JONES DAY

APRIL 2014

COMMENTARY

Democratic Republic of Congo: Now Is the Time to Make DRC Companies Compliant with OHADA Corporate Law

Five months to go.

With a view to improving its business and investment climate, the Democratic Republic of Congo ("DRC") joined the Organization for the Harmonization of Business Law in Africa ("OHADA") on September 13, 2012, thereby becoming the 17th Member State of this international organization (already including Benin, Burkina Faso, Cameroon, the Central African Republic, Comoros, the Republic of Congo, Côte d'Ivoire, Gabon, Guinea (Conakry), Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo).

Joining this organization involves major changes in Congolese business law, which will now be essentially governed by the provisions of the OHADA "Uniform Acts" that create a common set of regulations for the Member States and are directly enforceable in their jurisdictions. The implementation of OHADA law thereby carries reforms in a number of business law areas, including general commercial law, insolvency, accounting, transportation, securities, and arbitration law, as well as enforcement procedures.

With respect to corporate law, the provisions of the uniform act relating to companies law (*Acte Uniforme sur les sociétés commerciales et le GIE*, or "Uniform Act on Companies") now apply to DRC companies.

By way of contrast with the former corporate law, the Uniform Act on Companies offers economic players modern and foreseeable rules, which are similar to those of French and other civil law jurisdictions in many ways. For example, OHADA *société à responsabilité limitée* ("SARLs") and *sociétés anonymes* ("SAs") may have a sole shareholder and Director's positions may be held by legal entities.

This evolution results in the obligation for existing DRC companies to conform to OHADA law.

A Process of Harmonization With A Time Frame Questioned by the Recent Adoption of A New Uniform Act On Companies

On January 30, 2014 the OHADA adopted a revised Uniform Act on Companies (the "Revised Act") which will enter into force on May 5, 2014. The Revised Act terminates and replaces in its entirety the previous Uniform Act on Companies dated April 17, 1997 (the

"Former Act"). The Former Act shall however survive during a two-year period for the purposes of the harmonization process of the DRC companies not yet conforming with OHADA law (i.e., until May 5, 2016).

The Former and Revised Acts, however, have conflicting provisions regarding the harmonization process, and so, with the recent adoption of the Revised Act, the precise process and timeline for harmonization has become somewhat unclear. Indeed, under the Former Act, DRC companies incorporated before September 12, 2012 have two years (i.e., until September 12, 2014) to amend their bylaws in order to satisfy the Former Act requirements (the "Former Act Harmonization Process"). However, under the Revised Act, DRC companies incorporated before May 5, 2014 will have two years (i.e., until May 5, 2016) to amend their bylaws in order to satisfy the Revised Act requirements (the "Revised Act Harmonization Process").

Does the Former Act Harmonization Process still have to be complied with, or is it replaced by the Revised Act Harmonization Process? Article 919 of the Revised Act is unclear. To be on the safe side in view of the drastic consequences of non-compliance described below (and pending a possible corrective action by the relevant OHADA bodies), it would be advisable to comply with both harmonization processes as follows:

- DRC companies incorporated before September 12, 2012 shall amend their bylaws in order to satisfy the Former Act requirements before September 12, 2014;
- DRC companies incorporated before September 12, 2012 that have already amended their bylaws in order to satisfy the Former Act requirements, should verify whether their bylaws need to be modified in order to comply with the Revised Act requirements. In such case, they shall amend their bylaws between September 12, 2014 and May 5, 2016 in order to satisfy the Revised Act requirements;
- DRC companies incorporated between September 12, 2012 and May 5, 2014 should verify whether their bylaws need to be modified in order to comply with the Revised Act requirements. In such case, they shall amend their bylaws in order to satisfy the Former Act requirements before May 5, 2016.

In order to comply with this relatively short time frame, it is essential that companies, (in particular joint ventures), which have not already undertaken such a process, correctly and timely anticipate the preparatory work to be carried out and the actions to be performed during such transition period.

Radical While Unpredictable Consequences of Noncompliance

Any provision of a company's bylaws contrary to the new legislation will automatically be deemed null and void, which may have somewhat unpredictable consequences. In addition, companies that do not comply with the new required minimum capitalization thresholds set by the Former Act will be automatically wound up as of September 13, 2014.

Adoption of New Bylaws and Adjustment of Shareholders' Agreements

In practice, DRC companies will need to adopt revised bylaws to avoid any debate on their potential noncompliance with the new legislation. Shareholders' agreements established under the former corporate law regime will also have to be adjusted for such shareholders' agreements to become compatible with the new legal framework. The requirement to carry out these adjustments can be used as an opportunity to rethink and optimize the governance and shareholding structure of these companies (in particular in view of the high degree of flexibility offered by the "*société par actions simplifiée*", introduced by the Revised Act). It may also serve as a pretext for certain shareholders to try to renegotiate the substance of shareholders' agreements. It is essential to take into account the time necessary for these discussions and likely negotiations in light of the time constraint for conversion to OHADA law.

Adjustments To Be Made Are Significant

A few examples:

The Choice of a New Corporate Form. So far, DRC companies were mainly incorporated in the form of *sociétés par actions à responsabilité limitée* ("DRC SARL") or *sociétés privées à responsabilité limitée* ("DRC SPRL"). Neither of

these two corporate forms exist under OHADA law, which provides for a société anonyme ("OHADA SA") and a *société à responsabilité limitée* ("OHADA SARL") and also offers the possibility to incorporate companies as nonprofit "economic interest groups."

The new and very flexible form of the *société par actions simplifiée* ("SAS") will also be an option since it has recently been introduced by the Revised Act. The lack of clarity of the harmonization process resulting from the recent adoption of the Revised Act however imposes caution. To be on the safe side, it seems that such corporate form would be available as from May 5, 2014 only for DRC companies incorporated after this date. For DRC companies incorporated before May 5, 2014, it is advisable to wait until September 13, 2014 in order to apply for a conversion into this new corporate form.

Limitation on the Number of Director and Officer Positions Held. Foreign investors present in the DRC know how hard it can be to find the right people to whom director or officer positions within local companies can be entrusted.

This issue will have to be carefully considered under OHADA law as, while it allows for corporate entities to act as directors of SAs, it imposes strict limitations on the number of director or officer positions one person may simultaneously hold within different OHADA SAs based in the same country.

Obligation to Appoint a Statutory Auditor. Only a limited number of DRC companies were required to appoint a statutory auditor (only certain DRC SARLs), and such statutory auditors had very limited autonomy and powers under DRC law.

The new legislation significantly increases the role of statutory auditors and now requires the appointment of an auditor in all OHADA SAs and, subject to certain threshold conditions, in OHADA SARLs.

Related Parties Agreements. So far, DRC law provided for fairly limited authorization or ratification procedures for the related parties agreements (agreements referred to as regulated under OHADA law).

Such agreements will now be subject to more standard authorization or ratification procedures. In addition, it should be noted that person(s) "interested" in the relevant agreements will not be allowed to participate in the vote authorizing or ratifying such agreements. This new constraint may require adjustments to shareholders' or joint venture agreements currently in effect so as to avoid, for example, a situation where a minority shareholder of a joint venture objects to a renewal of license agreements entered into between such joint venture and its majority shareholder's group.

Local players and foreign investors who will have prepared their conversion to OHADA law during the current transition period should welcome this modernization of business law in the DRC and take this opportunity to optimize their DRC companies' structures and governances.

However, for those companies not yet conforming to OHADA law, it is now key to initiate and complete the preparatory work for their conversion promptly, given the significant number of amendments induced by the new legislation, in particular in the case of joint ventures where these modifications may give rise to the renegotiation of existing shareholders' agreements between the relevant partners.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Hervé Castelnau
Paris
+33.1.56.59.46.74
hcastelnau@jonesday.com

Denis Bandet
Paris
+33.1.56.59.46.91
dsbandet@jonesday.com

Laurent Vandomme
Paris
+33.1.56.59.39.31
lvandomme@jonesday.com

Thibaut Kazémi
Paris
+33.1.56.59.46.76
tkazemi@jonesday.com