to cross-border insolvency would be beneficial. A uniform law would bring transparency and clarity to the area of recovery of debts and reduce the transaction costs for the financial sector when deciding whether to carry on business in more than one jurisdiction.[3] The OHADA legislators saw the need and possible benefits in adopting a uniform insolvency approach. Today, the Member States of OHADA enjoy a uniform insolvency law with international insolvency provisions. The objective of this article is not to provide a detailed exposition of OIA, but rather to discuss the rules of OHADA's international insolvency law, its application and shortcomings. To attain these objectives, the article employs the doctrinal and exploratory research designs. The relevance of

1 Art 2 of the OHADA treaty refers to the different uniform acts adopted the council of ministers. They include regulations relating to company law, the definition and classification of traders, recovery procedures measures of enforcement, liquidation land administration proceedings and arbitration, labour law, accounting law and carriage and sales of goods.

2 The New Uniform Act Organizing Collective Proceedings for Wiping off Debts dated 10 September 2015 (otherwise called the 'OHADA Insolvency Act'). Underlying this is the aim to speed up and strengthen the efficiency of insolvency proceedings, facilitating the safeguard of viable companies and the substantial payment of creditors, and thereby leveraging access to better financing for businesses; Art. 1, OHADA Insolvency Act.

3 McCormack et al., Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices (European Commission, January 2016) <https://ec.europa.eu/info/sites/default/files/insolvency_study_2016_final_en.pdf>(last accessed 18.05.2022).

this article cannot be overemphasized. The article would contribute to the development of the practice of insolvency within the OHADA region. Theoretically, it would add to the existing body of knowledge and serve as a guide for future research in Cameroon in particular and the OHADA region in general

B. OHADA international insolvency law

Today, the Member States of OHADA enjoy a uniform insolvency law with international insolvency provisions. The provisions are part and parcel of the OIA and are copiously modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (MLCBI)[4] and the European Union Regulation on Insolvency Proceedings ('EIR').[5] This gives the provisions an international flavour, which in turn promotes wide acceptance of OIA. Considering that OHADA is at the forefront in the development of uniform insolvency law, we can say with certainty that the law provides practical lessons for states or regional bodies in the development of uniform insolvency laws.[6]

The international insolvency provisions address effectively cross-border insolvency (CBI) within and outside the OHADA space. One of the features of the law is that it provides for collective debt collection mechanisms through which an insolvent debtor's assets are pooled together for the benefit of all the creditors.[7] The opening of these proceedings stays all individual lawsuits by creditors against the assets of the debtors as well as the accruing of legal and contractual rights.[8] As a matter of fact, once insolvency is initiated, all the creditors are grouped together and represented by a trustee whose responsibility is to ensure that the interests of the creditors are protected. Another significant feature of the proceedings is the principle of *creditorium* parity or the *pari passu prorata parte* principle which aims to provide justice to creditors with the concept of proportional justice, which

4 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158.

5 The EC Regulation on Insolvency Proceedings ('EIR') was adopted by the Council of the European Union on 29 May 2000 and came into force on 31 May 2002.

6 Leno, 'Development of a Uniform Insolvency Law in SADC: Lessons from OHADA', pp 259–282.

7 See INSOL Europe, 'Insolvency Proceedings; A Double-Edged Debt Collection Tool' <www.insol-europe.org›documents> (last accessed 18.05.2022).

8 Arts 74–77 OIA.

emphasises on fairly and evenly distribution of debtor's assets to creditors in a more just manner in accordance with the proportion referred to in articles 166 and 167 of the OIA.[9]Against this backdrop, this section presents the application of the law within and outside the OHADA space with the aim of highlighting its shortcomings.

I. Cross-border insolvency within the OHADA region

Within OHADA, cross-border insolvency (CBI) refers to a situation where an insolvent debtor has assets across the region. A glaring example is that of an insolvent debtor in Cameroon who has assets in Senegal, Mali and Gabon. It poses no problem resolving insolvency between these countries because they are governed by a uniform law on CBI. The advantage of the uniform law is that it provides clarity of the applicable law, competent court and certainty of participation and treatment of creditors. When CBI sets in, the law requires the directors to take some form of action, and this generally involves filing for insolvency before the competent court[10] which is territorially limited to the place where the debtor has its registered office (corporate body) or principal place of business (individual).[11] It follows from the Cameroonian law on judicial organisation that the competent court would depend on the amount of the disputed claim.

In the light of the law on judicial organisation,[12] the court of first instance has jurisdiction over matters where the amount of damages claimed does not exceed 10 million CFA francs while the high court has jurisdiction over matters where the amount of damages claimed exceeds 10 million.[13]In Senegal, the commercial courts are competent to adjudicate on insolvency issues, an indication that there is no specialised bankruptcy court in the OHADA region. The time in which this must be done is within 30 days of

9 Winanto/Sulistiyono/Muryanto, ICGLOW 2019, p. 288, < https://www.researchgate.net/publication/337753592_Analysis_of_Equality_on_Creditor_Standing_Principle_on_The_Process_of_Arrangement_and_Settlement_of_Bankruptcy_Asset_in_Indonesia> (last accessed 18.09.2022).

10 Art. 25 of the OIA demands that the director files in a statement of insolvency supported with relevant documents such as certificate of incorporation and others as indicated in arts 26 of OIA.

11 Ibid, Art. 3 (1).

12 Law No. 2006/015 of 29th December 2006 as amended and supplemented by Law No. 2011/027 of 14th December 2011.

13 Ibid, Sections 15 (1) (b) and 18 (1) (a).

insolvency, failing which, the directors incur criminal penalties[14] according to the penal codes of the Member States. For instance, in Cameroon, the directors shall be punished with imprisonment for from 1 (one) month to 2 (two) years.[15]

In the event of CBI, two types of proceedings may be opened: main bankruptcy proceedings (MBP) and secondary bankruptcy proceedings (SBP), the difference of which lies in the fact that the MBP is universal in nature while SBP is territorial in nature. According to the law, the MBP shall be opened in the Member State within the territory of which the centre of the debtor's main interests is situated. The centre of the insolvent's main interests is situated in the Member State where the debtor has its registered office (case of a legal entity) and principal place of business (case of a self-employed individual).[16] When the MBP is opened, it has an international scope in that it encompasses all assets of the debtor[17] and creditors wherever located in the region. In order to ensure equal treatment of creditors, a creditor who has, in the course of bankruptcy proceedings, obtains through any means total or partial satisfaction of his/her claim, is required to return what has been obtained to the trustee of the opening proceedings.[18]

On the other hand of the continuum, the trustee, that is, the administrator or liquidator may exercise all the powers conferred on him/her by the law throughout the Member States, provided no other proceedings has been opened in the other Member States.[19] Although the appointment and powers of trustees are automatically given under the law, it is likely that, from a practical point of view, it will be necessary for him/her to work with the Member States in which he intends to exercise his powers; as the Member States are in control and supervision of trustees in the performance of their duties.[20]

14 Ibid.

15 Section 332 (1) c of Law No. 2 0 1 6/ 00 7 12 July 2016 relating to the Penal Code of Cameroon.

16 Art. 3 (1) OIA provides that 'the court territorially competent to adjudicate all procedures covered by this Uniform act shall be within the jurisdiction of which: – the individual debtor has its principal establishment on the national territory; or – The debtor company's registered office is located in the national territory'.

17 Art. 251 OIA.

18 Art. 250.

19 Ibid, Arts. 249 and 251.

20 Ibid, Art. 4–6. Supervision include investigation, verification, auditing of accounts and documents held by the trustee.

The general principle of the law is that any judgement opening the MBP, settling issues arising from the proceedings and closing down of the proceedings handed down by a court of a member state is res judicata on the territory of the other Member States from the time that it becomes effective in the state where proceedings are opened.[21] In fact, it is to be recognised by all the Member States. Though binding, the judgment is not enforceable in all the Member States because the Member States of OHADA are not parties to a treaty on the enforcement of CBI judgments.[22] As such, enforcement is in accordance with the national laws of Member States. In Cameroon for instance, enforcement is in accordance with the 2007 law.[23] Under the law, a party who seeks for enforcement of foreign court judgment in civil and commercial cases must provide a copy of the decision, original copy of proof of service of the decision and a certificate of non-appeal. The lack of a uniform act on Enforcement of CBI judgements can lead to difficulties in dealing effectively with enforcement that have a cross-border dimension.

In addition to the main bankruptcy proceedings (MBP), the law provides debtors and creditors with an opportunity to submit a bankruptcy petition also in the other Member State where the debtor has an establishment and assets. This type of proceedings is called the secondary bankruptcy proceedings (SBP) and it has to be noted that the effect of the secondary proceedings is restricted only to the assets of the debtor situated in the territory where the debtor has an establishment.[24] It should be mentioned that when is carried out in parallel to the main insolvency proceedings, that is, concurrently or simultaneously, the trustees of both proceedings are bound to cooperate in the exchange of information relating to the filing and verification of claims as well as the distributions of proceeds realised from the sale of assets.[25]

Both main and secondary proceedings take place based on the principle of mutual coordination and should not favour some creditors to the detriment of others. While creditors are at liberty to file in their claims in any

21 Ibid, Art. 247.

22 Some member states have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958.

23 Law No.2007/001 of 19 April 2007 relating to the Enforcement of Foreign Court Judgments.

24 Ibid, Art. 251.

25 Art. 252.

of the proceedings,[26] each creditor should only be entitled to participate in the distribution of the total assets in other proceedings if creditors, who are in the same position, receive the same proportionate share of their claims.[27] This goes to ensure equality between creditors and hence predictability. The complementary nature of these proceedings is also reflected in the fact that if there are funds remaining after settlement of liabilities in the secondary proceeding, they are subsequently transferred to the main proceeding. In a nutshell, whether main or secondary, the international insolvency provisions will automatically apply throughout the rest of the OHADA region.

II. Cross-border insolvency outside the OHADA space

Here we are looking at the case of an insolvent with assets outside the OHADA space. A case in point is that of an insolvent say in Cameroon who has assets in Nigeria and South Africa. Considering that these countries are not parties to a treaty relating to a uniform insolvency law, it is obvious that the insolvent would be subject to diverse insolvency proceedings opened in accordance with the laws of these countries respectively. While it would be costly for the insolvent, it will also be time consuming for him for her. Assuming the trustee in the local proceedings opened in Cameroon is seeking for recognition of the local proceedings from South Africa or Nigeria, he or she would have to do so in accordance with the laws of the foreign countries. On the other hand of the continuum, if a representative from South Africa or Nigeria is seeking for recognition of the foreign bankruptcy proceedings (FBP) opened in respect of assets in Cameroon, he would do so in accordance with the OIA. The OIA allows for recognition of FBP and cooperation between courts and insolvency representatives.

Article 256 (16) of the OIA lays down the conditions for the recognition of FBP. On the strength of article 256 (16), a FBP will be recognised if it is a foreign proceeding; if the representative requesting for recognition is a foreign representative and if an application is submitted to the competent court of the member state to which the request for recognition is presented. The application is accompanied by a certified copy of the decision to open the FBP and appointing the foreign representative; certificate of the foreign

26 Ibid, Art. 253.
27 Ibid, Art. 255.

jurisdiction to open FBP and appointing the foreign representative; statement of all proceedings known to the foreign representative and translated version of the documents in any of the official language (s) of the state to whom the application is presented.[28] In Cameroon for instance, the application will be accompanied by documents translated in English and French, both of which are the official languages as prescribed in article 1 (3) of the Constitution of the Republic of Cameroon.[29]

A point to note further is that the request for recognition does not subject the foreign representative, the affairs and assets of the debtor within its jurisdiction to the jurisdiction of the local court (territorial approach).[30] Pending recognition, the local court may take at the request of the FR provisional measures for the preservation of the debtor assets and protection of creditors' interests.[31] In taking the provisional measures, the court may freeze the assets of the debtor and entrust the administration of perishable goods in the hands of the foreign representative or trustee appointed by the competent local court.[32] It is not clear for how long these measures would last before recognition (limitation period).

Once a FBP is recognised, the foreign representative acquires the power to request for the opening of local bankruptcy proceedings in the member state of OHADA in which the assets of the insolvent are located.[33] He may equally participate in the local proceedings.[34]As for the creditors, those domiciled in the foreign state have the same rights as those in the local proceedings in respect of filing of claims.[35] This does not affect the priority rank of claims referred to in articles 166 and 167 of the OIA.[36] Notice to local creditors are served on foreign creditors individually stating the time

28 Art. 256–14.
29 Law No. 96–06 of 18 January 1996 to amend the constitution of 2 June 1972. Per Art 1 (3) of the Cameroon's constitution, the official languages of the republic of Cameroon shall be English and French, both languages having the same status. The state shall guarantee the promotion of bilingualism throughout the country. It shall endeavour to protect and promote national languages.
30 Arts. 256–8 and 256–9.
31 Ibid, Art. 258–18–20.
32 Ibid, Art. 256–18.
33 Art. 256–10.
34 Art. 256–11.
35 Ibid, Art. 256–12.
36 Ibid.

limit to file for claims[37] which is 90 days for foreign creditors and 60days for local creditors.[38]

When both foreign and local proceedings are conducted simultaneously or concurrently in respect of the same debtor, the courts and competent authorities of the foreign state and local court are bound to cooperate.[39] This is to ensure greater legal security in trade and investment; maximise debtor's assets, protection of all creditors, interested parties and debtors; and to facilitate restructuring in order to preserve investment and employment.[40] Employment is one area of the law whose regulation is in the hands of Member States. Though article 107 of OIA does not guarantees the continuity of employment contracts during insolvency; the labour laws of the Member States guarantee the automatic pursuits of contracts of employment.[41]

C. Limitations of the law and policy consideration

In the application of OHADA's international insolvency provisions, there are a number of challenges one may face in resolving CBI. The first challenge relates to the uncertainty created by articles 96, 166 and 167 of OIA. This leads to difficulty in the treatment of workers claims. According to article 96, the super priority claims of workers are paid within a period of ten (10) days following the decision to open the proceedings and upon a mere decision of the receiver.[42] This conflict with articles 166 and 167 of OIA, under which workers claims occupy the third and fourth positions.[43] There is also varied jurisdictional issue, that is, no specialised court for the settlement of insolvency disputes despite article 3 (1) of OIA.

The real challenge is that of implementation of the law. Implementation of laws is an important part of law enforcement. Without enforcement, laws would become meaningless. Law enforcement involves the willingness of the general society and those who live daily with the law to enforce the

37 Ibid, Art. 256–13.
38 Ibid, Art. 78 talks of 90 days for creditors abroad and 30 days for local creditors.
39 Ibid, Art. 256.
40 Ibid.
41 Art. 42 (1) (2) of Law No. 92/007 of 14 August 1992 relating to the labour Code.
42 Ibid, Art. 96.
43 Workers claims occupy the third position under article 166 and fourth position under articles 167.

law in order to maintain social order and to establish justice. Regrettably, implementation of OHADA's international insolvency law remains an issue of concern in the Member States. In fact, CBI is not a common practice among the corporate fraternity in the region. This is largely due to lack of awareness and understanding of the law. Following a survey conducted in Cameroon early this year, we found out that the business community is unfamiliar with the law and its possible benefits. This can lead to poor interpretation and application of the law as the case in Teks Global.[44] While creditors are disgruntled for non-payment of their claims, the lawyers representing the parties are not well grounded on the law leading to poor interpretation and application of the law. This creates uncertainty for all parties involved and reduces the assets of the estate and, hence, creditors chances of recovering outstanding debts.[45]

This lack of awareness also concerns judges and lawyers many of whom flaunted their total ignorance on their basis that the law is new and have not been trained. To some, they specialise in criminal law and have nothing to do with insolvency. The problem could also be attributed to the lack of a course on insolvency in most of the universities. Apart from Soa and Dschang, there is no course on insolvency in the sole English-speaking University in the country, that is, University of Buea. For some, the law is complex and difficult to understand because of the technical terms used. In respect of these difficulties, we posit that sensitisation and trainings should be affected through seminars and conferences with the aim of building capacities.[46]

Like the MLCBI, OHADA's international insolvency law does not deal with the enforcement of CBI judgements. While significant efforts have been made to enforce other types of judgements such as foreign arbitral awards,[47] none has been made to enforce CBI judgements. The differences in jurisdiction and enforcement make proceedings lengthy, costly, inefficient and prolonged for investors. By reason of these problems, we posit

44 Nadesh, 'Teks Global Investors disgruntled over non-payment of dividends, CEO blames IP payment system'(Cameroon News Agency, 26.12.2021) https://cameroonnewsagency.com/teks-global-investors-disgruntled-over-non-payment-of-dividends-ceo-blames-it-payment-system/ (last accessed 28.12.2022).

45 Leno, in Kashyap (ed), p.183.

46 Leno, 2022, p. 56–57.

47 See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958.

that the contracting states of OHADA should adopt a convention on the enforcement of CBI judgements in order to maintain uniformity in the application of the law, and hence predictability and confidence on the part of investors.

D. Lessons for the European Union

Considering that OHADA is at the forefront in the development of uniform insolvency law, we can say with certainty that the law provides practical lessons for states and regional bodies such as the European Union (EU) in the development of uniform insolvency laws.[48] Like OHADA, it is necessary for the legislators of the EU to develop a CBI law to resolve diverse and multiple bankruptcy proceeding in the union. In so doing, the Member States of the EU must be willing and prepared to cede part of their sovereignty to the EU. In other words, the Member States should be committed in developing a uniform international insolvency law that is applicable across the union. Like OHADA, the law should be drafted in the light of the MLCBI taking into account the following rules. The first rule relates to the principle of universalism of the main proceedings, which once open, covers all assets and creditors of the debtor wherever located in the region.

The second rule is that of the principle of territorialism which accords to Member States the opportunity to apply the law with respect to assets within their jurisdictions. Additionally, the law makes use of the principle of *creditorium* parity or the *pari passu prorata parte* which aims to provide justice to creditors with the concept of proportional justice, which emphasises on fairly and evenly distribution of debtor's assets to creditors in a more just manner in accordance with the proportion referred to in articles 166 and 167 of the OIA.[49]

48 Leno, Journal of African Law 2013, p 259 (259).

49 Winanto/Sulistiyono/ Muryanto, ICGLOW 2019, p. 288, < https://www.researchgate.net/publication/337753592_Analysis_of_Equality_on_Creditor_Standing_Principle_on_The_Process_of_Arrangement_and_Settlement_of_Bankruptcy_Asset_in_Indonesia> (last accessed 18.09. September 2022).

E. Conclusion

The globalised nature of business has pushed the OHADA legislators into adopting an international insolvency law to accommodate cross-border insolvency disputes arising from the region. The laws allow for recognition and cooperation between courts and insolvency representatives, a feature which has spurred wide acceptance of the law. Considering the importance of the law, the author calls on the EU to adopt a uniform law similar to OHADA's taking into the rules of universalism, territorialism and equality of creditors. Despite these developments, OHADA still faces a number of challenges. The first relates to the lack of implementation of the law by the business community. This is largely due to lack of awareness and understanding of the law, which according to the author leads to poor interpretation and application of the law as was the case in Teksglobal. The second challenge relates to the fact that Member States have not adopted a law on the enforcement of CBI judgement. This makes the proceedings costly and inefficient. In respect of these challenges, the author positions herself for the adoption of a law on enforcement and awareness creation of the law within the region. In a nutshell, OHADA should be applauded for taking the bold step hoping to develop its practice following trainings and sensitisation on the law.

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