THE PARTICULARITY OF THE CONTINUATION OF THE ACTIVITY OF COMPANIES IN THE PROCEDURE OF LIQUIDATION OF ASSETS UNDER OHADA LAW

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ABSTRACT

A reading of the provisions of the OHADA uniform act on the organization of collective proceedings for the discharge of liabilities shows that the continuation of the debtor's business ends with the opening of the procedure for the liquidation of assets. However, in exceptional cases where the conditions so require or are met, continuation of the activity may be authorized by the competent court, at the request of the liquidator and after obtaining the opinion of the judge-Commissioner, for a specified period. In order to ensure that it preserves the interests for which it was authorized, a report of the continuation of the activity must be made monthly by the trustee to the judge-commissioner and the representative of the legal department.

INTRODUCTION

Every company is called upon to know at a given moment of its existence the upheavals that could compromise its survival. It follows from this that a financially healthy and very successful company can "fall ill" and experience difficulties. In fact, from its creation to its liquidation, through its operation, the company "leads" a life that can be punctuated sometimes by normal or prosperous periods, sometimes by moments of difficulty or crisis. The most serious ones can lead to the application of the collective procedures[i] of discharge of the liabilities, the reorganization and in the most extreme cases the liquidation of the assets that leads to the pure and simple cessation of the activity. The liquidation of the assets puts an end to the debtor's business. This reality could probably be justified by the concern of the OHADA[ii]

legislator to avoid aggravating the liabilities of the company whose situation is irremediably compromised and which has no hope of returning to a balanced exploitation[iii].

Despite the fact that the OHADA legislation on collective proceedings strictly opts for the Prohibition of the continuation of the debtor's business in the proceedings for the liquidation of assets, however, it also does not ignore its continuation since it can exceptionally be authorized when certain interests justify it, at the request of the liquidator and afterwards of the judge-commissioner. The continuation of the activity, in the context of collective proceedings for the discharge of liabilities, shall be understood as the continuation of the activity engaged in by the debtor in default of payments before the judgment opening a collective procedure for the discharge of liabilities.

The liquidation of assets, according to the revised uniform act organizing collective proceedings for clearing of debts (AUPC), is a collective procedure intended to realize the assets of the debtor company in cessation of payments whose situation is irretrievably compromised to discharge its liabilities. Thus, from the date of the judgment opening the proceedings, the liquidator or liquidator proceeds to sell the assets of the company and pays the creditors. In principle, the interests of creditors should be taken more into account during this phase of curative treatment of the company's difficulties. Such liquidation may be affected by the continuation of the activity where it is authorized. Since the payment of creditors is a purpose of collective proceedings, the continuation of the activity benefiting them is therefore used to achieve that purpose. There is therefore a kind of contribution to be made by the continuation of the activity to the achievement of the aims of collective proceedings.

The liquidation of the OHADA properties is no longer merely a procedure with an essentially liquidative purpose, but is more like a procedure designed to allow the maintenance of activity and employment. This is demonstrated by the possibility of taking over the company through the technique of the global sale of assets in this phase. This suggests that the prospect of rescuing the company is not excluded in the event of liquidation of the debtor's assets.

In the light of the foregoing, it should be possible to arrive at the idea that the liquidation of assets is no longer intended solely to realize the assets in order to discharge its liabilities, but also to rescue the debtor in difficulty.

The judgment that opens the collective procedure for the liquidation of property takes place when the situation of the debtor in default of payments is irretrievably compromised and

no judicial reorganization is possible. Liquidation may be ordered directly[iv] upon the opening judgment in the absence of an arrangement either because the debtor has not made an offer or because the offer made is not serious[v]. It may also be initiated indirectly[vi] by conversion of previous reorganization proceedings into liquidation of assets, for example for non-performance of the arrangement or where, in the case of proceedings initiated against a natural person, that person is unable to continue business because of the disqualifications imposed on that person. In this particular case, the proceedings for the liquidation of assets should in principle take place when the defaulting undertaking is no longer capable of being reorganized by means of a substantive arrangement[vii]. In this way, no further activity can be envisaged apart from the specific needs of liquidation[viii].

In concrete terms, it should be noted in the liquidation of the OHADA assets that when the company no longer has any serious chance of continuing its business, it is likely to be subject to the liquidation of the assets governed by articles 25 et seq. of the AUPC on the opening of the judicial reorganization and the liquidation of the assets, that is to say that its end is inevitable. In these circumstances, any prospect of rescuing the company is excluded or prohibited[ix]. However, although the continuation of the activity may be allowed to end. For it to be possible, it will have to comply with a restrictive and prudent regulation. It is therefore not automatic, as it is allowed only in exceptional cases[x].

Article 113 of the AUPC indisputably highlights the regime of continuation of activity in the procedure of liquidation of assets.

In any event, the procedure for the liquidation of assets puts an end to the activities of the debtor **(I)**. However, by way of exception, it may be possible to maintain the activity in winding-up proceedings **(II)** and thus contribute to the achievement of the objectives assigned to the proceedings for the liquidation of assets. In this sense, the continuation of the activity is a means to the service of the liquidation of the assets.

I- The principle: cessation of the debtor's business in the procedure for the liquidation of assets

In principle, there is no reason to continue the activity in the procedure for the liquidation of assets[xi]. If it is not already open, the activity shall cease. The principle according to which the liquidation of the assets terminates the business of the debtor is clearly stated in OHADA law by Article 113 paragraph 1 of the AUPC. The existence of this principle could

be explained in order not to worsen the economic situation of the debtor who is already in a deficit situation, especially since, with the continuation of the activity, it is the conclusion of new contracts and thus the appearance of new creditors that will be added to the creditors prior to the cessation of payments.

Essentially, the end of the debtor's business by the opening of the procedure for the liquidation of assets raises questions about its nature **(A)** and the objectives it pursues **(B)**, which are distinct or different from the safeguard procedures.

A- The difference in the nature of the procedure for the liquidation of assets in safeguard proceedings

The difference in the procedure for the liquidation of assets, compared with the procedures for safeguarding the debtor's business (conciliation, preventive settlement and judicial reorganization), is that it has a special nature. The opening of the safeguard proceedings shall have no effect on the business of the debtor. It is the sine qua non condition for the debtor to be rescued in those proceedings. The situation is different in the procedure for the liquidation of assets, which is part of the prospect of the disappearance of the company. Its opening puts an end to the debtor's business. It shall be open to the debtor, who is a natural person pursuing an independent professional activity, whether civil or commercial, artisanal or agricultural ; to any legal person governed by private law, as well as to any public undertaking in the form of a legal person governed by private law which is in a state of cessation of payments and whose situation is irretrievably compromised. By means of this procedure, the legislature of uniform law sought to avoid the adverse effects of bankruptcy and the liquidation of assets and put an end to the difficulties of undertakings whose situation is irremediably compromised, which have already crossed the "clinical threshold of cessation of payments"[xii].

On the other hand, an irretrievably compromised situation should not be confused with the cessation of payments which leaves open the prospect of recovery. The irretrievably compromised situation is aimed at a company that is no longer viable and no longer has a serious chance of being put right. It is equivalent to the absence of any possibility of reorganization, and corresponds to the need to open a procedure for the liquidation of assets under OHADA law or judicial liquidation[xiii]. It also generally implies, after the commencement of collective proceedings, that creditors cannot be accused of having terminated their

participation[xiv]. As such, the liquidation of the OHADA assets appears to be a procedure which by its nature puts an end to the business of the debtor.

In our view, it seems difficult to seek to maintain activity when the economic and financial recovery of firms in difficulty is clearly impossible. It is therefore quite normal to put an end to this activity. While continuing the business is beneficial to creditors, this is not the case for the debtor who runs the risk of increasing its liabilities and consequently impoverishing them. This is an imperative for the OHADA legislature and a concern to stop the bleeding. In any case, if the company is not maintained and saved, it will disappear. An examination of the merits of the procedure for the liquidation of assets under OHADA law provides sufficient evidence of the importance attached by the Legislature to the treatment of the difficulties of undertakings and, consequently, of their fate. This is in direct line with the purposes or objectives pursued by the procedure for the liquidation of assets.

B - The objectives pursued by the procedure for the liquidation of assets

Like the other OHADA procedures, the procedure for the liquidation of assets has very specific objectives. Generally speaking, the liquidation of assets consists in putting an end to the activity of the enterprise under the best possible conditions. It is in fact a question of ensuring the payment of the creditors of the company that is destined to disappear. Its object is therefore to realize the debtor's assets in order to discharge its liabilities[xv] **(1)**. However, under OHADA law, the liquidation of assets is no longer merely a procedure for the purpose of liquidation, but is more a procedure designed to enable the business and employment to be maintained. The presence in this phase of the collective procedure testifies to the possibility of taking over the company through the technique of the global sale of assets[xvi]. This suggests that the prospect of rescuing the company is not excluded in the event of liquidation of the debtor's assets **(2)**.

1- The traditional objective of paying creditors

Despite the fact that by introducing the concept of enterprise in the law of collective proceedings the OHADA legislator extends the consideration of special interests to that of the general interest[xvii], the idea of discharge of liabilities still remains. It is also one of the objectives pursued by the collective proceedings for the discharge of OHADA's liabilities through the procedure for the liquidation of assets. The title of the Uniform Act provides information on this objective. These are transactions intended, if not entirely, at least in a

satisfactory manner to satisfy creditors by realizing the assets of the undertaking. Indeed, articles 146 to 172 of the AUPC contain the provisions relating to liquidative transactions. It appears that the liquidation of assets involves the realization of assets **(a)** and the discharge of liabilities **(b)**.

a- Realization of assets

The liquidation of assets is at the heart of the liquidation process. Unlike the simplified liquidation of assets[xviii], the trustee who now represents the debtor must proceed with the realization of the movable and immovable property, either separately or by way of a global assignment of assets. From a legal point of view, the realization of the asset appears to be the most important transaction, since most of the provisions relating to it concern it.

The realization of movable property includes both the sale or assignment of movable property and the collection of receivables. The relevant rules aim both to obtain the best price for the sale of the movable assets and the highest amount of recovery of the debtor's claims and to ensure a certain speed required for the efficient liquidation of the assets.

It should be noted that the trustee alone continues the sale of the debtor's goods and movables, the collection of debts and the settlement of the debtor's debts. The trustee is also authorized to assign the debtor's long-term claims on the same terms as for trade-offs and transactions, the objective being not to delay liquidation operations. Thus, the trustee need not wait until the liquidation is completed to satisfy the creditors, he could do so as he recovers the funds during the provisional continuation of the business. It must also immediately deposit the sales funds into a special account set up for this purpose and under the conditions laid down by the AUPC[xix]. In addition, the AUPC provides a clarification regarding goods on which there is a special or general real security (pledge or pledge). Thus, with the authorization of the judge-commissioner, the trustee May, by paying the debt, withdraw " the pledge or pledge made on the property of the debtor "[xx].

Overall, the realization of the assets and the recovery of the claims are characterized by the important powers granted to the liquidator and by the simplicity and speed of the procedure. The same objectives are found in the realization of buildings, but with a slowness and a heavy procedural burden due to the nature of these assets.

Like the realization of furniture, the realization of buildings is the subject of many rules. These are designed to take into account the nature of these assets and, in particular, to protect creditors, the debtor and third-party purchasers.

Furniture must be made quickly. If within three months of the decision to liquidate the assets, the liquidator has not initiated the proceedings for the enforcement of the immovable property, the mortgagee may resume his right of individual action on the condition that he give an account of it to the liquidator. Indeed, the AUPC provides that the debtor's real estate will be sold according to the procedure and the forms prescribed in the matter of sale on seizure of real estate[xxi]. However, it should be specified that the price and the essential conditions of the sale are fixed by the judge-commissioner[xxii]. In addition, the judge-commissioner may also authorize the sale of real property by amicable[xxiii] or private tender[xxiv]. This introduces the necessary flexibility to choose the most appropriate[xxv] method of implementation. Only a few exceptions regarding sale by seizure of real estate are provided for in Article 154 of the AUPC. This form of sale protects the interests of both the debtor and creditors.

It should be noted in connection with the liquidation of assets that the Uniform Act recognizes the possibility of a global transfer of all or part of the assets. In fact, as in French law[xxvi], article 160 of the AUPC states: "all or part of movable or immovable assets including, possibly, operating units, may be the subject of a global transfer". Specifically, it will be for the trustee to solicit offers and set the time limits for the submission of such offers. It will also be a question of choosing the one that he finds most interesting and that he will submit to the judge-commissioner who alone is authorized to authorize the sale.

In all cases, the realization of the assets pursues a primary objective, namely to discharge the liabilities.

b- Discharge of liabilities

To discharge the liability consists, with the realized asset and its amount made liquid, to pay all or part of the creditors. Thus, once the survival of the business is definitively compromised, it is normal for efforts to be directed towards the satisfaction of creditors who hope to recover their funds as badly as possible. The discharge of liabilities is the subject of general rules and certain specific provisions relating to the payment order of creditors. Previously, the concept of the discharge of liabilities should be clarified.

The discharge of liabilities[xxvii] is an essential operation in all collective proceedings. It is of particular importance, however, in the case of liquidation of assets, since it is the raison d'être of such liquidation, unless one considers, in a Marginal Way, the total sale of assets constituting an autonomous branch of activity or the imposition of property penalties on the debtor or on the company's directors. However, in some cases, the completion of the distribution of funds from liquidated assets results in the closing of the proceedings without all creditors being effectively and completely satisfied.

This raises the question of the fate of the right of individual creditors to sue at the end of the proceedings. Apart from closing the liquidation of assets by extinguishing liabilities, the liquidation for lack of assets allows creditors to partially recover their claims. Although the creditors recovered their individual right to sue, the effectiveness of such an option may be questioned, even if the debtor rapidly returned to better assets, which is illusory. Moreover, the debtor's return to a better state cannot be a condition for taking back the right of individual action.

French law, unlike OHADA Law, enshrines the extinguishment of the right to sue unpaid creditors against the debtor, in the event of insufficient assets, subject to the exceptions that the law of 26 July 2005 has considerably adapted[xxviii] and the order of 18 December 2008 reforming the law of companies in difficulty and more recently the law of 12 March 2014 reforming the Prevention of difficulties of companies and collective proceedings.

The proceeds of the realization shall be used to discharge the liabilities by means of distribution.

As in the realization phase of the assets, the judge-commissioner[xxix] and the trustee play a determining role in the discharge of the liabilities. Thus, payments are authorized by the judge-commissioner who fixes the share that belongs to each. All creditors whose claims have been admitted are entitled to payment and must be informed accordingly. Payment must be made exclusively by cheque drawn on the special account opened for the liquidation in accordance with article 4-22 of the AUPC.

As soon as the asset is realized and its amount liquidated, the judge-commissioner may order the distribution of the proceeds of the realization among all creditors whose claims have been verified and admitted. Thus, only the accepted claims will be able to participate in the distribution of the money. However, before distribution and because some creditors may

receive nothing due to the terms of the payment order[xxx], certain fees are charged. These are the costs and expenses of the liquidation, such as the trustee's and notary's fees and the subsidies paid to the debtor[xxxi]. Amounts corresponding to claims not yet fully admitted and to the remuneration of directors must also be set aside.

Pursuant to articles 166 and 167 of the AUPC, the order of distribution of funds arising from the realization of the debtor's movable and immovable property shall be made in accordance with the usual rules. The distinction is that the order of distribution of funds is not the same in these two situations. In particular, payment is made according to a well-defined order of priority among creditors. Therefore, the allocation is done step by step. But the New Uniform Act has made some changes[xxxii]. This is:

First, the creditors benefiting from the "new money" privilege have priority over all other creditors, both in respect of the realization of movable property and immovable property. In the event of insufficient funds, they shall be paid in proportion to the amount of their claims;

Second, the reform introduces a new distinction between unsecured and unsecured creditors, with the former being paid before the latter ;

Third, as regards the distribution of the price of the furniture, the payment order does not take into account the exercise of any right of retention or exclusive right of payment, for example in the case of a retention of title clause. In other words, in the event of a conflict between the preferred creditor or holder of a security right and the holder of a right of retention or exclusive right to payment, the second creditor will be paid in priority. Creditors with retention-of-Title rights and ownership rights are not included in the ranking ;

Fourth and last, creditors holding a pledge, pledge or general lien subject to publicity are now ranked in the same order. This reflects an improvement in the situation of secured creditors and those with general liens.

The liquidation of the assets of OHADA law retains the traditional character of a collective seizure of the debtor's assets in order to satisfy creditors in priority, but it also insidiously pursues the safeguard of production units capable of autonomous exploitation.

2 - Presence of the idea or objective of rescuing the enterprise in the procedure of liquidation of assets

Liquidate means to make liquid, that is to say to transform into cash, in cash, the assets and claims composing the debtor's assets, in order to satisfy the creditors of the enterprise[xxxiii]. The liquidation of assets or of the courts under French law is therefore a property enforcement procedure consisting in the sale of the debtor's assets to pay its creditors. On this basis, supporting the idea of a search for the company in difficulty in this phase of the procedure seems questionable and indigestible. This is not the case at all. The presence of the idea of rescuing the company in the procedure of liquidation of assets is well reflected through the mechanism of the sale of assets[xxxiv]. In this way, the continuation of the activity can contribute to the preparation of the solutions indispensable for the sale of the enterprise or its takeover. Asset divestitures now appear to be a real restructuring technique for defaulting companies[xxxv] **(a)**. And it is not the legal consequences reserved for it that would demonstrate the contrary **(b)**.

a- The sale of assets, technique of rescuing the enterprise in the liquidation of assets

The realization of the debtor's assets may take place separately or as a whole. In the latter case, there is a total or partial transfer of a set of movable and immovable property which is capable of being used autonomously in order to maintain an economic activity with the jobs attached to it. Beyond the simple transfer of goods, it is an economic activity that continues in the hands of the purchaser[xxxvi]. Admittedly, the transfer appears in the liquidation of assets as a method of realizing assets with the objective of discharge of liabilities, but limiting it to this single asset dimension would be counterproductive from an economic point of view.

The rules governing the global transfer of assets under OHADA law also seem to respond to this logic. According to Article 160 of the AUPC, the total sale of assets relates to all or part of the movable or immovable assets which may include operating units. It follows from the reading of articles 160 et seq.of the AUPC relating to the global sale of assets that it is a method of realisation of assets which responds to the obvious concern to ensure the maintenance of activities capable of autonomous exploitation. This desire to make the global sale of assets in the liquidation of assets, a mechanism for the survival of businesses and Jobs was confirmed by the revised AUPC of 10 September 2015. On reading article 161, it is stated that" [...] Tenders may or may not contain an undertaking to maintain all or part of the jobs. This is taken into account in the selection of the offer which seems to be the most serious [...]".

That is to say, the undertaking given by the transferee to maintain all or part of the jobs is certainly not mandatory but is decisive in the choice of the transferee. It is a condition in the choice of the offer that seems the most serious.

The mechanism adopted in OHADA law is reminiscent of the sale of a production unit instituted in the judicial liquidation phase by the French legislature in 1985[xxxvii]. The transfer of a production unit enshrined in the law of 25 January 1985 replaced the previous lump-sum transfer of the law of 13 July 1967, which had been the subject of considerable criticism because of its systematic and uncertain nature. The firm is often sold for a fixed price, without any real determination of its value. Such a system has often resulted in the dispersion of assets, the disappearance of the company and the spoliation of its creditors. By instituting the sale of production units, the law of 25 January 1985 had sought to combat these abuses by making the sale of units subject to a genuine structural change, transforming it into a genuine recovery plan through its ability to save a farm.

In French law, the reform of 26 July 2005 incorporated the transfer plan into the judicial liquidation procedure. This led some authors[xxxviii] to say that the purpose of the sale was essentially liquidative, that is, to sell the assets of the company and to distribute the sale price. Another doctrine[xxxix], whose arguments support our critical conviction of this approach. According to the court, although in liquidation, the assignment is a third-party reorganization of the business, based on the idea of continued operation, where the debtor is unable to affect the reorganization itself. The purpose of the transfer is to ensure the survival of the units that are still viable and the approach of the court must be pragmatic[xl] : it will have to assess on a case-by-case basis which sectors of activity that are unprofitable must be eliminated and which can be transferred and pursued by the transferee. The transfer plan must be conceived as a stand-alone solution for dealing with the company's difficulties. Its binding nature on creditors is only legitimate if it allows the business to survive.

The regime for the bulk sale of assets and the liquidation of assets is almost the same as that for the partial sale in the context of judicial reorganization[xli]. With respect to its terms and the processing of offers, it is indicated that the trustee shall elicit offers to acquire and set the time within which they are received. Any interested person may be the assignee excluding the officers of the legal person in liquidation of property, the relatives or allies of such officers or the debtor natural person up to and including the fourth degree. The aim is to make the

process more ethical by avoiding fraudulent collusion, which often occurs in collective proceedings. The transparency of operations is also ensured, since offers to acquire are lodged at the registry of the competent court, where any interested party may take cognizance of them. They are communicated to the trustee, the judge-commissioner and the crown representative. They must be clearly written down the price offered and its terms of payment. Where payment periods are requested, they may not exceed 12 months and must be guaranteed by a joint guarantee from a banking institution. The offer must specify the date of completion of the disposal.

The handling of the offers is the responsibility of the trustee and the judge-commissioner. The debtor shall be consulted and, if appointed, the controllers in order to obtain their opinion on the acquisition offers made. The trustee chooses the offer that appears to him to be the most serious and submits it, along with the opinions of the debtor and the auditors, to the judge-commissioner. The seriousness of the offer, in the relevant opinion of Professor SAWADOGO seems preferred to the highest price. But perhaps it all depends on the interest we want to preserve. ; the creditors, who are looking for an attractive price with payment guarantees, or the employees, who, in principle, hope that the company and the jobs associated with it will be maintained. An order for the global transfer of assets from the judge-commissioner of the Dakar Regional High Court in connection with the liquidation of the assets of the company Nouvelles brasseries africaines (NBA) reconciles the two interests. It considers that, in the context of a global sale of assets, the company, which made the most serious offer, taking into account the price offered, the method of payment (cash) and the chances of preserving the business and jobs, must be regarded as a transferee[xlii].

b- The effects of the sale of assets, as a technique for rescuing the firm in difficulty in the liquidation of assets

Once completed, a global asset sale is effective. But before presenting them, it should be pointed out that the judge-commissioner, who is competent under OHADA law to order the global transfer of assets, allocates a share of the transfer price to each of the assets transferred for the distribution of the price among the creditors and the exercise by them of their rights of preference. It has been shown in the preceding discussion that this share is generally less than the market value of the asset, since the total transfer price does not take into account each individual asset. Creditors with special privileges are among those affected by the rule of

assigning a share of the sale price to each of the assets assigned. They will not be able to exercise their right of preference over the real or economic value of the encumbered asset that is nevertheless assigned to it as a priority. But on part of the sale price of the assets, the determination of which does not comply with any objective and precise criteria.

Overall, the effect of the transfer is twofold. A translative effect, in the sense that it carries out the transfer of the enterprise or production unit capable of independent exploitation to a third party. It is the responsibility of the trustee to perform the acts necessary to carry out the assignment. The registry is responsible for performing the formalities of deregistration of security rights. In French law, he asked himself the question of the date of the transfer of ownership. The decision on the plan or the transfer documents? A decision of the court of cassation of 26 January 1993[xliii] ruled in favour of the decision to hand over the transfer documents. During this period, the management of the undertaking shall be the responsibility of the transferee. It seems to us that under OHADA law, the trustee manages the business until the final transfer of the business to the purchaser, unless the judge-commissioner decides otherwise in consultation with the trustee, the debtor and possibly the monitors. Mandatory effect, on the other hand, implies mutual respect of obligations between the assignee and the debtor.

The Assignee is under an obligation under pain of resolution to comply with all the undertakings entrusted to it and which it had accepted in the offer of assignment[xliv]. The principal obligation of the debtor is the payment of the transfer price, which is then distributed to the creditors. In OHADA Law, article 163, as far as the effects of the bulk sale of assets are concerned, refers to those defined in Article 133 of the AUPC. Thus, the sale price is paid into the assets of the union. A sale by bulk assignment will only purge security interests if the price is paid in full and the creditors secured by such security interests are satisfied. On the face of it, creditors with special security rights without distinction of any kind, including those with special privileges, appear to be protected, but there is no guarantee that they will be fully satisfied with their claims, although the text requires that the full assignment price be paid. The acquirer may not transfer, on pain of nullity, the assets he has acquired, except in respect of the goods, until the price is paid in full. The withdrawal of these items must be published in the RCCM[xlv] under the same conditions as those laid down for the privilege of the seller of goodwill and in the land register in accordance with the provisions organizing the land publicity for the real estate items.

On the other hand, the debtor, although occasionally consulted, plays a purely passive role in the assignments. It shall not prevent the transfer of the undertaking. Rather, it must seek to collaborate, because it may be possible for it to be recruited as an employee by the new employer. In addition, it is not required to guarantee the assignee against certain risks[xlvi]. The sale of a business is a judicial sale, the effect of which is a compulsory transfer of the ownership of the business in difficulty, the guarantees of ordinary law are no longer applicable[xlvii]. As a result, asset divestitures often need to be well prepared to avoid the transfer of unviable and irremediably compromised enterprises.

All in all, despite the objectives pursued by the procedure for the liquidation of assets, it gives concrete form to the immediate cessation of activity of the company. This means that there is no reason to continue the business of the debtor, except in exceptional cases.

II- The exception: the preservation of activity in the procedure of liquidation of assets

The continuation of the business may be necessary or at least useful in the winding-up proceedings. This solution results from the exceptional possibility of maintaining the activity laid down in Article 113 (2) of the AUPC. There are therefore exceptional cases in which there is a temporary maintenance of the activity in liquidation of the assets. To this end, it is not possible to continue the activity in the procedure of liquidation of assets. The conditions of its authorization **(A)** and of its duration are respected **(B)**.

A- The conditions for maintaining the activity in the liquidation of assets

In the event of the liquidation of assets, the continuation of the business is subject to a restrictive and prudent regulation[xlviii], dictated by the interests of the creditors. For there to be a possible provisional continuation of the activity in the liquidation of assets, two major conditions must be met. Indeed, the AUPC has made the continuation of the operation or activity subject to the requirement of prior authorization from a judicial authority having jurisdiction to that effect **(1)** and to the requirement of respect for Public Policy and the interests of Creditors[xlix] **(2)**.

1- Judicial authorization of the continuation of the activity

Exceptional authorization for the provisional continuation of the activity comes from the competent court **(a)**. Other bodies may also intervene in the authorization procedure for this activity **(b)**.

a- The court competent to decide

The decision to continue the business rests with the competent court in the event of the liquidation of the assets, by means of a judgment. It is in this sense that the second paragraph of Article 113 of the AUPC provides that: "exceptionally, if the public interest or that of the creditors so requires, the competent court may authorize, in the decision ordering the liquidation of the assets, a provisional continuation of the activity... ". This means that this competence is exclusively vested in the competent court.

As a matter of Comparative Law, the French legislature had already preceded its OHADA counterpart with regard to the authorization of the continuation of activity in the procedure for the liquidation of assets. Thus, article L641-10 first paragraph of the Commercial Code, derived from the law of safeguard, specifies, concerning the judicial liquidation, that: "if the total or partial cession of the enterprise is conceivable or if the public interest or that of the creditors requires it, the maintenance of the activity can be authorized by the court for a maximum duration fixed by decree in Council of State ".

It is therefore necessary for the competent court to obtain authorization to continue the activity. The power to authorize the continuation of the activity held by the competent court enables it to monitor and verify that the proposed measure does in fact meet the requirements of the law. Article 113 paragraph 2 of the AUPC presents the continuation of the activity in the procedure of liquidation of assets as exceptional. The maintenance of the debtor's business in the presence of a collective winding-up procedure is justified only in the presence of an authorization from the competent court. It is important to know the reasons and the reasons which led the competent court to authorize the continuation of the activity, especially as other bodies are involved in this direction.

b- Other bodies involved in the authorization of the continuation of the activity

Other bodies may intervene in the authorization of the activity in the procedure of liquidation of assets, in particular to enlighten and help the court to take a suitable decision. Indeed, the decision to continue the activity, because it is fraught with consequences, requires a special examination of the situation of the undertaking. The competent court May, in the decision to commence the liquidation of the assets, authorize a provisional continuation of the business, at the request of the liquidator and after obtaining the opinion of the judge-commissioner.

The decision initiating the liquidation of assets has certain effects on the debtor through the establishment of certain bodies[l]. This is the case with the trustee. The trustee plays an important role in authorizing the continuation of the business in the liquidation phase. The court will be able to rule only after a clear examination of the situation of the debtor. The final decision of the court of first instance must be preceded by a preparatory phase which will involve, directly or indirectly, those who have an interest in the continuation of the undertaking. It is he who is responsible for carrying out a serious diagnosis of the company's situation by drawing up a report describing the economic and financial situation so that the court can have a clear idea of it in order to decide properly. In particular, he must provide information[li] on the current state of the undertaking but also on its future state, by examining the accounting documents as well as any other documents useful for that purpose. The court must be able to see the advantages and disadvantages of continuing to operate. If the company shows signs of viability and such a prosecution appears appropriate, the trustee should serve it in his report after the judge-commissioner has given notice to the competent court that will have to decide whether or not to continue the business.

The judge-commissioner is also a body set up by the judgment opening the liquidation of property. It plays an essential role in collective proceedings. It shall, inter alia, ensure the protection of the interests involved and the attainment of the objectives pursued[lii]. This is the case in particular in the liquidation of assets to the extent that it gives its opinion on whether or not the activity continues.

Authorization of the continuation of the activity in the liquidation of assets also requires protection of the interests involved, which are the public interest and the interest of the creditors.

2- Respect for the public interest and the interests of creditors

The competent court may authorize the provisional continuation of the business on an exceptional basis only if the public interest **(a)** or that of the creditors **(b)** so requires.

a- Public interest

The business of the enterprise shall be continued in the procedure for the liquidation of assets only if the public interest so requires. This interest appears to be a prerequisite for the continuation of the activity. The notion of public interest, one of the most frequently used in

the science of law, is also one of the least clear. In general, the public interest can be seen as what is for the public good, to the benefit of all[liii]. This is in the context of collective proceedings for the discharge of liabilities in the economic public interest[liv].

Indeed, behind the concern dictated by economic considerations for the protection of the debtor (in particular the case where the debtor is an undertaking, that is to say a production centre and a tool of work, thus a cell of the economic fabric, local, regional or national) whose survival is in the public interest must be protected. In the eyes of the legislator, this protection is part of the public economic order, because the company in difficulty can no longer pay taxes on profits that it no longer makes and contributes less to the national production. That is to say, the undertaking has become a public good, by virtue of its economic and social purpose, the failure of which concerns public policy[lv]. What is at the heart of liquidation, as in prevention, is therefore economic public order, the protection of which must be ensured. In that sense, the authorization of the continuation of activity in the context of the liquidation of assets must be justified by the attainment of that interest. The competent court shall not order the continuation of the activity unless it appears to it that the public interest is required. Thus, it may authorize it where that condition is fulfilled.

The concept of public interest could be assimilated to the concept of general interest. Indeed, like the public interest, the general interest can be seen as what is for the public good, to the benefit of all. The two concepts can be used without distinction to say one and the same thing[lvi]. Thus, applied to the procedure of liquidation of assets, when an enterprise is called to disappear, it is the interest of all that is concerned. It is quite normal that this interest should be required as a condition of the authorization of the continuation of the activity in the procedure of liquidation of the assets.

In any event, the competent court may authorize the exceptional continuation of the activity only if the public interest so requires, as does the interest of the creditors.

b- The interests of creditors

Protection of the interests of creditors is a prerequisite for continued activity in the liquidation of assets. Thus, continuation of the business can only take place when the interests of the creditors so require. This means that failure to take this interest into account is a case of refusal of authorization. It is in the interests of creditors to continue the business that will promote liquidation and enable creditors to be paid.

When collective proceedings are initiated, this is because the available assets of the enterprise do not cover all the liabilities due or required, or because this risk is imminent due to insurmountable difficulties. These situations impose collective discipline on creditors in order to obtain the most complete payment for them. The interest of creditors means their collective interest. In other words, it is in the interest of the community as a whole that the creditors should be represented. It is a collective interest of creditors that is not limited to the personal interest of creditors[lvii]. The uniqueness of this interest is an element of grouping of creditors by abstraction of individuality[lviii]. It brings together creditors in a body[lix] which is more or less organized for the defense and protection of its members. Actions in the interest of the creditors are taken by the trustee, if any, by any controlling creditor under the terms of Article 72 of the AUPC. The trustee may take legal action against third parties who, by virtue of their actions, have contributed to the default or ruin of the debtor. This does not prevent a creditor from taking action against a third party if he has a distinct personal interest and therefore suffers a personal injury, which is distinct from that of other creditors.

Even if certain rights are granted to certain creditors in particular, it is nevertheless true that the interest of creditors, which is the recovery of their claims, is seriously threatened, especially since the collective interest will require that as many claims as possible be set aside in order to discharge the liabilities. The realization of their interest shall be permitted only in general after the assets have been realized with a view to the discharge of the liabilities[lx].

It should be noted, however, that the existence of the conjunction " or " in OHADA law introduces an alternative concept. This means that it is not necessary that these interests, namely the public interest and the interest of creditors, be taken into account in a concomitant manner. The existence of one of these interests in the liquidation of the assets should allow the continuation of the activity to be authorized. If there is a contradiction between these interests, we believe that the solution will be to examine the interests involved. It will be for the competent court to analyze and compare the interests involved and to decide usefully.

Contrary to OHADA law, French law added another case allowing the provisional continuation of the activity in the judicial liquidation. In addition to the public interest[lxi] or the interests of creditors[lxii], the activity may still be continued on an interim basis if it allows the company to submit a transfer plan[lxiii].

The provisional continuation of business in the liquidation of assets is permitted only for a specified period.

B- The duration of the continuation of the activity in the liquidation of assets

The continuation of the activity of the debtor is generally limited by law, because the enterprise that already encounters difficulties does not have to reconstitute a later liability therefore that it will not be able to discharge. The limitation of the duration of the maintenance of the activity arises from the idea that it is not indefinite but limited in time[lxiv]. This means that the duration of the period of continuation of the activity is not unlimited, since the legislator has fixed its duration in OHADA law. Before they can be justified **(2)**, the rules applicable to the authorized maintenance of the debtor's business must be determined **(1)**.

1- The rules applicable to the duration of the authorized activity in the liquidation of assets

Article 113 of the AUPC expressly limits the duration of the continuation of the activity, which is, moreover, only exceptional. Thus, in the event of liquidation of the assets, the duration of the continued operation or activity is 60 days after the authorization. It may be renewed once, for the same period, by the competent court at the request of the liquidator and after obtaining the opinion of the public prosecutor's office. In any case, it must end 18 months after the declaration of the liquidation of the assets, and at 24 months by a specially reasoned decision of the competent court for serious grounds, in exceptional cases[lxv].

In addition, the trustee must report the results of the operation each month during this provisional continuation of the business. He must submit his report to the judge-commissioner and to the public prosecutor[lxvi]. Since the continuation of the activity is a transitional period, the bodies of procedure exercise permanent control over the management of the activity in order to avoid that, contrary to expectations placed in it, worsen the economic and financial situation of the enterprise already in deficit[lxvii].

Under French law, the continuation of the activity in judicial liquidation may be authorized under the conditions laid down in article L641-10 of the Commercial Code for a period which may not exceed three months, subject to the provisions applicable to agricultural holdings[lxviii]. This authorization may be extended once, for the same period, at the request of the Public Prosecutor's office[lxix]. In short, the duration of the activity in judicial liquidation should not, in theory, exceed six months.

From another point of view, if claims arise during the continuation of business, they will be given preferential treatment in respect of claims arising after the judgment opening the liquidation procedure. Furthermore, in order to safeguard the rights of creditors during the provisional maintenance of the business, claims arising during this period of provisional continuation of business and which correspond to the preferential claims arising after the opening judgment will benefit from the preferential treatment. In addition, if there is a provisional continuation of the activity, there is no place for dismissal of the employees within fifteen days of the judgment of judicial liquidation.

2- The justification of the limitation of the duration of the authorized activity in the liquidation of assets

There are two reasons for requiring a time limit in liquidation proceedings. On the one hand, it can be justified by the fact that the liquidation of assets takes place only when the situation of the undertaking is irremediably compromised, i.e. only if there is no chance of the Undertaking being put right. On the other hand, the temporal limitation may be justified by the complexity and difficulty of liquidation operations which may take time and by the fact that the maintenance of the activity is essential for the proper execution of these operations. It is certainly in this sense that article 33 (3) of the UPC specifies, in the case where it orders the liquidation of the assets, a time limit according to which the closure of the liquidation is examined. This period is eighteen (18) months, may be extended once for a period of six (6) months. The competent court shall, at the end of that period, either of its own motion or at the request of any interested party, rule on the closure of the liquidation. This period is long enough to maintain the activity in liquidation of the assets, since it can reach the duration of one year.

Business continuity in the event of liquidation of assets is rare. One of the rare instances of prosecution could be found in Article 113 of the AUPC. Indeed, after having referred to article 113 of the AUPC, the agreement of the creditors and the non-opposition of the public prosecutor, the court "extends the mission of the trustee for one year", from the judgment, the main reason being that it is difficult to make the assets of the debtor liquid. It is simply to be hoped that continued activity will not lead to an increase in liabilities[lxx]. It is certainly in this sense that the debtor or officers of the legal person are in principle excluded from management.

They may take part only with the permission of the competent court under conditions laid down by it[lxxi].

Nevertheless, it is from the above that the continuation of the activity exceptionally authorized makes it possible to contribute, albeit in a relative or restrictive manner, to the achievement of the objectives assigned to the procedure of liquidation of assets. In this sense, the continuation of the activity is a means to the service of the liquidation of the assets.

In the end, the continuation of the activity at the same time arouses caution and hope. Prudence in the sense that the debtor's business ends because, since its situation is irremediably compromised and is destined to disappear, it is wise to avoid continuing to increase its liabilities. However, continuation of the activity may be permitted if the public interest or the interests of the creditors so require. Hence the hope. Even if it is authorized for a fixed period or limited in time, the continuation of the activity in the liquidation of assets in OHADA law not only allows the smooth operation of the transactions of collective seizure of the assets of the debtor intended to satisfy in priority the creditors, it also continues insidiously the safeguard of the production units susceptible of autonomous exploitation through the mechanism of the total cession of assets. This means taking into account the economic and social dimension of the continuation of the activity.

REFERENCES

[i] Le nouveau droit a mis en place deux séries de procédures qui interviennent chacune à un moment déterminé en fonction des difficultés du débiteur (article 2 de l'AUPC révisé le 10 septembre 2015 à Grand Bassam en Côte d'Ivoire) : La première série comprend ce que l'on appelle les procédures préventives : il s'agit de la conciliation et du règlement préventif. Ces procédures sont dites préventives en ce sens que leur application suppose que le débiteur ne soit pas en état de cessation des paiements. Cependant, la conciliation n'est pas à proprement parler une procédure collective de paiement, elle se caractérise par sa dimension confidentielle et amiable. La deuxième série est composée de deux procédures distinctes que l'on qualifie de curatives : le redressement judiciaire et la liquidation des biens. Elles se rapprochent en ce sens qu'elles interviennent après la cessation des paiements de l'entreprise débitrice, le redressement judiciaire visant la pérennité de l'entreprise et la liquidation des biens la réalisation de l'actif de l'entreprise en vue de l'apurement de son passif, lorsque sa situation est irrémédiablement compromise. Sur la notion de procédure collective d'après le professeur KALIEU (Y.R.), (« Notion de procédure collective ») in *Encyclopédie du droit OHADA*, sous la direction de P. G. POUGOUE, Lamy 2011, p. 1245, n°1, *« permet d'expliciter la typologie des procédures collectives (Règlement préventif, Redressement judiciaire, Liquidation des biens dans le cadre de l'OHADA), des critères d'ouverture des différentes procédures et les voies de recours en matière de procédures collectives »* ; v. aussi PETEL (P.), *Procédures collectives*, Dalloz-Cours, 7e éd., 2011, 260 p. Pour la définition, v. CORNU (G.), (dir.), *Vocabulaire juridique*, Association Henri Capitant, op. cit., p. 189.

[ii] Organization for the Harmonization of Business Law in Africa.

[iii] DADIÉ-DOBÉ (Z.M.) épse YORO, *La continuation de l'exploitation de l'entreprise dans les procédures collectives d'apurement du passif*, mémoire de DEA, université d'Abidjan Cocody, 1995, p. 2 ; MEVA'A (G.M.), *La continuation de l'activité de l'entreprise à l'aune de l'Acte uniforme OHADA révisé portant procédures collectives d'apurement du passif*, mémoire de master, Ngaoundéré, 2016, 83 p.

[iv] RIPERT (G.) et ROBLOT (R.), *Traité de droit commercial, effets de commerce, banques, contrats commerciaux, procédures collectives*, par DELEBECQUE (PH.) et GERMAIN (M.), op. cit., n° 3212 ; SAINT-ALARY-HOUIN (C.), *Droit des entreprises en difficulté*, op.cit., n° 1079.

[v] Selon un auteur, le législateur OHADA fait ainsi dépendre la liquidation de l'entreprise de l'appréciation du caractère sérieux ou non du concordat par le tribunal compétent. En ce sens : JAMES (J. C.), « Liquidation des biens dans le droit OHADA des procédures collectives », in POUGOUÉ (P.G.), (Dir), *Encyclopédie du droit OHADA*, Lamy, Paris 2011, pp. 1104 et s.

[vi] Cf. Tribunal de Grande Instance de Ouagadougou, Jugement n° 90 bis du 24 janvier 2001, Ohadata J.-04-181. Voir aussi JAMES (J. C.), « Liquidation des biens dans le droit OHADA des procédures collectives », in POUGOUÉ (P.G.), (Dir), op. cit., p. 1105.

[vii] Tribunal de Grande Instance de Ouagadougou, jugement n° 224 du 20 mars 2002, Requête aux fins de liquidation judiciaire de la SOTRAO, Ohadata J -04-187.

[viii] ANOUKAHA (F.), « L'émergence d'un nouveau droit des procédures collectives d'apurement du passif dans les Etats membres de l'OHADA », *in la Revue du CERDIP*, vol. 1, n° 1, janvier-juin 2002, pp. 62 et s ; v. aussi JAMES (J. C.), « Liquidation des biens dans le droit OHADA des procédures collectives », in POUGOUÉ (P.G.), (Dir), *Encyclopédie du droit OHADA*, op. cit, p. 1107.

[ix] JAMES (J. C.), « Liquidation des biens dans le droit OHADA des procédures collectives », in POUGOUÉ (P.G.), (Dir), Encyclopédie du droit OHADA, op. cit., p. 1106.

[x] Article 113 de l'AUPC.

[xi] Sauf par exemple lorsqu'il y a lieu d'achever certains travaux, de transformer un stock de matières premières en produits finis ou pour maintenir en bon état une unité de production dont la cession est envisagée.

[xii] Sur la notion en général, v. SAWADOGO (F.M.), « La cessation des paiements », *in Encyclopédie du droit Ohada*, op. cit., pp. 520 et s. Pour plus de précisions sur la notion de cessation des paiements et ses contours, v. JACQUEMONT (A.), Droit des entreprises en difficulté, Litec 2009, 6ème édition, pp. 114-117 ; NANTERME et PONCEBLANC, « L'opportunité d'avoir caractérisé légalement la notion de cessation des paiements : une opportunité qui n'est pas sans risques », Rev. proc. coll., 1986, p. 33 ; TEBOUL (G.), « A propos de la cessation des paiements », RJ com. 1998, 169 ; pour le même auteur, « La cessation des paiements : une définition ne varietur ? RJ com. 2004, hors série, p. 14 ; MARTY (J. P.), « De la cessation des paiements aux difficultés prévisibles », RLDA, mars 2005, p. 21 ; BERTHELOT (G.), « La cessation des paiements : une notion déterminante et perfectible », JCP E, 2008, 1, 2232 ; DERRIDA (F.), « Sur la notion de cessation des paiements », Mél. J. P. SORTAIS, Bruylant, 2002, p. 73 ; TRICOT (D.), « La cessation des paiements : une notion stable », Gaz. Pal. 29-30 avril 2005, p. 13 ; LEBEL (C.), « Etre ou ne pas être en cessation des paiements », Gaz. proc. coll., 7/8 sept. 2005. 14

[xiii] Cass. Com.31 mars 2004, n°02-16.437, D. 2004, p.1231, obs. AVENET-ROBARDET.

[xiv] Code Monétaire et Financier, article. L. 313-12.

[xv] Cf. Article 2 alinéa 4 de l'AUPC.

[xvi] La présence de l'idée de sauvetage de l'entreprise dans la procédure de liquidation des biens transparaît bien à travers le mécanisme de la cession d'actifs. V. VAUVILLE (F.), « La cession d'actifs après la réforme du 26 juillet 2005 », Droit et Patrimoine 2006, n° 146, p. 80 ; COURET (A.), « Plan de cession, mesure de redressement ou de liquidation ? », RLDA-Supplément, mars 2005, n° 80, p. 42.

[xvii] BEKONO NKOA (W.), *Les contrats en cours dans les procédures collectives d'apurement du passif de l'OHADA*, mémoire de master, Ngaoundéré, 2011, p. 3. Lire également BEKEMEN MOUKOKO (F.R.), *Le sort des contrats en cours dans les entreprises soumises à une procédure collective*, mémoire de DEA, Yaoundé 2, 2006.

[xviii] La petite entreprise éligible à la procédure simplifiée de liquidation des biens ne peut en bénéficier que s'il n'est pas propriétaire d'un actif immobilier. Cela revient à dire que la réalisation d'actifs portera essentiellement sur les meubles. v. Article 179-1 de l'AUPC.

[xix] Article 45 de l'AUPC.

[xx] Article 149 de l'AUPC.

[xxi] Articles 246 à 323 de l'AUPSRVE. L'acte uniforme sur les procédures collectives reprend ici la logique adoptée par la loi française du 25 janvier 1985 qui dispose en son article 154 (L.642- 18 du Code de commerce) que « *Les ventes mobilières ont lieu suivant les formes prescrites en matière de saisie immobilière* ».

[xxii] Article 150 de l'AUPC.
[xxiii] Elle est règlementée par les articles 155 à 158 de l'AUPC et les dispositions non contraires de l'AUPSRVE. La technique de la vente par adjudication amiable, qui est une vente aux enchères par-devant-notaire, sera utilisée si la cession permet de parvenir à de meilleurs résultats que ceux espérés dans le cadre d'une procédure de saisie immobilière.
[xxiv] Article 159 de l'AUPC. Dans la pratique, la vente d'immeuble de gré à gré est une modalité susceptible d'aboutir à un prix plus intéressant que la vente aux enchères publiques.
[xxv] TIGER (P.), « Les procédures collectives après cessation des paiements endroit harmonisé de l'OHADA », *Les Petites Affiches*, n°205, 13 octobre 2004, pp. 35-51, Spéc. p. 43.
[xxvi] Article L-622-18 du Code de commerce. v. MARTOR (B.), PILKINGTON (N.), SELLERS (D.) et THOUVENOT (S.), *Le droit uniforme africain des affaires issu de l'OHADA*, Litec, 2006.

[xxvii] La notion d'apurement du passif doit être précisée. Au sens large, elle équivaut à faire disparaitre le passif. Mais en réalité l'apurement du passif n'implique pas forcément le paiement effectif et intégral des créanciers. En fait, il s'agit d'un ensemble de procédés destinés à alléger au mieux le passif du débiteur dans la perspective de son redressement ou de l'extinction de son passif.
[xxviii] JAMES (J. C.), « Liquidation des biens dans le droit OHADA des procédures collectives », *in POUGOUÉ (P.G.), (Dir), Encyclopédie du droit OHADA*, *op. cit*, p. 1116 ; LIENHARD (A.), *Sauvegarde des entreprises en difficulté, le nouveau droit des procédures collectives*, Paris, édition Delmas, septembre 2007, n° 2115 ; JACQUEMONT (A.), *Droit des entreprises en difficulté*, *op. cit*, n° 847 et s ; SAINT-ALARY-HOUIN (C.), *Droit des entreprises en difficulté*, *op. cit*., n° 1229 er s.
[xxix] Article 164 de l'AUPC.
[xxx] Articles 166 et 167 de l'AUPC.
[xxxi] Article 165 de l'AUPC.
[xxxii] KALIEU ELONGO (Y.R.*), Le droit des procédures collectives de l'OHADA (A jour de la réforme du 24 décembre 2015)*, op. cit., p. 155.

[xxxiii] CORNU (G.), *Vocabulaire juridique*, op. cit., p. 617.
[xxxiv] VAUVILLE (F.), « La cession d'actifs après la réforme du 26 juillet 2005 », Droit et Patrimoine 2006, n° 146, p. 80 ; COURET (A.), « Plan de cession, mesure de redressement ou de liquidation ? », RLDA-Supplément, mars 2005, n° 80, p. 42. Voir aussi AKONO (A.R.), *Les privilèges dans les procédures collectives : Réflexions à partir des droits OHADA et français des entreprises en difficulté*, Thèse précitée, p. 342.
[xxxv] COUTURIER (G.), « Le plan de cession, instrument de restructuration des entreprises défaillantes », BJS, 1er févr. 2008, n° 2, p. 142.
[xxxvi] SAINT-ALARY-HOUIN (C.), « Le projet de loi sur la sauvegarde des entreprises : continuité, rupture ou retour en arrière ? », Droit et Patrimoine n° 133, Janvier 2005, p. 36.
[xxxvii] JAMES (J. C.), « Liquidation des biens en droit OHADA des procédures collectives », in Encyclopédie du droit OHADA, s/dir. de P. G. POUGOUE, Lamy 2011, op. cit., p. 1113, n° 39.
[xxxviii] V. Entre autres DEHARVENG (J.), « Le plan de cession dans la nouvelle architecture des procédures collectives – Un évènement et non plus une issue de la procédure » : D. 2006, p. 1047, spéc. p. 1048 ; PETEL (Ph.), « La réforme des plans de redressement », LPA, 10 juin 2004, n°116, p. 34 ; « FROEHLICH (P.), « L'ambivalence du plan de cession totale dans la loi de sauvegarde des entreprises » , D. 2005, doct., p. 2879, n° 1.
[xxxix] SAINT-ALARY-HOUIN (C.), « Le projet de loi sur la sauvegarde des entreprises : continuité, rupture ou retour en arrière ? », op. cit., pp. 36-38 ; v. aussi son ouvrage précité, p. 703, n°1121.
[xl] Ibid.
[xli] SAWADOGO (F. M.), Ouvrage précité, p. 303, n° 316.
[xlii] Ordonnance de cession globale d'actifs n° 482/2001 du Juge-commissaire de la liquidation des biens de la Société Nouvelles Brasseries Africaines, OHADATA J-05-53.
[xliii] Cass. com., 26 janvier 1993, n° 277, D. 1993, IR, p. 45, aussi, Cass. com., 6 décembre 1994, RJDA 4/95, n°52.
[xliv] Il s'agit par exemple du maintien de certains emplois, de la reprise de matériels, de la restructuration économique.
[xlv] Trade and Personal Property Credit Register.
[xlvi] Il s'agit entre autre du risque d'éviction, celui des vices cachés, de non concurrence.
[xlvii] SAINT-ALARY-HOUIN (C.), « Variations sur le plan de cession d'une entreprise en difficulté », op. cit., p. 548, n° 20.
[xlviii] SAWADOGO (F.M.), *Droit des entreprises en difficulté*, op.cit, p. 184.

[xlix] Cf. Article 113 alinéa 2 de l'AUPC, v. aussi Article 25 de la loi du 13 juillet 1967. Cette poursuite doit être envisagée sous certaines conditions : LE CORRE (P.M.), *Droit et pratique des procédures collectives, Réforme des procédures collectives* : Ordonnance du 12 mars 2014, op. cit., 2791 p.

[l] Article 35 alinéas 1 et 2 de l'AUPC.

[li] [li] L'une des principales missions de l'expert est de renseigner le tribunal sur l'état de l'entreprise afin d'apprécier la situation du débiteur et, de se fixer définitivement sur son sort. v. JACQUEMONT (A.), *Droit des entreprises en difficulté*, op cit, n°237, p.134.

[lii] Article 39 alinéa 1 de l'AUPC.

[liii] CORNU (G.), *Vocabulaire juridique*, op. cit., p. 561.

[liv]PEZ (T.), « L'ordre public économique », Nouveau cahier du conseil constitutionnel, 01 octobre 2015 n° 49, p. 43. L'ordre public est une notion juridique incertaine mais indispensable qui se trouve au cœur de la régulation. Ainsi assurer l'ordre public économique c'est assurer le bon fonctionnement du marché. La sauvegarde de l'ordre public implique donc nécessairement la régulation économique. Il existe donc un lien tangible entre l'ordre public économique et régulation économique.

[lv] SAINT-ALARY-HOUIN (C.*), Droit des entreprises en difficulté*, Paris, Montchrestien, Lextenso Editions, Précis Domat, 9ème éd., 2014, p 57 n° 95.

[lvi] KENMOGNE (N.), *L'intérêt général en droit des procédures collectives*, op. cit., p. 15.

[lvii] FRISON-ROCHE (M-A), « Le caractère collectif des procédures collectives », RJC, 1996, p. 293, n° 13.

[lviii] DERRIDA (F.), « Intérêt collectif et intérêts individuels des créanciers dans les procédures collectives de redressement ou de liquidation judiciaires », Mélanges Barthélemy MERCADAL, Éditions Francis Lefebvre, 2000, pp. 147 et s.

[lix] Cass. com., 3 juin 1997, Petites affiches, 28 novembre 1997, n° 143, p. 29. v. aussi KARFO (S.T.S), *Paiement des créanciers, sauvetage de l'entreprise : Étude comparative des législations OHADA et française de sauvegarde judiciaire des entreprises en difficulté*, op. cit., p. 33.

[lx] L'amenuisement des droits des créanciers est alors visible lors de la répartition du produit de la réalisation. Si les créanciers munis de sûretés ne sont pas épargnés, les créanciers chirographaires le sont encore davantage.

[lxi] Par intérêt public, il faut entendre par exemple dans le cas des licenciements de salariés qu'il ne faudrait pas précipiter.

[lxii] L'intérêt des créanciers peut revêtir différentes formes, comme le fait d'empêcher la baisse de valeur du fonds de commerce par exemple par la poursuite de l'activité.

[lxiii] Article L641-10 alinéa 1er du Code de commerce.

[lxiv] Tel est aussi le cas en droit français, v. DELATTRE (Ch.), « La période d'observation n'est pas indéfinie mais limitée dans le temps », Rev. proc. coll. n° 1, Janvier 2011, étude 6 concernant l'arrêt du TGI Lille, 3 septembre 2010, n° 09/06780 ; du même auteur, « Une période d'observation, illimitée ne devient-elle pas une « zone de non-droit » ? », Rev. proc. coll. n°6, novembre 2013, étude 30 ; Sur toute étude sur la période d'observation en droit français, v. BERTHELOT (G.), « La période d'observation, une notion temporelle à l'acception atemporelle », Rev. proc. coll. n°3, mai 2015, étude. v. aussi SALEY SIDIBE (H.), *Le sort des créances postérieures en droit français et droit de l'Organisation pour l'Harmonisation en Afrique du droit des Affaires (OHADA)*, thèse de doctorat en droit, Université Nice Sophia Antipolis, 2013, p. 77.

[lxv] Article 33 alinéa 3 de l'AUPC.

[lxvi] Articles 43 alinéa 5 et 112 alinéa 2 de l'AUPC.

[lxvii] DADIÉ-DOBÉ (Z.M.) épse YORO, *La continuation de l'exploitation de l'entreprise dans les procédures collectives d'apurement du passif*, mémoire précité, p. 10.

[lxviii] C.com., art. L621-3 : « Lorsqu'il s'agit d'une exploitation agricole, le tribunal peut proroger la durée de la période d'observation en fonction de l'année culturale en cours et des usages spécifiques aux productions de l'exploitation » ; C.com., art. L641-10 : « Lorsqu'il s'agit d'une exploitation agricole, ce délai est fixé par le tribunal en fonction de l'année culturale en cours et des usages spécifiques aux productions concernées ».

[lxix]C.com., art. R641-18 : « Le maintien de l'activité peut être autorisé dans les conditions prévues à l'article L641-10 pour une période qui ne peut excéder trois mois, sous réserve des dispositions applicables aux exploitations agricoles. Cette autorisation peut être prolongée une fois, pour la même période, à la demande du ministère public ».

[lxx] Tribunal Régional Hors Classe de Dakar, jugement n° 1578 du 18 juillet 2008, sur requête du syndic : inédit. V. SAWADOGO FILIGA (M.), « Commentaire de l'AUPC du 10 avril 1998 », in OHADA, Traité et Actes uniformes commentés et annotés, Juriscope 2016, 6ème édition, op. cit., p. 1213.

[lxxi] Article 114 alinéa 2 de l'AUPC.