

BURKINA FASO

SCPA KAM & SOME



FIRM INFORMATION

Website address: www.scpa-kmsome.bf

Languages spoken: French and English

Contacts: Guy Hervé Rommel Kam and Emmanuel Yonli

Address: No 800 rue 15-293 Ouaga 2000, 01 BP 727 Ouagadougou 01

Telephone: +226 25 40 88 44

Email: contact@scpa-kamsome.bf; emmanuel.yonli@scpa-kamsome.bf; guyherve.kam@scpa-kamsome.bf

TYPE OF GOVERNMENT

The Constitution of Burkina Faso establishes a semi-presidential government with a parliament.

POLITICAL SYSTEM

The president is elected by the universal suffrage for a term of five years. The parliament consists of one chamber called the National Assembly which has 127 seats with members elected for five years' tenure. The parliament may be dissolved by the President of the country. There is a constitutional chamber of ten members. There is also an Economic and Social Council whose role is purely consultative.

LEGAL SYSTEM

The legal system is the French Civil Law system. The judicial system is made up of two branches: the judicial branch and the administrative branch. At the top of the judicial branch is the "Cour de cassation". Beneath it are the courts of appeal at Ouagadougou, Bobo-Dioulasso and Fada N'Gourma and 25 tribunaux (tribunaux de grande instance). At the same level are the tribunaux de commerce (tribunals of commerce) at Ouagadougou and Bobo-Dioulasso that handle cases involving commercial law and the tribunaux du travail (labor tribunals) at Ouagadougou, Bobo-Dioulasso and Koudougou. At the top of the administrative branch is the "Conseil d'Etat". Beneath the Conseil d'Etat are 25 "tribunaux administratifs" that handle cases involving administrative law. There is a High Court of Justice to try the president of the country and ministers for treason and other serious crimes.

In 1995 an Office of Ombudsman "Médiateur du Faso" was created to handle disputes between the State and its citizens.

In the view of guaranteeing the independence of the judicial system, during the Transition the "Conseil National de la Transition" (the parliament) amended the Constitution regarding judges appointment and their career management. Therefore, judges career is managed by the Burkina Magistrates' Council presided by the President of the "Cour de cassation" without the government involvement.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. liquidation)?

Burkina Faso is a OHADA (Organisation for the Harmonization of Business Law in Africa) zone member State. As such, insolvency is governed by the OHADA Uniform Act on Collective Proceedings for the Clearing of Debts. According to this Act, insolvency is the situation of a debtor who not able to meet his/ its due debts with its available assets.

What are the tests for financial distress (i.e. business rescue or administration)?

The Uniform Act on Collective Proceedings for the Clearing of Debts makes no difference between liquidation and administration. Therefore, the criterion for opening administration is the failure to meet due debts with available assets.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

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 is the court having jurisdiction to handle matters relating to insolvency.

Formal restructuring procedures

Administration proceedings starts in the same way as liquidation.

Informal insolvency or restructuring procedures

Burkina Faso law does not provide for informal liquidation or administration procedures.

LIQUIDATION

What is the aim of liquidation?

Liquidation aims to realizing the debtor's assets to clear his/ its debts.



Process required to commence a liquidation

Insolvent debtor 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. 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 debtors and the list of workers.

At what point does the liquidation process commence?

Liquidation proceedings must be commenced by debtor within the 30 days following the date of insolvency.

Duration of the liquidation process

The duration of the process liquidation may last a maximum of 2 years starting from the opening of the procedure.

Extent of court involvement in the liquidation process

As already mentioned, the liquidation procedure in Burkina 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.

Management of the company whilst in liquidation

Liquidation is ordered by the court by judgment. The liquidation judgment automatically involves the winding-up of the business of the debtor. The debtor is removed from any administration or disposal of its assets. He is then represented by the liquidator for all such acts. The debtor's non-personal correspondences must be handed to the liquidator. Debtor may however be present when those correspondences are opened.

Filing of claims

Creditors existing as of the date of liquidation judgment 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 judgment until 60 days of the second publication of liquidation judgment in legal news paper. Creditors who do not reside in the national jurisdiction of the liquidation proceedings benefit from an extension of the 60 days to 90 days.

Factors which influence the period of the administration in a liquidation

The court fixes the period after which the termination of the liquidation must be examined. That period must not exceed 18 months. Should the closing of the liquidation may not be ordered at the expiry of this period, the court may extend this period once for a limited period of 6 months, after having heard the liquidator on the reason why there is a need to extend the liquidation period.

Effect of liquidation on employees

As of the commencement of liquidation, contracts of employment can be terminated by the liquidator. Employees are privileged creditors for employment contracts related claims.

Effect of liquidation on contracts

The liquidator may require the continued performance of ongoing contracts in the interests of the debtor.

Effect of liquidation on shareholders

The effects of liquidation on shareholders depend on the legal form of the company. The Uniform Act on companies has created various types of companies with either limited liability and unlimited liability. In companies like « société à responsabilité limitée » (SARL) or « société anonyme » (SA) shareholders bear losses only in proportion of their contribution in the share capital. In others like « société en nom collectif » (SNC), « société en commandite simple » (SCS) the liability of shareholders is unlimited. Therefore, the opening of the liquidation is extended to them, and they are themselves put into administration or liquidation according to their situation. In addition, once the liquidation proceedings is opened, shareholders that are officers or directors of the company are no longer allowed to sell their shares.

Effect of liquidation on creditors

The judgment that orders liquidation interrupts all legal action and recovery procedures or enforcement measures of the creditors forming the masse of creditors against the debtor.

Pending claims, litigation, arbitration

Voidable transactions

The Uniform Act provides for a period of time called "suspect period" situated between the date of insolvency and the date of the liquidation judgment. According to their nature, transactions performed by the debtor during this suspect period must or may be held not valid against the creditors.

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 winding-up operations. This minutes is transmitted to the court which declares the liquidation terminated. The liquidation may 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.

Director or officer liability

The Uniform 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:

- The court may decide that the company's debts must in whole or in part be borne by the management;
- The members of the management may be declared personally in liquidation;



- The member of the management may be declared in personal bankruptcy;
- The management may be declared in fraudulent bankruptcy;
- The management may be made subject to criminal bankruptcy.

BUSINESS RESCUE / ADMINISTRATION

Process required to commence a business rescue or administration

Like liquidation, administration proceedings may be commenced with respect to any individual or corporate body that is in the state of insolvency.

At what point does the business rescue or administration process commence?

Administration proceedings is commenced in the same way as that of liquidation.

Duration of business rescue/administration process

The maximum duration of the administration procedure is 9 months.

Extent of court involvement in the business rescue/administration process

Administration process is judicial as that of liquidation. Therefore, court has an important involvement in its process.

Management of the company whilst in business rescue/administration

In administration proceedings, debtor's activities continue with compulsory assistance of an administrator in all acts in connection with the administration and disposal of his assets. However, debtor may validly carry out alone the acts of conservancy and those of day-to-day management that are part of the usual activity of the company. He must however report these acts to the administrator.

Filing of claims

Like in liquidation, in administration proceedings, creditors existing as of the date of liquidation judgment form a masse represented by the administrator who acts in their interests. Creditors must, in written, make a declaration of their receivables accompanied with supporting documents for verification by the administrator starting from the date of the administration judgment until the 60 days following the second publication of administration judgment in legal news paper. Creditors who do not reside in the national jurisdiction of the administration proceedings, benefit from an extension of the 60 days to 90 days.

Factors which influence the period of business rescue

In principle, the period of Business Rescue procedure is 6 months starting from the judgment that opens the procedure. However, this period may be extended for a limited period of 3 months by the Court at its own initiative or at the debtor's or the administrator's request.

Funding of the company whilst in business rescue/administration

Funding of a company whilst in administration proceedings is allowed.

Effect of business rescue / administration on employees

Putting a company into the administration proceeding does not in itself involve termination of employment contracts. There may however be termination of employment contracts on economic grounds should the economic situation of the company so requires. It is worth mentioning that employees are privileged creditors for employment contracts related claims.

Effect of business rescue / administration on contracts

The Uniform Act on Collective Proceedings provides for the principle of the continuation of ongoing contracts. Therefore, the opening of administration proceedings in itself must not result in contracts termination. However, the administrator and the other party to the contract may request contract termination subject to some conditions set forth by the Uniform Act.

Effect of business rescue / administration on shareholders

The effects of administration on shareholders depend on the legal form of the company. In companies where the liability of shareholders is unlimited, the opening of administration is extended to them, and they are themselves put into administration or liquidation according to their situation. In addition, once the administration proceedings is opened, shareholders that are officers or directors of the company may sell their shares only with the authorization of the supervising judge.

Effect of business rescue / administration on creditors

As above mentioned in respect of liquidation, the administration judgment form creditors whose claims exist before the opening of administration into a masse represented by the administrator who acts in their collective interests. These creditors are no longer allowed to undertake any individual legal action or recovery procedures or enforcement measures against the debtor.

Pending claims, litigation, arbitration and effects of the moratorium

Voidable transactions

The Uniform Act provides for a period of time called "suspect period" situated between the date of insolvency and the date of the administration judgment. According to their nature, transactions performed by the debtor during this suspect period must or may be held not valid against the creditors.

The business rescue (administration plan)

In administration proceedings, the debtor is required, either together with the insolvency declaration, or until 60 days following the opening of administration procedure to make a draft Composition Agreement (concordat) showing that the company is economically and financially viable. The Composition Agreement must be serious, that is to say, its



implementation will lead to the restoration of the economic and financial health of the debtor and pay its debts, with the view to its continued survival. The creditors and the administrator are informed of the proposal of the Composition Agreement.

Voting on the plan

The voting of the Plan is organized by the court. If the majority of the creditors in number whose claims have been finally or provisionally admitted, representing at least 50% of the total value of such claims votes for the Plan, it is ratified.

Cram down on creditors

Once the business rescue plan has been ratified, it is in principle binding on all creditors existing as of the date of the decision that opened the administration proceedings.

Implementation of the plan

The Composition Agreement is implemented according to its terms. Creditors having special real security are bound by the reductions of debts and grace period they themselves have granted. However, if the Composition Agreement provides for a grace period not exceeding two years, this grace period may be opposed to them should the grace periods they have granted are lower. In addition, some administrative bodies that are under a statutory obligation not to grant reduction or grace period are not bound by the Composition Agreement.

Discharge of debt

The Composition Agreement may involve granting reduction of debt and grace period to the debtor. Creditors that have granted reduction are not entitled to seek enforcement of the reduced amount against the debtor.

Effect on suretyships

The opening of the administration procedure interrupts or suspends the enforcement of suretyships given by an individual but any suretyships provided by a company may be enforced by a creditor.

How is the process terminated

The administration procedure is terminated with the ratification of the Composition Agreement or its conversion into liquidation. In the case of the ratification of a Composition Agreement, the administration process continues with the implementation of the Composition Agreement.

What is the status of the company after the business rescue

If a Composition Agreement is ratified and implemented in accordance with its terms, the company will continue to trade and will graduate from business rescue. If the Composition Agreement is rejected, the company is put into liquidation.

Director and officer liability

The civil and criminal liability of directors or officers of a company that is placed in business rescue is the same like that of a company placed in liquidation.

SECURITY

Types of security

In Burkina there are various types of securities divided into personal securities and real securities.

Personal securities are undertaken by a person or an entity to guarantee an obligation of another person or entity. There are two types of personal securities that are the security bond (le cautionnement) and the independent guarantee (la garantie autonome).

Real securities may be taken over movable or immovable properties and are as follows: the right of retention, the retention of title and property assigned as guarantee, the pledge over movable assets, pledge over intangible assets, preferential rights and mortgage.

Taking of security

Securities in Burkina Faso may be taken through an agreement or through a court order.

Security trustees / special purpose vehicles

The Uniform Act on securities provides for a security agent who may represent the creditor for the constitution, the registration and the enforcement of one or more securities. As far as the mortgage is concerned, given that it has to be notarized, the notary represents the creditor for the constitution and the registration formalities.

Most robust form of security available to local and/or international lenders

The most robust form of security in Burkina Faso is the mortgage. Given, however, that its enforcement may be interrupted or suspended in the event of liquidation or administration procedure, it is advisable to associate it with independent payment guarantee on first demand given by a financial institution.

Registration of security

Personal securities are not subject to registration formalities. All securities over movable assets are subject to registration at RCCM (Trade Registry) and mortgages are registered with the land registry. Securities over movables assets may be registered by the debtor's, a security agent's or the creditor's request. Mortgages are registered at creditor's request. In both cases, there are forms available at the RCCM and the land registry to be filled.

Stamp duty

Securities are subject to registration with the tax office and therefore subject to stamp duties of the amount of CFA 400 per sheet. The registration duties represent the fixed amount of CFA 6000.

Registration costs

The registration cost for securities over movable assets is 1% of the amount guaranteed. Payment is made at the RCCM



(Trade Registry) at the moment of the registration. The payment must be testified by a receipt delivered by the Court's clerk in charge of the RCCM. As far as mortgages are concerned, the registration cost includes:

- 1,05% of the amount of the mortgage for the publication with the land registry. Payment is made at the land register when the mortgage is being registered. Payment is testified by a receipt delivered by land registry officer;
- Notary's fees which vary according to the amount of the mortgage from 3% to 0,5 %.

The debtor bears the cost of registration.

Instances in which securities might be vulnerable to attack

The registration of securities aims at informing third parties and extending their effects to them. If a security is not registered, the creditor who has taken it does not have priority over third parties including debtor's others creditors. Therefore, the enforcement against third parties may be successfully challenged by them. In addition, insolvency proceedings suspend or interrupt securities enforcement. And taking a mortgage does not prevent from government expropriation for public interest of the property object of the mortgage. In this event however, the secured creditor's rights apply on to the expropriation indemnity.

Methods of enforcement of security

The method of enforcement of security depends on whether the security is personal or real. As far as personal securities are concerned, when default occurs, the secured creditor requests the execution of the defaulted obligation against the person of the guarantor. For real securities, in the event of default, the secured creditor arranges for the forced sale of the secured property by public auction. The procedures of enforcement of securities are provided for by the Uniform Act on Enforcement Measures.

Problems experienced when enforcing security

The common problem that may be experienced when enforcing securities is that the enforcement may be challenged by any person having interest, including the debtor, the guarantor and third parties.

Financial assistance requirements

Not applicable

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Foreign judgments are enforceable in Burkina only if they have been declared enforceable after an exequatur procedure, subject to cooperation treaties in judicial matters.

Requirements for recognition of a foreign judgment

To be recognized or declared enforceable in Burkina Faso, the foreign judgment must have been handed down by an internationally competent court. A foreign court is internationally competent, if the Burkina courts do not have exclusive jurisdiction, if the dispute has a close connection to

the Burkina court and provided the choice of the foreign court is not fraudulent.

In addition, the foreign judgment must be final according to the laws of the State of origin; not contrary to Burkina Faso's public policy and rendered in accordance with the adversarial principle. The dispute (between the same parties and having the same object) must not be pending before the Burkina Faso courts or a court of another jurisdiction (other than the jurisdiction of its origin)

Requirements for the recognition of a foreign trustee, business rescue practitioner, or an insolvency practitioner

The Uniform Act on Collective Proceedings for Clearing of Debts provides for the recognition of foreign insolvency procedures, subject to the submission of an application to the competent Court by the foreign Business Rescue or Insolvency Practitioner. The recognition application must be accompanied by:

- A certified copy of the decision opening the collective procedure;
- A certificate of the court certifying the opening of the collective procedure;
- In the absence of the above mentioned documents, anything acceptable to the Court that evidences the opening of the collective procedure and the appointment of the Business Rescue or Insolvency Practitioner.

