

A Critical Appraisal of the Preventive Procedures for Companies in Difficulty under the OHADA Bankruptcy Law

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Abstract

This article provides a critical appraisal of the preventive procedures established under the OHADA Uniform Act on Bankruptcy Proceedings, enacted on September 25, 2015, which aims to facilitate the timely reorganization of distressed businesses and protect the interests of creditors. However, significant procedural and operational hurdles persist, including inefficiencies in the conciliation process, a lack of clarity regarding the roles of conciliators, and inadequate safeguards for stakeholder participation. By analyzing the strengths and weaknesses of the current preventive measures outlined in the Uniform Act, this research highlights the need for reforms that enhance the effectiveness of the OHADA insolvency regime. Furthermore, the study makes sound recommendations aimed at improving these preventive procedures to ensure they better serve their intended purpose of promoting sustainable business recovery in OHADA member states. Ultimately, this research aims to contribute to the ongoing discourse on enhancing corporate resilience in the face of economic challenges while providing actionable solutions to strengthen the existing framework.

Keywords: *Critical, Appraisal, Preventive, Procedures, Companies, Difficulty, OHADA, Bankruptcy, Law.*

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INTRODUCTION

The Organization for the Harmonization of Business Law in Africa (OHADA) plays a crucial role in the legal landscape of African business practices, particularly concerning the management of companies facing financial difficulties. The advent of the OHADA Uniform Act on Bankruptcy Proceedings on September 25, 2015, represents a significant development aimed at addressing the pressing issues of corporate insolvency. This legal framework serves as a panacea for the challenges faced by distressed companies, offering preventive procedures designed to facilitate early

intervention and reorganization before a company reaches the brink of total failure [1].

The OHADA insolvency law introduces a structured approach to the management of companies in difficulty [2], prioritizing preventive measures such as conciliation and preventive settlements. Conciliation serves as an initial step in the process, allowing companies to negotiate with creditors and seek mutually beneficial arrangements to address their financial woes. The execution and outcomes of conciliation efforts are vital in determining whether a company can recover or if it will succumb to insolvency [3].

¹ Hainsworth, D. (2016). The OHADA Uniform Act on Bankruptcy Proceedings: A New Framework for Restructuring Distressed Companies in Africa. *Journal of African Law*, 60(2), 201-219.

² "Companies in difficulty" refers to businesses that are experiencing financial distress or facing challenges that could jeopardize their ability to continue operations. This can include situations where companies are unable to meet their financial obligations, facing insolvency, or struggling with liquidity issues. Alternative appellations for "companies in difficulty" may include distressed

companies, troubled companies, financially distressed firms, insolvent companies, companies facing financial hardship, underperforming businesses, and companies at risk of bankruptcy. These terms are often used interchangeably, but they may carry slightly different connotations depending on the context in which they are used.

³ Fatou, S. (2021). Balancing Interests: An Assessment of OHADA's Bankruptcy Framework. *African Journal of Business and Economic Research*, 16(1), 85-101.

Preventive settlements provide another layer of protection for troubled companies, enabling them to formalize agreements that outline how to address their debts while maintaining operational continuity. An exploration of the commencement of preventive settlements, their effects on stakeholders, and the enforcement proceedings underscores the significance of these procedures in the broader context of corporate governance. Moreover, simplified preventive settlements present unique characteristics that can enhance the efficiency of the overall process [4].

This critical appraisal seeks to identify the strengths and weaknesses inherent in the preventive procedures established by OHADA's insolvency law. By analyzing the intricacies of these mechanisms and their practical implications, this thesis aims to contribute to a deeper understanding of the OHADA framework and propose recommendations to enhance its effectiveness. Ultimately, the research aspires to enrich the discourse on corporate resilience and effective insolvency management within the OHADA region, ensuring that the legal framework effectively balances the interests of creditors while fostering a supportive environment for business recovery.)

The Strength and Weaknesses of the Conciliation Proceeding

The conciliation procedure under OHADA's insolvency law offers several strengths that enhance its effectiveness in addressing the challenges faced by companies in difficulty. These strengths become evident when considering the unique pressures that financially distressed companies encounter, particularly the risk of insolvency and the need to maintain critical relationships with stakeholders.

Strengths of the Conciliation Procedure

The conciliation procedure has some very interesting features which we shall be highlighting as straitening the insolvency proceedings for companies in difficulties within the OHADA zone.

Focus on Amicable Resolution

One of the key advantages of conciliation is its focus on amicable resolution. This procedure aims to facilitate negotiations between the debtor, often a struggling company, and its major creditors, fostering an environment where parties can collaboratively explore solutions to financial difficulties. For companies facing operational challenges, this cooperative approach can lead to mutually beneficial agreements, such as restructuring payment terms or extending credit lines, which preserve the business relationships essential for

recovery. The ability to negotiate directly with creditors in a non-adversarial setting not only helps in maintaining goodwill but also fosters a more constructive dialogue that can lead to innovative solutions tailored to the company's specific circumstances [5].

In the context of corporate distress, the ability to negotiate directly with creditors can lead to tailored solutions that meet the unique circumstances of the debtor. For example, extending payment terms or restructuring credit lines can help preserve vital business relationships, thereby enhancing the likelihood of a successful recovery. This cooperative approach can be contrasted with the adversarial nature of litigation, which often exacerbates tensions between parties and can lead to further deterioration of the company's relationships with its stakeholders.

Confidentiality

The initiation of the conciliation procedure is relatively straightforward, requiring a petition to the court that outlines the debtor's difficulties and proposed solutions. This accessibility allows companies in distress to seek assistance proactively, before reaching insolvency, making conciliation a preventative measure. The requirement for essential documentation, such as financial statements and a declaration of non-insolvency, establishes a clear framework for what is needed to commence the process. This ensures that both the court and the conciliator have adequate information to assess the situation, enabling companies to present their cases effectively and to outline their plans for recovery in a structured manner [6].

Confidentiality encourages candid discussions about the company's difficulties and allows for exploration of potential solutions without the fear of public scrutiny. In contrast, under the UK insolvency regime, while there are provisions for confidentiality during certain processes, the broader public interest often necessitates disclosures that can affect the company's reputation [7]. Thus, the confidentiality inherent in the OHADA conciliation process serves as a protective mechanism for distressed companies, allowing them to navigate their challenges with greater discretion.

Accessibility

The accessibility of the conciliation procedure is another significant strength. Initiating conciliation requires merely filing a petition that outlines the debtor's difficulties and proposed solutions. This straightforward process encourages distressed companies to seek assistance before reaching insolvency [8].

⁴ Hinnouh, I. (2015). L'Acte uniforme sur les procédures collectives en Afrique : état des lieux et perspectives. *Revue de Droit des Affaires Internationales*, 85-106.

⁵ Article 5-1 OHADA Uniform Act on Bankruptcy Proceedings 2015.

⁶ Ibid

⁷ <https://cms.law/en/int/expert-guides/cms-expert-guide-to-restructuring-and-insolvency-law/united-kingdom> Accessed 5 September 2024.

⁸ Article 5-2.

The requirement for essential documentation, including financial statements and a declaration of non-insolvency, establishes a clear framework for what is needed to commence the process. This structured approach contrasts with the more complex requirements of the UK administration process, where the criteria for initiating insolvency proceedings can be more stringent and less transparent [9]. By enabling companies to proactively address their financial challenges, the conciliation procedure acts as a preventative measure that can help avert the more severe consequences of insolvency.

Independent Conciliator

Moreover, the appointment of an independent and impartial conciliator is a fundamental strength of this procedure. The conciliator's professional qualifications and neutrality enhance the legitimacy of the process, ensuring that all parties feel fairly represented, which is critical for companies in difficulty. A skilled conciliator can facilitate discussions and help navigate the complexities of the debtor's financial situation, identifying areas where compromises can be made and guiding the parties toward a resolution. This impartial oversight not only fosters trust among stakeholders but also enhances the likelihood of reaching a successful outcome that benefits both the company and its creditors [10].

A skilled conciliator can facilitate discussions, navigate the complexities of the debtor's financial situation, and identify areas where compromises can be made. This role contrasts sharply with the UK approach, where administrators may have competing interests, particularly if they are appointed by a creditor. In the UK, the perception of bias can undermine the efficacy of negotiations and ultimately the success of restructuring efforts [11]. Thus, the independent conciliator under OHADA provides a layer of trust and impartiality that

can enhance the likelihood of reaching a successful resolution.

Structured Timeline

The structured timeline for conciliation, capped at three months with a possible extension, adds a sense of urgency to the process, which can be beneficial for companies facing immediate financial pressures. This time limitation encourages parties to engage actively in negotiations and work towards a resolution promptly, minimizing the duration of uncertainty for the debtor and its creditors. The automatic conclusion of the conciliation process if no agreement is reached creates a clear endpoint, allowing companies to either move forward with a settlement or, if necessary, explore alternative legal remedies. This structured approach helps companies avoid prolonged distress, enabling them to either stabilize their operations or pivot toward other insolvency solutions more quickly [12]. In the UK, the administration process does not have such a clear timeline, which can lead to protracted negotiations and uncertainty. By imposing a deadline for the conciliation process, OHADA provides a framework that encourages prompt action, ultimately benefiting all parties involved by facilitating quicker resolutions.

Monitoring and Accountability

The proactive mechanism for monitoring the debtor's situation through regular progress reports submitted by the conciliator to the court is a significant strength. This element of accountability ensures that any signs of potential insolvency are promptly addressed. This aspect aligns with "crisis management theory" [13], which advocates for swift action in response to emerging risks to prevent escalation into more severe financial distress [14]. In the UK context, while there are monitoring requirements, they may not be as rigorous [15], as those established under OHADA's conciliation procedure. The proactive nature of OHADA's approach

⁹ Insolvency Service. (2022). "Administration: A Guide for Companies." This official government publication outlines the administration process, including the criteria and procedures that must be met for initiating insolvency proceedings in the UK.

¹⁰ Article 5-4

¹¹ Ashurst LLP. (2023). "Insolvency in the UK: Overview." Ashurst. This article outlines the UK insolvency regime, detailing the stringent requirements and processes involved in initiating insolvency proceedings. Available at: Ashurst - Insolvency in the UK

¹² Articles 5-3, 5-4.

¹³ Crisis management theory in insolvency law emphasizes the need for proactive measures to address financial distress, focusing on early intervention, stakeholder engagement, and strategic decision-making. This approach advocates for a structured framework to manage crises effectively, ensuring the survival and recovery of distressed companies while balancing the

interests of creditors and other stakeholders. The main proponent of this theory is often attributed to researchers and scholars like D. Baird and T. Morrison, who highlighted the importance of crisis management within the context of corporate insolvency. Their work emphasizes that timely intervention can prevent deeper financial failures and facilitate smoother restructuring processes.

¹⁴ Article 5-6.

¹⁵ Young, B. M. H. (2011). "Insolvency Administration: Current Issues and Developments." *The Company Lawyer*, 32(7), 215-221. Young highlights that the administration process in the UK allows for a degree of flexibility, which can lead to varying levels of adherence to monitoring protocols depending on the specific circumstances of each case (Young, 2011). Furthermore, C. A. Wilson emphasizes that while the UK system provides essential protections for creditors, the practical enforcement of these monitoring requirements often falls short, allowing for potential lapses in oversight (Wilson,

provides a framework for early intervention, enabling the conciliator to alert the court and stakeholders if the company's situation deteriorates, thus safeguarding the interests of all parties.

Temporary Relief from Debt Payments

The ability of the court to defer debt payments during the conciliation process allows the distressed company to focus on negotiations without the constant pressure of outstanding debts (Article 5-7). This temporary relief fosters a conducive environment for finding workable solutions, enabling companies to concentrate on restructuring efforts without the immediate burden of creditor actions. In contrast, under UK common law, while administration does provide for a moratorium on creditor actions, this is often subject to specific conditions and can be limited in duration. The OHADA system's more straightforward and immediate relief from debt obligations allows companies to navigate their challenges with greater flexibility and focus [16].

Legally Enforceable Agreements

Agreements reached during conciliation can be filed with a notary or enforced by the court, enhancing their legitimacy and protecting the interests of all parties involved [17]. This aspect reinforces the importance of legally binding agreements in facilitating trust and compliance among stakeholders, as supported by "contract theory" [18]. The confidentiality of agreements further maintains the company's reputation, ensuring sensitive information is protected. In contrast, the UK system's public disclosure requirements can sometimes undermine the enforceability and confidentiality of arrangements, making it more difficult for companies to negotiate effectively.

Protective Measures for Debtors

The protective measures afforded to the debtor during the execution of the conciliation agreement,

2015). This lack of rigor can result in challenges for stakeholders in ensuring compliance and safeguarding their interests during insolvency proceedings.

¹⁶ Baird, D. G., & Morrison, T. (2005). "The Unsecured Creditors' Bargain." *University of Chicago Law Review*.

¹⁷ Article 5-10.

¹⁸ Contract theory plays a crucial role in understanding the agreements reached during conciliation, particularly in the context of OHADA's insolvency law. By enabling these agreements to be filed with a notary or enforced by the court, contract theory emphasizes the importance of legally binding agreements in fostering trust and compliance among stakeholders. This theoretical framework highlights how enforceable contracts create a structured environment where parties are more likely to honor their commitments, thereby enhancing the legitimacy of conciliation outcomes. The reliance on contractual obligations not only protects the interests of

which stay all legal actions against the company, are crucial for enabling a focused recovery effort. This prohibition on individual creditors from seizing assets allows the company to concentrate on adhering to the terms of the agreement without the looming threat of creditor actions [19].

This aspect aligns with the "theory of stakeholder management", which emphasizes the importance of balancing the interests of various stakeholders while providing a stable environment for recovery. In the UK, while the moratorium on creditor actions exists during administration, it may not be as comprehensive or protective as under the OHADA framework, potentially leaving companies vulnerable to aggressive creditor actions [20].

Inherent Weaknesses of the Conciliation Procedure

Despite the numerous cited benefits of the conciliation procedure in the insolvency law, there are however some setoff. Let's examine the following limitations.

Potential for Incomplete Agreements

One inherent weakness of the conciliation process is the potential for reaching incomplete or inadequate agreements. While the emphasis on amicable resolution is beneficial, it may lead to rushed negotiations where parties prioritize speed over the thoroughness of the agreement. This can result in arrangements that do not adequately address the underlying issues facing the company, leading to future disputes or failure to implement the terms effectively. Comparatively, the UK insolvency framework allows for more extensive examination and negotiation periods within administration, which can lead to more comprehensive restructuring plans. This flexibility may be necessary for larger or more complex entities,

all parties involved but also promotes cooperation and reduces the likelihood of disputes. Scholars such as Ian Macneil and Robert Coase underscore the significance of contract theory in establishing reliable frameworks for negotiation and enforcement, further demonstrating its relevance in the context of conciliation agreements (Macneil, 1978; Coase, 1960).

¹⁹ Article 5-12.

²⁰ R. Edward Freeman is often credited as the leading figure in this theory. In his seminal work, "Strategic Management: A Stakeholder Approach" (1984), he argues that businesses should create value for all stakeholders, including employees, customers, suppliers, and the community, rather than focusing solely on shareholders. Freeman's framework emphasizes the importance of balancing the interests of diverse stakeholders in decision-making processes.

highlighting a potential shortcoming in the more rigid OHADA conciliation timeline [21].

Limited Scope of the Conciliation Process

The conciliation procedure may not be suitable for all companies, particularly larger entities with complex financial structures. While small businesses may benefit from the streamlined process, larger firms often require more comprehensive restructuring plans that the conciliation procedure cannot accommodate. In the UK, the administration process is better equipped to handle complex cases due to its more flexible framework. Administrators have broader powers to manage complex financial situations and to develop more comprehensive restructuring strategies tailored to the specific needs of the company, addressing limitations inherent in the OHADA process [22].

Dependence on Goodwill

The success of the conciliation process is heavily reliant on the goodwill of both the debtor and creditors. If one party is unwilling to negotiate in good faith or is resistant to compromise, the process may break down, leading to further financial distress or insolvency. In contrast, the UK insolvency framework provides more structured oversight through the appointment of administrators who have a fiduciary duty to act in the best interests of all stakeholders [23]. This can mitigate issues of bad faith or reluctance to engage in meaningful negotiations, offering a more robust safeguard against breakdowns in the process.

Time Constraints

While the structured timeline can promote urgency, it may also create pressure that hampers thorough negotiation. Parties may feel compelled to rush to reach agreements, potentially resulting in incomplete or unsatisfactory solutions. Additionally, the potential for extensions may not always be granted, limiting flexibility for parties to reach a more thorough resolution. The UK administration process provides greater flexibility in terms of timelines, allowing for extended negotiations as needed. This flexibility can be particularly beneficial in complex cases where thorough analysis and planning are necessary to ensure successful outcomes.

Enforcement Challenges

Although agreements are legally enforceable under OHADA, challenges may arise in ensuring compliance, especially if one party becomes uncooperative after the conciliation process. Enforcing the terms of the agreement can become problematic, particularly in jurisdictions with weaker enforcement mechanisms. In the UK system, while enforcement can still be an issue, the broader legal infrastructure provides more robust mechanisms for enforcing compliance with agreed-upon terms, often leading to more successful implementations of restructuring plans.

The conciliation procedure under OHADA's insolvency law offers several strengths that enhance its effectiveness in addressing the challenges faced by companies in difficulty. By promoting cooperation, facilitating early intervention, providing temporary relief from creditor actions, and establishing enforceable agreements, the conciliation process serves as a critical mechanism for corporate respland. However, inherent weaknesses exist that can impact the overall effectiveness of this framework. Comparisons with the UK common law system reveal that while OHADA's conciliation process has unique strengths.

The Strength and Weaknesses of the Preventive Procedures

Here, we shall examine the benefits of the preventive procedures and their off shorts in the insolvency proceedings.

The Strength of the Preventive Procedures

The strengths of the preventive procedures outlined in the OHADA legal framework for insolvency are underscored by a combination of theoretical support and practical considerations. The provisions for preventive settlements enable debtors facing financial difficulties to seek relief before insolvency occurs, aligning with the principles of early intervention. This approach reflects the theory of preventive law, which advocates for addressing potential legal issues before they escalate, thereby promoting business continuity [24].

The requirement for debtors to submit comprehensive documentation when filing their petition enhances transparency and accountability, resonating with the theory of disclosure in corporate governance. This theory emphasizes the necessity for stakeholders to access relevant information for informed decision-

²¹ Fletcher, I. (2005). *Insolvency in Private International Law*. Oxford University Press). Fletcher emphasizes the structured nature of administration, which provides a moratorium that allows for negotiations with creditors, thus facilitating a more thorough examination of the company's financial position.

²² Ian Fletcher, who discusses the UK administration process in his book *Insolvency in Private International Law* (2005). Fletcher emphasizes the structured nature of

administration, which provides a moratorium that allows for negotiations with creditors, thus facilitating a more thorough examination of the company's financial position.

²³ Cohen, A., & Phillips, H. (2013). "The Role of Administration in the UK Insolvency Regime." *International Company and Commercial Law Review*, 24(2), 55-71.

²⁴ Wagner, 2013.

making [25]. By mandating detailed financial disclosures, the law ensures a clear understanding of the debtor's economic situation.

The explicit prohibition against filing for preventive settlement under certain conditions acts as a safeguard against potential abuses of the system. This regulation promotes stability within the insolvency framework and prevents misuse by debtors attempting to exploit the process [26]. Furthermore, the necessity for documents such as the debtor's certificate of insolvency status reinforces the principle of due diligence in financial practices, which advocates for thorough verification of information prior to making financial commitments [27].

The comprehensive approach to restructuring mandated by Article 7, which requires that proposed arrangements include specific recovery measures, emphasizes the importance of tailored solutions in insolvency management. This aligns with the theory of restructuring as a proactive tool, enabling customized responses to unique financial challenges [28]. Provisions for maintaining and financing the company, including potential capital increases and debt-for-equity swaps, highlight principles of corporate finance, offering flexibility essential for survival and recovery [29].

Moreover, the involvement of an expert appointed by the court to evaluate the proposed arrangement fosters impartiality and objectivity in assessing the debtor's financial situation. This is crucial for protecting the interests of creditors and enhances trust in the insolvency process [30]. Judicial oversight, demonstrated by the court's authority to appoint and compensate the expert, reinforces the legitimacy of the preventive settlement process, aligning with principles of judicial independence [31].

The provisions allowing for the provisional enforceability of court decisions regarding preventive settlements reflect the urgency required in distress situations. This aligns with Transaction Cost Economics, which posits that reducing uncertainty can significantly enhance organizational efficiency [32]. The right to appeal decisions in the preventive settlement process further ensures transparency and fairness, consistent with Legitimacy Theory, which posits that organizations must operate within social values to maintain legitimacy [33].

Simplified preventive settlements for small enterprises demonstrate a flexible approach tailored to

their unique challenges. This reflects the Resource-Based View (RBV), which emphasizes the importance of resources and capabilities in achieving organizational performance [34]. The streamlined process allows small enterprises to access necessary support more effectively, enhancing their chances of recovery.

Thus, the OHADA legal framework for preventive settlements embodies a structured, proactive approach that balances the interests of debtors and creditors. The integration of various legal theories not only enhances the efficiency and transparency of the process but also establishes a robust foundation for corporate recovery and stakeholder cooperation.

Weaknesses of the Preventive Procedures

The OHADA legal framework for insolvency, while robust in its provisions for preventive procedures, exhibits certain weaknesses, contradictions, and ambiguities that can undermine its effectiveness.

One notable weakness is the explicit prohibition against filing for preventive settlement under specific conditions. Although this provision is intended to prevent misuse, it can also create a paradox. In situations where a debtor genuinely requires relief but is technically ineligible due to minor non-compliance or misinterpretation of the conditions, they may be denied access to the preventive procedures. This rigid approach could lead to scenarios where businesses that could benefit from early intervention are instead pushed towards insolvency, contradicting the law's intent to promote business continuity [35]. This contradiction is further echoed in the criticisms of preventative frameworks, which argue that overly stringent regulations can deter debtors from seeking necessary assistance [36].

The requirement for comprehensive documentation when filing for preventive settlement enhances transparency; however, it can also introduce ambiguity regarding what constitutes sufficient documentation. This ambiguity can lead to inconsistent application of the law across different jurisdictions, with some courts demanding more stringent documentation than others. As a result, businesses may face uncertainty regarding their eligibility for preventive procedures, undermining the principle of equitable access [37].

Additionally, the emphasis on tailored recovery solutions, as mandated by Article 7, raises questions about the practical implementation of such provisions.

²⁵ Demb & Neubauer, 1992.

²⁶ Ben-ami, 2006).

²⁷ Baker & Anderson, 2010.

²⁸ Mokal, 2005

²⁹ Harris & Raviv, 1990.

³⁰ Cheffins, 2006.

³¹ Gordon, 2007.

³² Williamson, 1985.

³³ Suchman, 1995

³⁴ Barney, 1991.

³⁵ Ben-ami, 2006.

³⁶ Hirsch, 2014

³⁷ Wagner, 2013; Gordon, 2007.

While the law encourages personalized responses to financial challenges, the lack of clear guidelines on how to develop and assess these tailored arrangements can lead to confusion and inconsistency. This gap may result in creditors and debtors having differing expectations of what constitute an acceptable recovery plan, potentially complicating negotiations [38].

Judicial oversight, intended to enhance trust in the insolvency process, also presents contradictions. While appointing an expert to evaluate proposed arrangements aims to ensure impartiality, there is a risk that the expert may lack sufficient independence from the court, leading to potential biases in their assessment. This dependence could compromise the objectivity of the evaluation and ultimately impact the credibility of the preventive settlement process [39].

The provisions for provisional enforceability of court decisions regarding preventive settlements highlight a critical ambiguity regarding the balance of power between debtors and creditors. While expedited decision-making is crucial in distress situations, it raises concerns about the potential for hasty judgments that may not adequately consider the rights and interests of all stakeholders. This lack of careful deliberation could lead to decisions that, while expedient, might be detrimental to the long-term viability of the business and unfair to creditor [40].

Furthermore, the framework's provisions for small enterprises, while designed to provide flexibility, may inadvertently reinforce existing disparities between large and small businesses. The simplified preventive settlements could lead to assumptions that smaller entities face less complex challenges, potentially overlooking the nuanced difficulties they encounter in a competitive market. Such assumptions may result in inadequate support for these enterprises, thereby hindering their recovery efforts [41].

Thus, the OHADA legal framework for preventive procedures in insolvency law, while embodying several strengths, contains inherent weaknesses and contradictions that can complicate its application. The ambiguity surrounding documentation requirements, the rigid prohibitions on preventive filings, and the potential biases in judicial oversight can all create barriers to effective corporate recovery. Addressing these challenges is essential for ensuring that the preventive procedures serve their intended purpose and promote a fair and transparent insolvency process.

CONCLUSION AND RECOMMENDATIONS

In concluding our critical appraisal of the insolvency proceedings of conciliation and prevention under the OHADA bankruptcy law, it becomes evident

that while these mechanisms are designed to promote business recovery and protect stakeholder interests, they exhibit both strengths and weaknesses when compared to similar frameworks in common law jurisdictions. The strengths of the OHADA framework lie in its proactive approach, enabling debtors to seek relief before insolvency becomes irreversible. This early intervention aligns with the theory of preventive law, which emphasizes addressing potential legal issues proactively. Furthermore, the requirement for comprehensive documentation enhances transparency, reinforcing corporate governance principles. The judicial oversight provided by the appointment of experts aims to foster impartiality, ensuring that the evaluation of recovery plans remains objective, thus enhancing the legitimacy of the process. However, the weaknesses inherent in these procedures cannot be overlooked. The rigid eligibility criteria for preventive settlements may inadvertently deny access to necessary relief for genuinely distressed businesses, contradicting the law's intent to facilitate early intervention. Moreover, ambiguities surrounding documentation requirements and the lack of clear guidelines for tailored recovery solutions can lead to inconsistent applications across jurisdictions, undermining equitable access to preventive measures. When comparing the OHADA framework with common law systems, such as those in the United States or the United Kingdom, it is apparent that the latter often provide greater flexibility in the restructuring process. For instance, the U.S. Chapter 11 bankruptcy provisions allow for a broader range of recovery options and often prioritize the needs of distressed businesses while balancing creditor interests. This contrasts with the more stringent procedural requirements seen in OHADA law, which may limit the scope of recovery for businesses facing unique challenges. In summary, while the OHADA bankruptcy law's provisions for conciliation and prevention demonstrate a commendable framework aimed at promoting business recovery, significant room for improvement exists. Addressing the identified weaknesses, such as rigid eligibility criteria and ambiguities in procedural requirements, is essential for enhancing the effectiveness of these mechanisms. By integrating best practices from common law jurisdictions and fostering a more flexible and transparent approach, OHADA can strengthen its insolvency procedures, ultimately benefiting both debtors and creditors while promoting economic stability in the region. The ongoing evolution of insolvency law in various jurisdictions offers valuable insights that can inform future reforms within the OHADA framework, ensuring that it remains responsive to the needs of businesses and stakeholders alike.

Against this backdrop, to enhance the efficacy of the conciliation and prevention procedures under the OHADA bankruptcy law, several recommendations can

³⁸ Mokal, 2005.

³⁹ Cheffins, 2006; Gordon, 2007.

⁴⁰ Williamson, 1985.

⁴¹ Barney, 1991; Solomon, 2010.

be drawn from common law practices. By addressing the identified weaknesses and ambiguities in the current framework, OHADA can create a more robust and adaptable insolvency process.

Recommendations for the Conciliation Procedure

1. Flexibility in Eligibility Criteria:

The OHADA law should consider adopting more flexible eligibility criteria for accessing conciliation. Common law jurisdictions often allow a wider range of distressed businesses to seek relief, emphasizing the need for a case-by-case assessment. This flexibility can enable businesses facing unique circumstances to obtain necessary support before insolvency becomes unavoidable.

2. Streamlined Documentation Requirements:

To reduce the burden on debtors, the documentation requirements for initiating conciliation should be simplified. Clear guidelines should be provided to outline essential documents without overwhelming debtors with excessive paperwork. Common law jurisdictions often adopt a more pragmatic approach, allowing for initial filings with basic information, with more detailed disclosures required as the process advances.

3. Enhanced Judicial Discretion:

Granting judges more discretion in evaluating conciliation petitions can lead to more equitable outcomes. By allowing judges to assess the merits of each case based on specific circumstances, the system can better accommodate diverse business models and financial situations. This judicial flexibility is a hallmark of common law systems and can promote a more just application of the law.

4. Incorporation of Mediation Techniques:

Introducing mediation techniques into the conciliation process can help facilitate dialogue between debtors and creditors. Mediation encourages collaboration and can lead to mutually beneficial agreements, enhancing the overall effectiveness of the conciliation procedure. Common law jurisdictions, such as the United States, frequently utilize mediation in insolvency proceedings to foster amicable settlements.

Recommendations for the Prevention Procedure

1. Clear Guidelines for Tailored Recovery Plans:

The OHADA law should establish clear guidelines for creating tailored recovery plans that consider the unique circumstances of each debtor. This can include developing standard templates that guide debtors in proposing recovery measures that are realistic and achievable. Common law systems emphasize the importance of bespoke recovery plans that align with the specific needs of distressed businesses.

2. Access to Professional Advisory Services:

Providing debtors with access to professional advisory services can enhance the quality of recovery plans submitted for approval. This could involve establishing a network of experts who can offer guidance on financial restructuring and operational improvements, drawing on practices from common law jurisdictions that promote the involvement of financial advisors in the insolvency process.

3. Strengthening the Role of Court-Appointed Experts:

The OHADA framework should enhance the role of court-appointed experts by providing them with comprehensive training and resources. This can improve the quality of evaluations and recommendations made during the preventive settlement process. The involvement of qualified professionals can foster greater trust in the process and ensure that all stakeholders' interests are adequately represented.

4. Encouraging Stakeholder Participation:

Actively involving all relevant stakeholders, including creditors, employees, and community representatives, in the preventive settlement process can lead to more comprehensive and effective recovery solutions. This participatory approach mirrors the practices in common law systems that prioritize stakeholder engagement to ensure that diverse perspectives are considered.

5. Regular Review and Adaptation of the Framework:

Establishing a mechanism for the regular review and adaptation of the preventive procedures in OHADA law can ensure that the framework remains responsive to evolving business environments and economic challenges. This approach is akin to practices in common law jurisdictions, where periodic assessments lead to reforms that enhance the efficiency and effectiveness of insolvency laws.

Thus, by integrating these recommendations into the OHADA framework for conciliation and prevention, the legal framework can address existing weaknesses and ambiguities while fostering a more supportive environment for distressed businesses. Drawing lessons from common law practices can enhance the effectiveness of these procedures, ultimately promoting greater business continuity and economic stability within the OHADA member states. The evolution of insolvency law requires a commitment to continuous improvement, ensuring that the framework meets the needs of all stakeholders in the dynamic landscape of corporate recovery.

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