

# COVID-19: PRESSURE POINTS: BUSINESS RESCUE AND INSOLVENCY IN THE OHADA REGION (AFRICA)

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Legal Briefings - By **Olivier Binyingo and Bertrand Montembault**

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A mere few weeks ago, the hypothesis that the COVID-19 virus would not affect the African continent was still being widely propagated. The theory that the virus does not survive in warm weather has since been debunked and the number of African countries that have recorded confirmed cases of coronavirus is growing rapidly. On 18 March 2020, the Director-General of the World Health Organisation, Tedros Adhanom Ghebreyesus, warned that Africa has to prepare for the worst.

In Francophone Africa, a number of affected countries have started to implement measures based on lessons learned from Asian and Western countries in an attempt to contain the virus. These measures range from the closure of schools, the suspension of flights from the most affected countries (or the outright closure of air borders in Côte d'Ivoire and Senegal for example) to the prohibition of large gatherings of people, or some combination of these.

Whether those measures will be successful in avoiding a severe health crisis remains to be seen. However, considering its ties with the global economy, the adverse economic impact of COVID-19 is something Francophone Africa will not be able to escape. In the weeks and months to come, many companies will run into difficulties and some of them will not survive. The adequacy of the legal framework to deal with the economic fallout of COVID-19 will be put to the test.

In the OHADA region, which is made up of 17 mostly Francophone African countries, business rescue and insolvency procedures are governed by the Uniform Act Organising Collective Proceedings for the Clearing of Debts of 10 September 2015 (the **Uniform Act on Collective Proceedings**).

The Uniform Act on Collective Proceedings provides for two mechanisms aimed at avoiding that a company becomes unable to pay its debts when they fall due. These mechanisms are conciliation (*conciliation*) and preventive settlement (*règlement préventif*). If the company does reach the stage where it is unable to pay its debts when they fall due, regardless whether it first attempted conciliation or preventive settlement, the uniform act allows for business rescue proceedings (*redressement judiciaire*) or liquidation proceedings (*liquidation des biens*).

### **CONCILIATION (CONCILIATION)**

Conciliation is available to any company that experiences difficulties (or foresees difficulties) but that is not yet in a situation of inability to pay its debts when they fall due. The aim of the conciliation procedure is to find a confidential amicable agreement between the company and its main creditors and contract parties, in order to resolve the difficulties the company is facing.

The conciliation proceedings are initiated by a court application submitted by the debtor (or by the debtor together with one or more creditors) in which the difficulties are described together with the measures proposed to resolve them.

If the application is successful, the court will appoint a conciliator who, during a maximum period of three months, is required to facilitate the conclusion of an amicable agreement between the debtor and his main creditors in order to resolve the debtor's difficulties.

### **PREVENTIVE SETTLEMENT (RÈGLEMENT PRÉVENTIF)**

Preventive settlement is available to any company that experiences "*serious financial or economic difficulties*", but that is not in a situation of inability to pay debts when they fall due.

The preventive settlement proceedings are initiated by a court application submitted by the debtor (or by the debtor together with one or more creditors), in which the debtor describes his financial or economic difficulties, as well as the prospects for the recovery of the company and the settlement of its liabilities. The application is accompanied by a draft preventive settlement agreement (*concordat préventif*) to be entered into by the debtor and his creditors, which agreement has to contain the measures that are envisaged to turn the business around.

If the application is successful, the court will appoint an expert for the preventive settlement to report on the financial and economic situation of the debtor and the prospects of recovery, taking into account the deadlines and the extensions granted or likely to be granted by creditors and all other measures contained in the preventive settlement agreement.

During a maximum period of three months granted by the court for preventive settlement, all individual proceedings seeking to obtain payment of claims that arose prior to the decision approving the preventive settlement are suspended or prohibited.

The court-appointed expert is required to consult with the debtor and his creditors to facilitate the conclusion of a preventive settlement agreement based on the draft preventive settlement agreement that was part of the debtor's preventive settlement application. If a settlement agreement is concluded, this agreement will have to be approved by the court. Such approval makes the agreement compulsory for all (secured and unsecured) creditors with a claim that pre-dates the court decision to allow preventative settlement proceedings.

A receiver (*syndic*) or supervisor can be appointed by the court to supervise the implementation of the preventive settlement agreement.

### ***BUSINESS RESCUE (REDRESSEMENT JUDICIAIRE)***

If a company becomes unable to pay its debts when they fall due it is obliged to make a declaration in order to initiate either business rescue or liquidation proceedings. Such declaration must be made with the relevant court within 30 days of no longer being able to pay debts when they fall due.

If the debtor requests the initiation of business rescue procedures, he will be obliged, either together with the aforementioned declaration or at the latest within 60 days from the initiation of business rescue proceedings, to submit a draft settlement agreement (*concordat*). The draft settlement agreement needs to demonstrate the prospects of recovery of the company and the measures envisaged for such recovery.

Business rescue proceedings can also be initiated by a creditor of the company who has a "*certain, liquid and due claim*" against the company.

The court decision initiating business rescue proceedings automatically results, from the date of the decision and until the approval of the settlement agreement (or the conversion of business rescue proceedings into liquidation proceedings), in compulsory assistance of the debtor for all acts concerning the administration and disposal of his property. Such assistance is provided by a court-appointed receiver (*syndic*).

The decision also results in all claims against the company existing prior to the date of the decision becoming enforceable. However, the creditors of the company will no longer be able to enforce their rights individually, as only the court-appointed receiver can act on behalf of the creditors collectively.

The receiver is tasked with the mapping and verification of all claims against the company and with the facilitation of discussions between debtor and creditors aimed at reaching a settlement agreement. A draft settlement agreement is submitted to a vote at the assembly of creditors that have been identified. If the majority of creditors representing at least 50% of the aggregate liabilities vote in favor of the proposed settlement agreement, such settlement agreement is adopted.

The court can appoint one or more supervisors (or extend the appointment of the receiver) to supervise the implementation of the settlement agreement.

### **LIQUIDATION (LIQUIDATION DES BIENS)**

For companies that have become unable to pay their debts when they fall due and for which no prospects of recovery exist, liquidation proceedings will have to be initiated. Such proceedings can be initiated by the company itself or by a creditor of the company with a "*certain, liquid and due claim*".

If the court decides to initiate liquidation proceedings, it sets a period of maximum 18 months for the finalization of such proceedings, which period can be extended once for a maximum period of 6 months. The court will appoint a receiver (syndic) who will be tasked with the orderly liquidation of the company's assets.

The decision to place the company in liquidation automatically results in the company's dissolution. As from the date of this decision, the debtor loses his entitlement to manage and dispose of his assets. The rights of the debtor in relation to his assets are exercised, throughout the duration of the liquidation proceedings, by the court-appointed receiver.

The decision also results in all claims against the company existing prior to the date of the decision becoming enforceable. However, as is the case in the context of business rescue proceedings, the creditors of the company will no longer be able to enforce their rights individually, as only the court-appointed receiver is entitled to act on behalf of the creditors collectively.

The receiver is tasked with the mapping and verification of all claims against the company. He will proceed with the realisation of the company's assets and pay the company's creditors out of the proceeds, taking into account the ranking of the creditors, as well as any valid guarantees such creditors may have.

Business rescue and insolvency proceedings often carry the risk of a ripple effect, as creditors that are (temporarily) unable to enforce their claims run the risk of getting into difficulties themselves. Considering the prognosis that most sectors of the economy will be adversely affected by the effects of COVID-19, this ripple effect could be severely enhanced and the courts in the OHADA region may be confronted with an unprecedented influx of applications from companies seeking protection against their creditors. It remains to be seen whether the available mechanism under the Uniform Act on Collective Proceedings will be adequate to avoid a domino-effect or whether the State will have to be called upon to intervene.

[More on navigating the COVID-19 outbreak](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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