Winding Up Insolvent Company in the Democratic Republic of Congo Under Ohada Law

Conseils pratiques publié le **09/01/2022**, vu **3478 fois**, Auteur : YAV & ASSOCIATES

Different types of winding up insolvent companies exit and the law is complicated.This brief will address only the liquidation of company under OHADA Law applicable in DRC

1. Introduction

In the Democratic Republic of Congo, Insolvency law is governed by the Uniform Act of 10 September 2015 for the organisation of collective proceedings and the discharging of debt, allowing an insolvent debtor to file for preventive settlement, legal redress or liquidation and sets out clear rules on the steps and procedures for each of the options available.

There are three formal insolvency procedures for a company, namely the precautionary regulation, the judicial redress and the liquidation procedure. The precautionary regulation is a pre-insolvency rescue procedure designed to avoid the cessation of payments or the cessation of the activities of the company and allows for the discharging of the debts of the company by way of a preventive concordat, whereas judicial redress aims to safeguard the company and discharge its debts by way of a concordat of redress. As for the liquidation procedure, its purpose is the realisation of the assets of the debtor to discharge its debts.

This brief will address only the latter as *a company may be placed in liquidation if it is unable to pay its debtors or if it has lost its share capital.*

2. Insolvency situations and procedures of winding up companies

There are different types of winding up insolvent companies and the law is complicated because each time of winding up has its own procedure.

- If the company is insolvent, the shareholders may trigger a winding-up to avoid bankruptcy and, in some cases, personal liability for the company's debts. Even if it is solvent, the shareholders may feel their objectives have been met and it is time to cease operations and distribute company assets.

- In other cases, market situations may paint a bleak outlook for the business. If the stakeholders decide the company will face insurmountable challenges, they may call for a resolution to wind up the business. A subsidiary also may be wound up, usually because of its diminishing prospects or its inadequate contribution to the parent company's line. But unfortunately, sometimes problems may arise due to procedural defects, order of settlement, and many others.

The methodology for winding up a company can be initiated intentionally by the shareholders or creditors or by a Tribunal for a variety of reasons, including the conclusion of business, misfortune, bankruptcy, the passing endlessly of promoters, and so on.

When a winding-up application is filed, the court has the option of either dismissing it or making an interim request, depending on what the court deems appropriate. It can even *appoint a temporary liquidator for the company until the winding up order is completed or make a request for free or low-cost winding up. It is a process in which the company's assets are directed to the benefit of its members and creditors.* The person in charge of directing the benefits and liabilities is known as ***the Liquidator.***

3. Liquidation of insolvent company under OHAD law

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*".

Liquidation is the process in accounting by which a company is brought to an end in DRC. The assets and property of the company are redistributed. *Liquidation is also sometimes referred to as winding-up or dissolution, although dissolution technically refers to the last stage of liquidation.*

The process of liquidation also arises when customs, an authority or agency responsible for collecting and safeguarding customs duties, determines the final computation or ascertainment of the duties or drawback accruing on an entry.

Liquidation may either be *compulsory* (sometimes referred to as a creditors' liquidation following bankruptcy, which may result in the court creating a "liquidation trust") or *voluntary* (sometimes referred to as a shareholders' liquidation, although some voluntary liquidations are controlled by the creditors).

The parties which are entitled by law to petition for the compulsory liquidation of a company vary from jurisdiction to jurisdiction, but generally, a petition may be lodged with the court for the compulsory liquidation of a company by:

· The company itself

· Any creditor which establishes a prima facie case;

· Contributories: Those shareholders be required to contribute to the company's assets on liquidation;

· A public prosecutor

· An official receiver.

The grounds upon which an entity can apply to the court for an order of compulsory liquidation also vary between jurisdictions, but normally include:

· The company has so resolved;

· The company is unable to pay its debts as they fall due;

· It is just and equitable to wind up the company, as for example specified by an Insolvency Act;

· The company was incorporated as a corporation and has not been issued with a trading certificate (or equivalent) within 12 months of registration;

· It is an “old public company” (i.e. one that has not re-registered as a public company or become a private company under more recent companies legislation requiring this);

· It has not commenced business within the statutorily prescribed time (normally one year) of its incorporation or has not carried on business for a statutorily prescribed amount of time;

· The number of members has fallen below the minimum prescribed by statute;

In practice, the vast majority of compulsory winding-up applications are made less than one of the last two grounds. An order will not generally be made if the purpose of the application is to enforce payment of a debt which is bona fide disputed.

4. Addressing liquidation of company, its consequences, and liabilities

When overwhelming financial difficulties make it impossible for a company to continue operations, a corporation dissolution may be the only valid solution. The company assets and debts are tallied, proper financial reports are filed, and the company is dissolved by submitting corporate dissolution or bankruptcy forms. The government records this information and then the company ceases to be a legal entity.

In the case of total destruction or loss of property, which may happen as a result of a natural or man-made disaster, a company may choose to go through the process of corporation dissolution. Once damages are assessed and insurance settlements are received by the owners of the company, the corporate dissolution process eliminates the business entity. This protects the owners from further damages and gives the owners a chance to start over as a new company if they desire.

*There are times when company dissolution is caused by severe internal disagreements among corporate leaders***.** This can be the case when a company changes direction, is being mismanaged or experiences the breakdown of leadership for various reasons. A corporate dissolution may be the only solution to settling disputes and restructuring the company so that all benefit in the long term.

The liquidation procedure may be commenced by insolvent debtor, the court, the public prosecutor and the creditors. The commercial court where debtor has his/its principal place of business or his registered office in the court having jurisdiction to handle matters relating to insolvency.

Process required to commence a liquidation: Liquidation aims to realising the debtor's assets to clear his/its debts. Insolvent debtor [company] therefore must lodge a declaration of insolvency to commence liquidation. Should the debtor not do so, the court, the public prosecutor and debtor's creditors may lodge liquidation proceedings against the debtor. *Please note that the company can also lodge the voluntary liquidation. The insolvency declaration of the debtor must be accompanied by some documents including the company's financial statements, the statement of cash flow, the list of assets and liabilities, the list of creditors and creditors and the list of workers.*

Liquidation proceedings must be commenced by debtor within the 30 days following the date of insolvency and the duration of the process of liquidation may last a maximum of 18 months starting from the opening of the procedure.

The liquidation procedure in DRC is judicial, meaning that the court is seriously involved. The procedure is opened and closed by the court. In between, there is a supervising judge appointed to follow up how it evolves. The supervising judge is vested with important power to make decision on issues arising as the process is going on. The decisions made by the supervising judge may be appealed before the court.

Liquidation is ordered by the court by judgement that automatically involves the winding-up of the business of the debtor. In so doing, the management of the company whilst in liquidation the debtor is removed from any administration or disposal of its assets and is represented by the liquidator for all such acts. At this stage, creditors existing as of date of liquidation judgement form a masse represented by the liquidator who acts in their collective interests. Creditors must, in written, make a declaration of receivables, accompanied with supporting documents, for verification by the liquidator starting from the date of the liquidation judgement until 60 days of the second publication of liquidation judgment in legal gazette. Creditors who do not reside in the national jurisdiction of the liquidation proceedings benefit from an extension of 60 days to 90 days.

Concerning the effect of liquidation on employees, it shall be noted that as of the commencement of liquidation, contracts of employment can be terminated by the liquidator. Employees are privileged creditors for employment contracts related claims. The effects **of liquidation on contracts, shareholders and creditors are as follow:**

- *On contracts*, the liquidator may require the continued performance of ongoing contracts in the interest of the debtor/company.

- *On shareholders* , the effects of the liquidation depend on the legal form of the company. The OHADA Act on companies has created various types of companies with either limited liability or unlimited lability. *In the SARL shareholders bear losses only in proportion of their contribution in the share capital.*

- *On creditors*, the judgement has orders liquidation interrupts all legal action and recovery procedures or enforcement measures of the creditors forming the masse of creditors against the debtor.

How is the liquidation process terminated ? Liquidation is normally terminated when winding-up operations have been completed. In this case, the liquidator gives a final accounting to the supervising judge who minutes the completion of wining-up operations. This minutes is transmitted to the court which declares the liquidation terminated. *The liquidation mat also be terminated based on insufficient funds to cover winding-up operations*. In this case, the court on its own may

decide so, or any interested party may request from the court to declare liquidation terminated.

Finally, addressing *Director of officer liability and their consequences***,** we should note that:

- *For Director of officer liability*, the OHADA Act provides for various liabilities of the management of the company in liquidation, including liability of managers for company's debts, extension of liquidation to the managers, personal bankruptcy, fraudulent bankruptcy and criminal bankruptcy.

- *Consequences of director or officer liability,* under some conditions:

¾ *The court may decide that the company's debts must in whole or in part be borne by the management;*

¾ *The members of the management may be declared personally in liquidation;*

¾ *The member of the management may be declared in personal bankruptcy;*

¾ *The management may be declared in fraudulent bankruptcy;*

¾ *The management may be made subject to criminal bankruptcy.*