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A Revised Uniform Companies Code for the 17 African Countries of Ohada

BENIN, BURKINA FASO, CAMEROON, CENTRAL AFRICAN REPUBLIC, CHAD, COMOROS, CONGO, DEMOCRATIC REPUBLIC OF CONGO, EQUATORIAL GUINEA, GABON, GUINEA, GUINEA BISSAU, IVORY COAST, MALI, NIGER, SENEGAL AND TOGO

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A revised companies code was adopted by Ohada¹ on **30 January 2014 (The Uniform Act on Commercial Companies and Economic Interest Groups; the “Revised Code”).** The Revised Code adds tailwind to a fast developing market and further incentivizes investors, including private equity investors, to enter the dynamic African markets.

The Revised Code addresses investors’ concerns regarding the somewhat dated and inflexible previous code by allowing the formation of “SAS” companies with their simplified and more flexible governance, and the conduct of meetings by video. More sophisticated shares and securities have also been further developed, like share classes with varied dividend, voting and other rights, as well as convertible and subordinated bonds.

Above all, the Revised Code clarifies many important provisions and reduces ambiguities, including a provision that shareholder agreements are now expressly permitted.

The Revised Code should be published in Ohada’s official legal journal before April 2014 and become effective by July 2014 at the latest. Existing Ohada companies then have two years to conform their articles of association to the Revised Code.

¹ Organized in 1993, Ohada—a French acronym meaning “Organization for Harmonization of Business Law in Africa”—is a regional organization comprised of 17 West African states which promotes regional integration, economic growth, and legal stability by adopting uniform legal codes, including a companies code (in French: *Acte uniforme relatif au droit des sociétés commerciales et du groupement d’intérêt économique*) which has been the companies code of all Member States since 2000.

Major Changes

One main change for investors seeking to establish a vehicle in an Ohada country is the creation of a new corporate entity: the SAS. This type of limited liability company has already been very popular in France due its flexibility and ease of governance. For example, the SAS has few statutory requirements and is thus primarily governed by the articles of incorporation which the shareholders agree upon.

The Revised Code also explicitly provides for the ability of companies or shareholders to:

- Make equity contributions to companies through services;
- Form a company with varied share capital, which offers more flexible options for capitalizing the company;
- Have a court appoint temporary management for a company experiencing serious management difficulties;
- Restrict share transfers for up to 10 years for a serious and legitimate reason;
- Establish foreign representative or sales offices of indefinite duration;
- Issue varied share classes, share warrants and shares with additional subscription rights;
- Issue convertible and subordinated bonds;
- Issue interim dividends; and
- Issue free shares to the company's personnel.

Earlier drafts of the Revised Code eliminated the necessity of using notaries when signing or amending articles of association. Although the final Revised Code maintains this necessity, it allows Member States to repeal the requirement under their local laws if so desired.

Other Noteworthy Changes

Throughout the Revised Code, the drafters have clarified and fleshed out existing rules so as to reduce certain ambiguities. For example, shareholder agreements are now expressly addressed in the Revised Code, which adds stability to investors structuring their investments on that basis. Furthermore, the Revised Code now also states clearly that provisions in shareholder agreements which run counter to the articles of association or the Revised Code will be trumped. Likewise:

- It is now clear that any provision of a company's articles of association which conflicts with the Revised Code will be voided; and
- The definition of a related-party contract now includes persons holding at least 10% of the shares of an SA (*société anonyme*), and this contract's approval process has been further detailed.

Additionally, the Revised Code contains new rules and procedures to simplify corporate procedures:

- The use of electronic communication is expressly permitted under certain conditions—e.g. video conferences for shareholder meetings and email for shareholder convocations or filing annual accounts;
- Subject to limitations regarding duration and maximum amount, shareholders can delegate certain details of capital injections to the board; and
- Specific procedures are provided for the incorporation and capitalization of a company in the form of an SA which issues shares on a public market.

The Revised Code also modifies rules regarding, *inter alia*, appointment and removal of statutory auditors, shareholder information rights, procedures for share transfer consents and exercising preemption rights.

Private equity investors, sponsors, operators, lenders, State actors and local populations will all benefit from the new dynamism in African investment. The Revised Code will play a key role in further improving that environment. Please feel free to contact us if you would like further details or advice on the Revised Code or specific situations concerning investments in Africa.

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