INCORPORATING A COMMERCIAL COMPANY IN THE DEMOCRATIC REPUBLIC OF CONGO UNDER OHADA LAW

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There are different types of commercial companies that can exist in a member state of OHADA (the organization for the Harmonization of Business in Africa) such as the Democratic Republic of Congo [DRC]. This article discusses the types of companies and their incorporation or establishment in the Democratic Republic of Congo

There are different types of commercial companies that can exist in a member state of OHADA (the organization for the Harmonization of Business in Africa) such as the Democratic Republic of Congo [DRC]. The Uniform Act on Commercial Companies and Economic Interest Groups governs the incorporation and general operation of these companies.

Types of Companies

1. LIMITED LIABILITY COMPANIES

There are two types of limited liability companies: the SA and the SARL. In both, the liability of each shareholder for the company's debts is limited to the amount of his shareholding.

1.1. *Société Anonyme (SA)*

The process of incorporating an SA requires the services of notary, who authenticates each step.

First, the founders of the company must publish subscription bulletins. Then at least a quarter of the share capital must be paid before the articles of association can be prepared. If there is to be a public offering the company's shares, there must first be a Constituent General Meeting (the public offering of shares also affects the number of statutory auditors required as two are needed if there is a public offering whereas only one is needed if there is not).

Once the previous steps have been completed, the company must then be registered at a local RCCM (Registre du Commerce et du Crédit Mobilier). When the company has been registered, a notice must be placed in an appropriate national legal journal or newspaper.

A SA can be managed either by a managing director or by a board of directors. The key determinant as to which form of management is adopted is the number of shareholders the company has; a company with three or more shareholders must have a board of directors. The guidelines for the management of an SA are outlined in the Uniform Act.

The rights possessed by shareholders are reflective of the amount of their shares. Both individuals and corporate bodies can be shareholders in an SA. The Uniform Act allows a quite a large degree of freedom in allowing SA's to create other types of securities other than shares, namely bonds

and hybrid securities.

The decision to increase the share capital of an SA can only be made in a (extraordinary) shareholders' meeting (and this is the same for any decision to reduce the share capital). The process is quite similar to that of incorporation as at least of quarter of the amount of the shares must be paid following which a notarized statement of subscriptions must be made.

As an SA must have a minimum capital of USD 20,000 (and USD 200,000 of it makes public offerings), any reduction of its share capital cannot result in a capital lower than this amount.

Under the Uniform Act an SA cannot buy its own shares directly or through a third party. However, there are exceptions to this under the Act including where the shares are attributed to company employees.

1.2. *Société á Responsabilité Limitée (SARL)*

The process of incorporating a SARL is similar to that of the SA – the only difference being the minimum share capital amount, which in this case is USD 2,000.

In addition, the minimum value for each share in USD 10.

A SARL is managed by one or more managers (gérants) who are either appointed in the articles of association or at some point during the company's lifespan.

Like an SA, an SARL can have just one shareholder as it can be created by one or more individual or corporate organization. Shareholders have the right to vote on decisions, the right to dividends and the right to information regarding the company as well as the right to question such information.

Collective decisions are made in annual general meetings –which can be called by shareholders representing at least a quarter of the shares or by a petition made to the court by an individual shareholder – or by written consultations.

Where a SARL's capital exceeds USD 20,000; its annual turnover is more than USD 50,000; or it has more than 50 permanent employees, the SARL must have at least one statutory auditor.

Agreements made between an SARL and a manager or shareholder can be authorized by a two stage process in which a report in written by the relevant manager or statutory auditor, then a decision is made by shareholders representing more than half the share capital as to whether or not the agreement will be authorized. However, agreements between the company and an individual shareholder or a manager in which the latter benefits from, this may be held void or null.

2. UNLIMTED LIABILITY COMPANIES

In addition to limited liability companies, the Uniform Act on Commercial Companies and Economic Interest Groups also provides for a number of types of companies where shareholders, or some of them, have unlimited liability.

2.1. *Société en Nom Collectif (SNC)*

Governed by Article 270 of the Uniform Act, an SNC is defined as a private partnership. In an SNC all the shareholders are jointly liable for the debts of the company. There is no required maximum or minimum number of shareholders and all the shares are of equal value.

The manager of an SNC can be a shareholder or non-shareholder and does not have to be an individual – a corporate body can be manager.

The powers and identity of the manager are usually outlined in the articles of association. In such cases, a unanimous vote is required to revoke the manager's tenure. However, when the manager's identity is not in the articles of association, the revocation can be done through a majority vote.

In an SNC, all decisions are made either by the manager, by written consultation or by a simple majority at the annual shareholder's meeting.

2.2. *Société en Commandite Simple*

There are two types of shareholders in an SCS:

1. *Associés Commandités* (active partners) – these shareholders are jointly (and unlimitedly) liable for the company's debt and are identifiable. These shareholders jointly manage the company (unless otherwise stated in the articles of association)

There must be at least one active partner in an SCN

2. *Associés Commanditaires* (sleeping partner)– these shareholders are only liable to the extent of their contribution to the capital share and are not identifiable

If a sleeping partner assumes any of the responsibilities of the active partners, the becomes unlimitedly liable. Managers generally make the key decisions and all other issues are decided at the annual shareholders meeting

2.3. *Société en Participation (SP)*

Technically this is not a company, but rather, a joint venture between two or more partners.

An SP is not registered with the RCCM and as a result, is not party to court proceedings; is not subject to collective insolvency hearing; does not have a registered office or corporate name and does not enter into contracts.

However, SP's are generally governed by the same guidelines as SNC's in relation to the partners.

2.4. *Société de Fait* [De facto company]

This is an informal business relationship between two or more individuals or corporate bodies as there as the company is not formally registered.

However, where the court confirms the existence of a *société de fait*, the guidelines relating to shareholders in a SNC are applicable