THE REPOSSESSION OF SPOUSE'S PROPERTIES *IN BONIS* DURING COLLECTIVE PROCEEDINGS IN THE OHADA ZONE: AN APPARENT HERITAGE PROTECTION

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THE REPOSSESSION OF SPOUSE'S PROPERTIES *IN BONIS* DURING COLLECTIVE PROCEEDINGS IN THE OHADA: AN APPARENT HERITAGE PROTECTION

Gaston Djoupoyang Igri [1]

Abstract : *The risk represented by collective proceedings for the spouse's heritage in bonis, has been sufficiently perceived by the OHADA legislator. Consequently, it provides a repossession of properties by this spouse in Article 99 of the Uniform Act relating to the organization of collective proceedings.*

If this seems to be a good catch word, a deep analysis shows that this protection is apparent for two reasons. The first one stems from the maintaining of the "presumption mucienne", which was believed to have disappeared. The second one occurs in a fairly problematic formulation of paragraph 2 of Article 99 of the AUPC which questions the principles governing debts issues in matrimonial regime. In other words, the legislator enacts a rule relating to properties of married people while neglecting some important principles governing their matrimonial regime.

Keywords : *Spouse in bonis, repossession, collective proceedings, "presumption mucienne", creditor, OHADA Uniform Act, "action paulienne", unenforceability.*

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The husband carrying on a business may be the subject of collective proceedings either as a sole trader, farmer or craftsman, general partner or as the manager of a company. Initiating such proceedings against an entrepreneur is risky enough for his spouse. Moreover, the spouse has no interest in having the proceedings extended to him or her[2]. Unlike the French comparative law, which may give the debtor's spouse the opportunity to have his debt purged following a collective proceeding OHADA law does not offer any advantage to the spouse except for inconveniences; as a logical consequence of the debtor's default. As one author states, *"the default of the principal debtor, whether a natural person or a legal entity, has become one of the major risks that can lead to a chain reaction with serious economic and social consequences"*[3]. It is for this reason that the opportunity is given to the spouse of the debtor to take back his property, since the body of creditors tends to seize everything: the personal patrimony of the debtor, the family patrimony and the patrimony of the spouse *in bonis*. With a view to protecting the spouse of the bankrupt debtor from this unfortunate solidarity, section 99 of the UACP[4] offers him the possibility of repossessing his property during the legal redress or liquidation of the property[5].

However, an in-depth analysis of this prescription of the taking back of property by the spouse does not seem to be a guarantee, since the said article seems in itself to call this protection into question. It therefore seems reasonable to ask what could limit this protection. In other words, how is the protection offered to the spouse *in bonis* by section 99 of the UACP more apparent than real?

The first justification could lie in the possibility offered to the body of creditors to provide evidence contrary to the financing of the property thus established. This could bring the spouse back to the era of the “présomption mucienne”, although rejected by the same

[2] D. MARTIN, *Le conjoint de l'artisan ou du commerçant (statut professionnel, fiscal, social matrimonial et successoral)*, collection Sirey, 1984, p. 104. For the author, if the law refuses to extend the status of trader (a condition for initiating collective proceedings against him) to women, it is simply because "the true intention of the law was, hence the reference to women, to prevent the household from being exposed to the risk of commercial collapse".

[3] KOFFI MAWUNYO AGBENOTO, *Le cautionnement à l'épreuve des procédures collectives*, PhD thesis, University of Lome and University of Maine, 2008, p. 12.

[4] Uniform Act organizing Collective Proceedings.

[5] J. ISSA-SAYEGH, "Presentation of the provisions on collective liability settlement proceedings ", OHADATA D-06-07, www.ohada.com, p. 14.

OHADA legislator (I). The second justification lies in the debts and security interests that may encumber the property taken over (II).

I- THE UNDERLYING MAINTENANCE OF THE "PRÉSOMPTION MUCIENNE"

Taken over by the former French colonies, the "présomption[6] mucienne" is a legal conjecture or judgment according to which *"property acquired for valuable consideration since marriage by the bankrupt's spouse is presumed to have been acquired from the bankrupt's money and, consequently, is included in the assets of the bankruptcy"*[7]. Long considered as an accomplice of her husband, the wife had to undergo the misadventures of her husband subjected to collective proceedings. By this presumption, the legislator imposed solidarity to the wife in the misfortune of the bankrupt husband. Professor SAWADOGO, in a historical evocation, rightly points out that the 1807 Commercial Code was severe towards the bankrupt's wife[8]: *"She was suspected of being responsible, to a certain extent, even to a large extent, for the bankruptcy, notably through her lifestyle and it was estimated that " at the very least she had to share her husband's misery since she had profited from the happy years"*[9]. It was with the advent of equality between men and women that this presumption was bilateralized[10].

Aware that the spouses *in bonis* were more victims than accomplices of the bankruptcy, the OHADA legislator proceeded to a legislative reversal, so that the misadventures of this spouse are reduced. However, there are still manifestations of the "présomption mucienne" (A) which should be completely abandoned (B).

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[6] See to this effect, A. -L. COVELLE, *De la preuve et de la présomption de décès*, thèse Doctorat, université de Genève, 1886; A. -B. CAIRE, Relecture du droit des présomptions à la lumière du droit européen des droits de l'homme, © éditions A. Pedone EAN 978-2-233-00641-7, www.pedone.info.

[7] Draft Convention and Report European Communities on Bankruptcies, Concordats and Similar Proceedings, Supplement 2/82 to the EC Bulletin, Luxembourg: Office for Official Publications of the European Communities, p. 76.

[8] F. M. SAWADOGO, "Effects of the opening of collective proceedings against creditors", Encyclopédie du droit OHADA, ed. 2011, Lamy, p. 740.

[9] F. M. SAWADOGO, op. cit.

[10] Op. cit. at 740 et seq.

A- The manifestations of the underlying maintenance of the "présomption mucienne"

While proclaiming the abandonment of the "présomption mucienne" in its paragraph 1[11], section 99 of the UACP, insidiously specifies in its paragraph 2 that *"the body of creditors may, by proving by any means that the property acquired by the debtor's spouse has been acquired, in whole or in part, with values provided by the debtor, request that the acquisitions thus made be included in the assets, in proportion to the debtor's contribution, where applicable in value"*.

It is therefore understandable that it would be excessive to speak of abandonment in a total sense. It is more a question of a change in the burden of proof, of attenuating the "présomption mucienne" than of a genuine abandonment[12], because the trustee's objective, which is to combine the assets of the spouse *in bonis* with the assets of the body of creditors, has not been abolished. It no longer simply enjoys a presumption. It is no longer the spouse *in bonis* who bears the burden of proof to the contrary, but rather the receiver.

Thus, the mass has not lost its central power held in the "présomption mucienne". It is always given to him to reunite the assets of the spouse *in bonis* with the assets of his debtor. Moreover, the foundation previously raised by the "présomption mucienne" has remained unchanged. The consideration that property acquired by the debtor's spouse was acquired with values provided by the debtor spouse remains. The deletion, in form, of the "présomption mucienne" would have restored all its force to section 1315 of the Civil Code. However, one might wonder whether the OHADA legislator really takes into account the spirit of this section. According to this section, *"he who claims performance of an obligation must prove it. Conversely, the person who claims to be released must justify the payment or the fact that produced the extinction of his obligation".* At first sight, this principle is respected, since it is up to the body of creditors to prove that the assets of the spouse *in bonis* were acquired thanks to the financing of the debtor spouse. The exemption from the burden of proof which he

[11] Section 99 paragraph 1 of the UACP : "The consistency of the personal property of the spouse of the debtor declared in receivership or liquidation of property is established by him, in accordance with the rules of his matrimonial regime.

[12] See for example S. BECQUE-ICKOWICZ and S. CABRILLAC, "Le coup de grâce constitutionnel à la ″présomption mucienne″". Bull. Joly Entreprises en Difficulté, March 2012, n° 2, p. 120.

previously enjoyed would really disappear. But if we stand on the ground of proof, we could say that there is nevertheless a sort of exemption from the burden of proof that remains[13].

In addition, section 99 of the UACP offers the body of creditors or receiver a system of freedom of evidence. Under this system, the law does not require any particular mode of proof. As specified in paragraph 2, evidence may be established by any means. It will then be sufficient for the body of creditors to establish that the spouse *in bonis* does not exercise any profession enabling him to acquire all the property of which he claims to be the owner. When the spouse is unemployed or has never practiced a remunerated profession, it will be easier to combine his assets with those of his debtor spouse. It is up to the spouse *in bonis* to prove otherwise in order to rebut this "presumption" by establishing that the property he claims to own comes from a gift. That is, an estate or an outside gift. It is certain that the spouse will not be able to establish that all his property comes from an estate.

Thanks to paragraph 2, it is therefore possible for the body of creditors to reintegrate the assets of the spouse *in bonis* into the assets of the debtor spouse as under the "présomption mucienne". By this fact, the presumption of fraud of which some authors[14] speak survives. This great favor offered to the mass by the legislator is not without consequences on the theoretical and practical level.

On the theoretical level, the reinstatement rule as provided for in section 99 (2) is derogatory from the rules of civil law. In civil law, it is the person who acquires the property who owns it and not the person who financed its acquisition. For example, in a contract of sale, it is the person who purchased the property who owns it and not the person who would have provided the funds for the purchase. The origin of the financing should therefore not affect the owner's qualification. But the collective proceedings confuses finance and the title[15]. If the purpose of the collective proceedings was to establish justice or fairness, this attitude would have been commendable, unfortunately it is not. All that matters here, to the body of creditors or to the legislator, is the increase in the pledge of the debtor's creditors.

[13] M. V. BRÉMOND, states that this is a presumption of man, see V. BRÉMOND "Les moyens de défense de l'époux faisant l'objet d'une action en "réunion d'actif"", JCP éd. N. 2006, 1170, n° 7.

[14] P. LE CANNU, J.-M. LUCHEUX, M. PITRON and J.-P. SÉNÉCHAL, Entreprises en difficulté, éd. GLN Joly, n° 1801 et s., see also for other analyses: V. BRÉMOND, "Les moyens de défense de l'époux faisant l'objet d'une action en réunion d'actif", JCP N, 2006, n° 1170 and the authors cited in note 5, cited by F. VAUVILLÉ, Cons. constant, Jan. 20 2012, No. 2011-212 QPC, www.vivaldi-chronos.com.

[15] M. STORCK, "Le titre ou la finance? Le droit de propriété dans les régimes de séparation de biens", D. 1994, chron. pp. 61 et seq.

On a practical level, this veiled presumption will be an obstacle to the policy of entrepreneurial incentives for African women. Because the majority of women use their husbands to develop a business[16]. This means that the mass can seize not only the private property of the woman, but also her professional property, including her business.. What about women who do not have a specific profession? It is obvious that they will not escape the torments of collective proceedings. Men may also suffer these avatars. But in Africa, many women are unemployed, and some husbands forbid their wives to exercise any profession. Most African Personal Codes or Civil Codes encourage this attitude, either by requiring the wife to have her husband's authorization to practice a profession, or by giving the husband the possibility of opposing the exercise of a profession by his wife.

It is not surprising, moreover, that such a formulation of paragraph 2 of section 99 in its French form[17] has been declared unconstitutional.

B- The need to abandon the underlying "présomption mucienne"

One of the major arguments that could be put forward to defend the existence of paragraph 2 of section 99 of the UACP would be the fight against fraud committed by a spouse[18]. Indeed, the presumption had a very precise objective, that of fighting against the fraud of the spouses. As Professor SAWADOGO points out, once again, "the "présomption mucienne" aims at avoiding fraud which would consist, for a dishonest trader, with the complicity of his wife, to register all his goods or an important part of them in the name of the latter". The spouses could, however, rebut this presumption with evidence to the contrary. Only the latter had to be established in writing, i.e. by an inventory or any other pre-constituted writing having a certain date. In practice this proof was difficult to provide.

However, compared to common law and specific UACP methods to fight against fraud, this paragraph is excessive, if not unnecessary. Moreover, it causes many difficulties, which have, in comparative law, made it unconstitutional.

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[16] F-X. ONANA, " Les motivations des femmes à entrer en affaires au Cameroun ", Colloque international sur la vulnérabilité des TPE et des PME dans un environnement mondialisé, 11e journées scientifiques du Réseau Entrepreneuriat INRPME-AUF-AIREPME, Trois-Rivières, Canada, 27 au 29 mai 2009, pp.1-17.

[17] UACP section 99 is actually a reworking of Art L. 624-6 of the French Commercial Code.

[18] Professor F. M. SAWADOGO specifies to this effect that, "The mucienne presumption aims at avoiding fraud which would consist, for a dishonest trader, with the complicity of his wife, to register all his goods or a significant part of them in the name of the latter". F. M. SAWADOGO, op. cit. p. 741. In light of this analysis, we can say that the legislator would presume that the spouses were fraudsters. In other words, married entrepreneurs would be dishonest people. If that is the case then this paragraph is simply an insult to married people in that profession. Fortunately, the OHADA legislator nevertheless has a more respectful attitude.

It is in fact section L624-6 of the French Commercial Code[19], which is the counterpart of paragraph 2 of section 99 of the UACP, which has been declared unconstitutional by the French Constitutional Council[20]. On 2 November 2011, the Supreme Court of Appeal referred to the latter a priority constitutionality question raised by Ms Khadija A. marries M., relating to the conformity with the rights and freedoms guaranteed by the Constitution of section L624-6 of the Commercial Code, which *"allows the reinstatement of assets acquired by a spouse using values provided by his spouse who is the subject of collective proceedings"*[21]

Paragraph 2 of section 99 of the UACP is also superfluous in the light of the various more effective, rigorous, even rather severe measures, such as "action paulienne" within the framework of ordinary law, unenforceability during the suspect period and the repression of offences against the company's fortune or assets in a specific sense.

"Action paulienne", also called "action revocatoire", is provided in section 1167[22], paragraph 1, of the Civil Code. It can be defined as *"one tending, for the creditor, to see any act concluded by his debtor called into question, for the purpose of reducing the chances of recovery of the debt"*[23]. "Action paulienne" has two effects. That of the unenforceability to the creditors of the fraudulent act[24] on the one hand and that of the reintegration of the property into the patrimony of the debtor[25] on the other hand.

In addition to "action paulienne", unenforceability, as a measure of protection, is offered to creditors. Professor SAWADOGO describes this unenforceability as a reinforced "action paulienne"[26].

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[19] This article provides that "the judicial representative or administrator may, by proving by any means that the property acquired by the debtor's spouse has been acquired with values provided by the debtor, request that the acquisitions thus made be included in the assets".

[20] Commercial Chamber, Judgment of 2 November 2011, No. 1123.

[21] Decision No. 2011-212 QPC of 20 January 2012, www.conseil-constitutionnel.fr/conseil constitutional/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2011-212-qpc/decision-n-2011-212-qpc-du-20-janvier-2012.104570.html.

[22] After a reference to derivative action, section VI on agreements against third parties provides that creditors "may also, in their own name, challenge acts committed by their debtor in fraud of their rights".

[23] P.-Y. GAUTIER and F. PASQUALINI, "Action paulienne", Rep. civ. Dalloz, 2006, p.2.

[24] Cass. com, 22 May 1978, see O. ROLLUX, " Droit des sociétés : l'action paulienne ", fiche pédagogique virtuelle, faculté de droit virtuelle, Université de Lyon 3, 2009, fdv.univ-lyon3.fr, p. 3.

[25] Cass. civ 3rd 9 July 2003 see O. ROLLUX, op. cit.

[26] F. M. SAWADOGO, *Droit des entreprises en difficulté*, Coll. Droit Uniforme Africain, Bruylant, Brussels, 2002, p. 222, n° 229, quoted by F. THERA, *L'application et la réforme de l'acte uniforme de l'OHADA organisant les procédures collectives d'apurement du passif*, thèse de Doctorat, Université Jean Moulin Lyon 3, 2010, p. 220.

Provided by section 67 to 71 of the UACP, unenforceability also makes it possible to fight against fraudulent acts of the debtor[27]. It is part of the UACP's specific measures to protect the company's assets and the interests of creditors[28]. Unenforceability applies specifically to acts performed by the debtor during the suspect period beginning on the date of cessation of payments and ending on the date of the opening decision[29].

The OHADA legislator has not confined itself to combating fraud solely in civil matters through unenforceability actions or "actions paulienne". This fight also extends to the penal level. Misappropriation of assets or finances and other similar offence committed after the cessation of payment, are the subject to real repression.

It is in Chapter II, **other offences[30]**, that the OHADA legislator protects the company's assets or the pledge of creditors against fraudulent acts by certain persons. The latter can be grouped into two categories according to articles 240 and 241 of the UACP. The first category is that of third parties[31] who are not necessarily close to the debtor[32]. The second category is that of the debtor's relatives or allies. It includes in particular the spouse, descendants, ascendants or collateral of the debtor or his allies who, without the debtor's knowledge, would have misappropriated, diverted or concealed effects depending on the assets of the debtor in a state of suspension of payments. If they have committed these offences with the debtor's knowledge or in concert with the latter, the spouse and the parents will be guilty of complicity and the debtor guilty of bankruptcy[33].

[27] F. K. DECKON, "Le conjoint du débiteur soumis à une procédure collective en droit uniforme de l'OHADA", LPA, 14 Jan.2008, n° 10, p. 9; F. M. SAWADOGO, op. cit., n° 228, p. 221, quoted by F. THERA, op. cit., p. 220.

[28] F. M. SAWADOGO, "L'Acte uniforme portant organisation des procédures collectives d'apurement du passif", www.ohada.com, p. 41.

[29] Section 67 of UACP.

[30] Chapter II of Title V entitled Bankruptcy and other offences.

[31] Persons involved in the management of the company or enterprise without a specific title. See S. YAWAGA, "Infractions relatives aux procédures collectives d'apurement du passif", *Encyclopédie du droit OHADA*, ed. 2011, Lamy, p. 1008.

[32] These are persons convicted of having, in the interest of the debtor, removed, concealed or concealed all or part of his movable or immovable property, all without prejudice to the criminal provisions relating to complicity; persons who have been convicted of fraudulently producing in the collective proceedings, either on their behalf or by the interposition or supposition of a person, alleged claims; persons who, trading under the name of another person or under an alleged name, have, in bad faith, embezzled or concealed, attempted to embezzle or conceal part of their property.

[33] S. YAWAGA, op. cit. at 1008.

In addition to this possibility that the trustee has to reunite the assets of the spouse *in bonis* in the assets of the body of creditors, the OHADA legislator strengthens the protection of creditors or the body of creditors by taking into account debts and securities.

II- THE PROBLEM OF DEBTS[34] AND SECURITY INTERESTS[35] IN THE PROPERTY TAKEN BACK

By specifying that "repossessions made in application of these rules are exercised by the spouse concerned only at the expense of the debts and securities of which the goods are encumbered", paragraph 3 of section 99 of the UACP conditions the repossession of the goods to the taking into account of the debts and securities. In other words, the debts and securities made on the property taken back are not purified or sponged off. This implies that the spouse with the right of repossession becomes a debtor if this was not the case. The legislator ignores the author of the debt or security or the person on whose behalf the debt or security was granted, yet this is a decisive point in the context of matrimonial property regimes[36]. What is important to the legislator is the patrimony that collects the assets subject to debts or security interests. Such an attitude by the legislator would be unfair, especially in a Community system. It is certainly understandable that the legislator is divided between the interests of the spouse and those of the creditors (A). But this does not mean that it should adopt formulations likely to sacrifice on the altar of creditors, the interests of the spouse *in bonis*. In order not to agree to this unfair wording, we believe that the legislator could have left it to the spouse to make a choice (B).

A- A formulation with unfair consequences for the spouse *in bonis* and his "desired creditors"

[34] By debt, the OHADA dictionary means a sum of money due. See BITSAMANA (H-A), Dictionary of Law OHADA, OHADATA D-05-33.

[35] According to art. 1st of the AUS, a security interest "is the allocation to a creditor of an asset, a group of assets or a patrimony in order to guarantee the performance of an obligation or a group of obligations, whatever its legal nature and in particular whether they are present or future, determined or determinable, conditional or unconditional, and whether their amount is fixed or fluctuating".

[36] Ph. SIMLER, "Pour un autre régime matrimonial légal", *L'avenir du droit, Mélanges en hommage à FRANÇOIS TERRÉ, Dalloz, P.U.F., Ed. du Juris-Classeur*, 1999, p. 455, quoted by A-S. BRUN, *Contribution à la découverte d'un droit commun patrimonial du couple,* Doctorat en droit privé, Université Pierre Mendès France-Grenoble II, 2003, p. 417.

Under section 99, paragraph 3, of the UACP, the interests of the debtor spouse's creditors are safeguarded. However, when one wonders about the impact of this paragraph 3 of the said article on the assets of the spouse *in bonis*, one can understand that it is necessary to rethink this creditor protection formula. The legislator does not mention the origin of the debt. It does not take into account the person on whose behalf the debt or security was incurred. One might even ask to what creditors these debts and securities are safeguarded. Is it for the benefit of the creditors of the spouse subject to the collective proceedings or for the benefit of the personal creditors of the spouse *in bonis?* Or is it for the benefit of all creditors?

It is clear that the Uniform Act organizing collective proceedings mainly protects professional creditors, i.e. creditors of the spouse subject to collective proceedings[37]. It is only in an accessory way that the creditors of the spouse *in bonis* could benefit from these collective proceedings. In other words, they will have to be satisfied with the spouse's *in bonis* separate estate without taking advantage of the rules of the matrimonial regime[38]. However, in the absence of precision on the origin of the debt, we understand that this protection measure is intended for the creditors of the spouse subject to collective proceedings. In addition to the assets of the debtor spouse subject to collective proceedings, the professional creditors have as security the spouse's *in bonis* own assets. By this wording of paragraph 3 of Article 99 of the UACP, the legislator reduces the patrimony of the spouse *in bonis*, affects the property of the spouse with or without his consent to the satisfaction of the creditors of the spouse subject to the collective proceedings. In this way, the legislator implicitly gives the trading spouse the authorization to distract the property of his spouse, he can grant debts or securities on all property even those not belonging to him.

In addition to this reduction in the *in bonis* spouse's patrimony, collective proceedings result in a limitation of the spouse's *in bonis* powers over his or her property. This situation applies particularly to the common spouse in good. Since common property is the pledge of creditors[39], the spouse will suffer the same limitations as the debtor spouse. At the same time this paragraph 3 reduces the basis of the claim, the guarantees of the creditors of the spouse *in*

[37] F. THERA, *L'application et la réforme de l'acte uniforme de l'OHADA organisant les procédures collectives d'apurement du passif*, thèse de Doctorat, l'Université Jean Moulin Lyon 3 , 2010, p. 202.

[38] Most legislation agrees that in the Community system, common property is the pledge of creditors.

[39] J. DJOGBENOU, *Procédure collective d'apurement du passif*, Programme DESS droit des affaires et fiscalité, Université Catholique d'Afrique de l'Ouest, Abidjan, Côte-d'Ivoire, Année universitaire 2010, cabinet-djogbenou.org, p. 15.

bonis. Thus, collective proceedings lead to an increase in the type and, certainly, also in the number of creditors of the spouse *in bonis*.

The legislator by this paragraph 3 automatically puts into conflict the creditors of the spouse *in bonis* and those of the body of creditors who are primarily concerned by the collective proceeding[40]. More so, when their rights would relate to the common goods. This situation is similar to the opposition between persons using an individual recovery proceeding and those using a collective proceeding. Knowing the supremacy of collective proceedings, one can better understand that this formulation is to the disadvantage of the creditors of the spouse *in bonis* beneficiaries of individual proceedings. Their situation will be even worse if they do not submit to collective proceedings, in particular by declaring their claims. If they do not declare them in time or fail to do so, their fate will be less envious than that of unsecured creditors. Hypothesis plausible in view of the legislator's silence regarding the creditors of the spouse *in bonis*.

As a matter of comparative law, we can appeal to French case law. According to this case law, the existence of creditors' rights is not affected by the absence of a declaration in the collective proceedings of the debtor or defaulting spouse[41]. Position adopted by the Court of Cassation and endorsed by the plenary assembly[42] through the following formula: *"the liquidation of a married person under the regime of community of property does not modify the rights that the creditors of his spouse hold under the matrimonial regime"*[43]. Nevertheless, the exercise of the rights of the spouse's creditors must be the subject of a declaration. Otherwise, they may exercise their rights only after the creditors admitted to the collective proceedings[44].

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[40] F. M. SAWADOGO, "L'Acte uniforme relatif au droit des sociétés commerciales et du GIE", communication to the ERSUMA training seminar, held from 22 July to 09 August 2002, www.ohada.com. See also: B. JADAUD, Droit commercial, Règlement amiable, redressement et liquidation judiciaires des entreprises, Montchrestien, 1997, pp. 151-164; A. PERRODET, "Le conjoint du débiteur en redressement judiciaire", RTDCom., 1999, pp. 1-61, cited by F. M. SAWADOGO op. cit.

[41] A. KARM, *L'entreprise conjugale*, Defrénois, coll. D. and Notariat, t. 5, 2004, preface P. CATALA, p.383.

[42] A. KARM, op. cit. The author states that this position was adopted in 1993 by the Court of Cassation. To illustrate her comments, she quotes in particular in footnote 88: Com. 19 January 1993, Rèp. Defrénois 1993, Part I, arts. 35616, pp. 1045 et seq. and arts. 35630, p. 1198 (corrigendum) and Les Petites affiches 20 December 1993, No. 152, pp. 9 et seq. As far as the Plenary Assembly is concerned, this position was taken in 1994, as illustrated by the decisions in footnote 89: Ass. Plen. 23 December 1994, Report by Councillor CHARTIER, D. 1995. p. 145 f. (extracts) and Opinion of Advocate General ROEHRICH, Bull. inf. C. cass. of 1 February 1995, No. 402, pp. 1 et seq.

[43] A. KARM, op. cit. at 384.

[44] Op. cit.

In view of these difficulties, it is important that paragraph 3 be redrafted to be a solution that takes into account or has an interest in all stakeholders. In this way extremist discourse will be avoided.

B- Advocacy for a more respectful reformulation of the balance between the various creditors

In view of the detrimental consequences of the wording and even the imprecision of this paragraph 3 of section 99 of the UACP, it is wise for the legislator to make amendments which should be beneficial both for the spouse *in bonis* and for the spouse's personal creditors.

While it is true that the purpose of collective proceedings is to safeguard the business and discharge the liabilities, it is no less true that the interests of the personal creditors of the spouse *in bonis* and the debtor spouse must be taken into account. Faced with this situation of balance of interests in a collective proceedings open against a spouse, French doctrine has examined the question. Both specific and radical proposals have been made by French doctrine.

Among the specific proposals, the liquidation of the community would be for some the recommended solution[45]. This liquidation shall be made on the basis of the causes of dissolution of the matrimonial regime legally provided for[46]. This could include divorce, death, legal separation from the declared absence of one of the spouses[47] and separation from judicial property[48].

This idea of dissolution of the matrimonial regime, certainly favorable to the spouse *in bonis* and his creditors, is not the subject of unanimity. Legally it could be challenged. In terms of application in the African context it is unlikely to thrive. As regards the legal plan, one author points out that "*the enumeration of the causes of dissolution of the community in article 1441 of the Civil Code being both restrictive and imperative, and the opening of collective proceedings against one of the spouses not being mentioned, this cannot lead to the dissolution of the community*"[49]. In other words, we should stick to the causes of divorce. Collective

[45] Op. cit. p. 388.

[46] Art. 1441 French Civil Code.

[47] I. GOAZIOU-HURET, "Divorce and collective proceedings", RTDCom. 2002, p. 627 et seq. cited by A. KARM, op. cit. at 388.

[48] R. SAVATIER, La communauté conjugale nouvelle en droit français, Dalloz, 1970, spec. No. 140, p. 258, cited by A. KARM, op. cit. at 388.

[49] A-S. BRUN, *Contribution à la découverte d'un droit commun patrimonial du couple*, thèse de Doctorat en droit privé, Université Pierre Mendès France-Grenoble II, , 2003, foot note 1146.

proceedings can occur without these causes of divorce. In this case, this idea of dissolution would be useless, except to want to simulate or make a forcing. At the very least, there will be fraudulent intent at this time.

In the OHADA area, this proposal not only faces the latter obstacle, but is also limited by the principle of immutability of matrimonial agreements maintained by most of the legislation of the organization's member countries. In other words, this solution of opportunity must be abandoned. This last remark should also be extended to two other specific proposals. These are the conventional modification of the creditors' pledge and the generalized co-management of the assets[50].

Alongside these various ad hoc proposals are those which, according to one author[51], are radical. This mainly concerns the reduction of the extent of the creditors' pledge base and the deferred community[52].

In addition to these latter measures that could be applied in the OHADA area or zone, the legislator will have to take into account the Individual and Family Codes that offer solutions that it will just have to reconcile with collective proceedings in order for justice to be done. In this sense, two main avenues are open to OHADA and national legislators.

On the one hand, the OHADA legislator could make a reference to the techniques of debt obligation as provided for by matrimonial property regimes. On the other hand, an option could be offered to the spouse *in bonis*. The first proposal will not be new or difficult. Since, this is what was implemented with the establishment of the spouse's property *in bonis* in paragraph 1 of section 99 of the UACP. In this sense, it would be desirable for jurisdiction simply to be given to the rules of the debt obligation. The debt obligation is a measure for determining which spouse is a debtor or which spouse should be sued for restitution of the debt. This question allows creditors to know if the only debtor is the spouse who contracted with them or if his spouse is also a debtor[53]. Whatever the matrimonial regime, there are solidary debts and personal debts. In other words, there are debts for which creditors can sue either spouse in full; and debts for which they can sue only the spouse with whom they contracted.

[50] A-S. BRUN, op. cit. p. 454 et seq.

[51] Op. cit.

[52] Op. cit. p. 472

[53] B. KAN-BALIVET, " Régime matrimoniaux, l'interdépendance entre les conjoints : les dettes ménagères ", fiche pédagogique virtuelle, www.facdedroit-lyon3.com.

The second proposal is that an option be granted to the spouse *in bonis*. It can take two forms: a renunciation option as existing in the community regime, or an option of acceptance under condition of inventory as provided for in matters of succession. Whichever option is chosen, the spouse *in bonis* must be able to make an inventory of the property in order to know what debts or security interests are encumbering that property and thus accept them accordingly or abandon them to the collective proceedings. Indeed, it would be better for the spouse to have a reduced patrimony without debts than to have a patrimony riddled with debts that would make his situation worse than that of his pursued spouse.