I- GENERAL INTRODUCTION

The OHADA insolvency law is derived primarily from the Uniform Act of 10 April 1998 organizing collective proceedings for wiping off debts. The adoption of this U.A in 1998 enriched the insolvency law with new procedures. However, more than ten years after its entry into force, it became necessary to carry out its assessment in a bid to consider improvements that meet the current needs of economic operators and create the conditions necessary for private sector development in Member States.

Within the framework of the reform and modernization program of existing Uniform Acts led by the Permanent Secretary, the Council of Ministers of OHADA authorized in 2007 the revision of the Uniform Act organizing collective proceedings for the wiping off debts. Several studies were conducted so as to determine the shortcomings and weaknesses of the said Uniform Act and identify areas for improvement.

Member States were further requested to prepare an assessment report prior to the implementation of the U.A. on collective proceedings. In doing so, they were expected to take into account the socio-economic impact of their proposals, in accordance with the guidelines of the new policy underlying the reform of Uniform Acts.

It came out that according to best international legal practices, including those of the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law (UNCITRAL), an efficient insolvency legislation must meet three major requirements:

1) rehabilitate viable companies and quickly liquidate those that are not viable;
2) maximize recoveries by creditors on the basis of the market value of the debtor’s assets;
3) establish a clear order to pay secured and unsecured debts.

Countries with legislation meeting these three requirements generally have higher recovery rates compared to other countries. This also facilitates access to finance and reduces its cost. On September 10, 2015, the Council of Ministers of OHADA adopted the revised Uniform Act organizing collective proceedings for wiping off debts.

II- JUSTIFICATION OF THE REFORM

The assessment report revealed that the old text had the following shortcomings:
- Lack of a modern preventive conciliation procedure to promote private negotiations and extrajudicial agreements between debtors and creditors so as to safeguard companies facing difficulties and improve the recovery rate of both secured and unsecured debts;

- Limited scope of implementation the Uniform Act organizing collective proceedings for the wiping off debts considering that it did not apply to some categories of professionals;

- Bankruptcy proceedings lasting too long;

- Quite cumbersome procedures for micro-entrepreneurs;

- Lack of regulations regarding judicial representatives (preventive settlement experts and bankruptcy administrators);

- Lack of adequate regime for international bankruptcies initiated out of the OHADA space;

- Lack of clarity in the ranking of creditors.

In response to this assessment, a series of recommendations and innovations were made in the prior audit report taking into account the economic analysis of law and best international practices. Innovations include the:

- Widening of scope of the U.A. and introduction of simplified procedures for the benefit of "small businesses", especially micro-entrepreneurs;
- Definition of key concepts to facilitate the implementation and interpretation of the revised U.A.;
- Establishment of a new preventive procedure of conciliation to safeguard companies facing difficulties;
- Establishment of a "new money" privilege for those who grant new loans to companies facing difficulties to facilitate their rescue and redress;
- Shortening of deadlines and duration of collective proceedings to help achieve the objectives pursued;
- Establishment of a legal framework to regulate the activities of legal representatives, namely insolvency experts and administrators, as well as other national regulatory authorities or structures in Member States;
- Establishment of a new cross-border insolvency regime based on the UNCITRAL Model Law.

III- OBJECTIVES OF NEW UNIFORM ACT

The revised U.A. seeks to meet the needs of economic operators for the development of the private sector at national and regional levels. In this perspective, significant changes will strengthen the protection and control of the various actors, while ensuring greater efficiency of preventive and collective proceedings both in terms of safeguarding viable businesses and conducting prompt liquidation of non-viable ones.

In other words, the aim is to develop the OHADA law regarding the prevention and treatment of company difficulties and to make it more consistent with the spirit of the OHADA law by making a law which is simple (introduction of conciliation and preventive settlement as well
as simplified procedures for legal redress and liquidation of assets), modern (substantial provisions on international collective proceedings initiated out of the OHADA zone) and suitable (socio-economic context, external consistency with other U.As and domestic laws), without upsetting the current architecture and philosophy of Uniform Acts.

The revised U.A. seeks a more rapid achievement of the objectives pursued by OHADA. Indeed, the implementation of the old U.A. on collective proceedings had proven to be generally unsatisfactory or disappointing.

The new U.A. essentially aims to:

- Simplify and secure proceedings to allow the foreseeability of solutions and recognize the rights of existing creditors as well as establish clear rules for the ranking of priority claims;

- Adopt solutions that are in line with the socio-economic context of OHADA Member Countries, business practices and constraints faced by entrepreneurs and business operators;

- Form a coherent and harmonized legal framework, in particular taking account of the changes on the Uniform Acts relating to General Commercial Law, Securities Law and Corporate Law: The project pays particular attention to changes on the Uniform Act on Securities, on the structure and operation of the Trade and Personal Property Credit Register (RCCM) and innovations such as the introduction of the status of business starter (statut de l’entreprenant);

- Incorporate existing international "best practices" that keep evolving at the international level, especially in the domain of international bankruptcy;

- Strengthen and improve the status and responsibilities of legal representatives (bankruptcy experts and administrators) who play a vital role in the success of collective proceedings and enable to achieve the objectives.

IV- KEY INNOVATIONS OF THE NEW U.A.

- Broader scope of implementation ratione personae

The new U.A takes into account business starters (entrepreneurs). Its scope covers “every natural person exercising an independent professional activity whether civil, commercial, craft or agricultural”. The resulting effect is that it applies to farmers, craftsmen, business starters, freelance professions, whether regulated or not.

- Jurisdiction

The new Uniform Act provides for a conciliation procedure in article 3, paragraph 1, while paragraph 2 gives the jurisdiction on collective proceedings matters to the competent court in Member States exclusively.

- Legal representatives

The new Uniform Act provides for the rules to ensure the regulation and supervision of legal representatives, in a bid to professionalize the trades of bankruptcy administrators and preventive settlement experts. Indeed, the role of bankruptcy administrators in the smooth conduct of collective proceedings cannot be overemphasized. This regulation is considered an essential factor to ensure the achievement of objectives. Of course, if bankruptcy administrators are technically incompetent, of bad character, or are careless regarding the
conduct of proceedings, if they embezzle funds generated from the proceedings, the company will not be rescued nor will creditors be paid.

- **Preventive proceedings**

They are two in number. Their common feature is that the company is not yet in cessation of payment. They are: (i) conciliation, which is a completely new procedure and; (ii) preventive settlement, which has innovated only in some respects.

One of the innovations of the new U.A. is the establishment of a conciliation procedure with a strong amicable dimension, in the sense that its commencement does not affect the rights of creditors or those of the debtor. A conciliator who is appointed is a mere facilitator in finding an agreement between the parties; he is an interface between the debtor and creditors.

- **Preventive settlement**

Although preventive settlement proceedings have not been substantially modified, important amendments were made so as to enhance its efficiency and ensure better protection of creditors.

Regarding the conditions for commencing a preventive settlement procedure, the debtor must not be in cessation of payment and must also prove serious financial or economic difficulties (art. 6, para. 1). Among the documents to be furnished by the debtor in support of his claim, there must be a proposed agreement with creditors (art. 6-1, 13°) and it is in view of this proposed agreement and its seriousness that the procedure may be opened by an Order of the President of the competent court who also appoints an expert (art. 8). It is worthy of note that the new text provides for specific rules to ensure the independence and impartiality of the President and allows the debtor and any creditor to request for his replacement. (Art. 8-1) .. 6 last para.).

Regarding creditors, a “**new money**” privilege has been instituted for people who grant new loans or supply services or goods to companies facing difficulties (art. 11-1). Obviously, before approving the preventive settlement, the competent court must verify that the conditions for granting this privilege are met and shall mention this fact as well as the amount in his decision so as to avoid subsequent disputes (art. 15, 2, para. 4).

A totally new simplified preventive settlement procedure is also provided. This variant of preventive settlement, which is meant for small businesses, is optional. They can therefore decide to commence or not, even if they meet the conditions (art. 24-2).

- **Judicial administration and liquidation of assets**

Regarding the judicial administration and liquidation of assets, certain provisions are worth mentioning:

- **Judicial administrator (art. 39 and 40)**

Articles 39 and 40 of the updated U.A. has clarified the role of Judicial administrator. It is worthy of note the introduction of paragraph 2 in Article 39 which states that “the functions of a bankruptcy administrator shall be incompatible with any other judicial function relating to the collective proceedings in respect of which he has been appointed as such.” This provision is intended to ensure the impartiality of the competent court which must not be influenced by the judicial administrator.

- **International collective proceedings (art. 247 to 289)**

The amendments on the section dedicated to international insolvency proceedings are justified by the fact that the 1998 U.A. opted for a pragmatic solution to resolve difficulties related to international bankruptcy proceedings, but its scope was limited to the territory of OHADA Member States. So it became necessary to extend this cope.
The practical difficulties encountered in cross-border insolvency proceedings were taken into account and modern solutions adopted. These solutions are recognized internationally including by the UNCITRAL Model Law, the three European conventions on insolvency proceedings as well as the case law of the French 
*Cour de cassation* regarding the international and domestic public policy nature of the principles of discontinuation of individual proceedings in the face of collective proceedings, the divestment of the debtor and the interruption of proceedings in case of bankruptcy.

Thus, drawing on international standards, the new U.A, in the second chapter of the title on international insolvency, made provisions devoted to the recognition and effects of foreign insolvency proceedings into OHADA Member States. It also made improvements on the recognition and effects of insolvency proceedings initiated within Member States.

The provisions of this new Section are intended to fill a gap in the 1998 U.A. regarding issues arising from international insolvency proceedings out of the OHADA space. Indeed, this development was timely and indispensable considering the increasing number of cross-border insolvencies. There is no doubt therefore that a sustained effort is being made to improve the attractiveness of OHADA law.

The UNCITRAL Model Law, which has acquired an international reputation, is an important source of inspiration in the sense that it has been adopted by many states worldwide. This fact substantially strengthens the legal security and could therefore foster greater attractiveness of the OHADA space while preserving judicial prerogatives of States Parties. It is however worthy of note that the inclusion of this instrument into the U.A. on collective proceedings took into account the realities of the OHADA space.

**VI- EXPECTATIONS**

The revised U.A. on collective proceedings with the amendments on preventive settlement, judicial administration and the implementation of conciliation should further promote the rescue of companies facing difficulties that are still viable. It should also lead to more substantial dividends to creditors with the speeding up of the liquidation of assets which henceforth has to be conducted within a reasonable time, the regulation of the role of bankruptcy administrator so as to enhance competence and moralize his intervention, as well as the limitation of his remuneration which should no longer, as often in the past, consume a substantial part of the debtor’s assets. In this respect, the national authority in charge of supervising judicial representatives, which may be set up by each Member State, could play a vital role.

However, the outcome of the new U.A. on collective proceedings will depend on the quality of persons who are in charge of its implementation. These include judges who should be aware of their crucial role and the significance of collective proceedings in protecting the general interest.

Dr. Boubacar Sidiki DIARRAH  
Senior Judge  
Director of Judicial Affairs, OHADA