The OHADA corporate reform:

Major evolution of the corporate law regime within the Sub-Saharan Africa zone

With a global population expected to rise from 1 billion today to 1.5 billion by 2035, Africa's economic potential is booming. According to the World Bank, global GDP in Sub-Saharan Africa reached $1.29 trillion in 2012, and the International Monetary Fund forecasts that its growth rate will reach 6 per cent in 2014. Francophone Africa and more particularly the OHADA zone, which covers 17 West and Central African jurisdictions, has the potential to attract increasing interest from investors (see What is OHADA).

Further to its adoption by the Council of Ministers of OHADA, the Reformed Uniform Act on Companies ("R-UAC") published in the OHADA Official Gazette on 4 February 2014 and will come into force on 5 May 2014.

The R-UAC is largely inspired by French corporate law and practice and will greatly enhance the reliability and flexibility of structuring investments within OHADA countries. It will be of particular interest for the structuring of joint ventures as well as private equity transactions and may be used in combination with the tools and mechanisms historically and generally used in the context of international transactions.

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Overview of the key features of the reform:

Legislative improvements	Examples of innovative tools and future practical uses
Creation of a new legal form of company modelled on the French contractual limited liability company, "SAS", providing greater flexibility	> Vast contractual structuring possibilities, e.g. governance, transfer of shares etc.
Implementation of a new preference shares regime	> Possibility of creating different categories of shares with different categories of preferential rights e.g. political rights and economic rights etc.
Creation of new categories of securities: convertible bonds and other hybrid securities	> New possibilities in terms of financing, which will be more similar to what exists in other markets
Allocation of free shares to directors and employees	> Possibility of allocating performance free shares to certain key managers and key employees as in other markets and could also be attractive to certain expatriate directors/employees
Modernisation of certain corporate governance rules, including attendance at meetings via videoconference	> Improvement of the decision making process, in particular for foreign investors at board and shareholder meetings

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1. New flexible contractual company: the "SAS"

The R-UAC introduces a new form of limited liability company, the SAS, which in our view constitutes a breakthrough in corporate structuring under OHADA law and presents a significant improvement for investors. This will allow structures similar to those which exist in other mature markets.

Indeed, with the sole requirement that the SAS be represented by a Chairman, the R-UAC allows the shareholders to organise their governance as they see fit, and therefore to tailor the SAS's articles of association to their precise needs (such as the structure of governance bodies, the rules applying to such bodies and the powers of the shareholders).

In addition to this ability to tailor the SAS's articles of association, the R-UAC provides that the breach of a key provision of the SAS's articles of association will result in the nullity of the action causing the breach and a right of specific performance (as opposed to merely a claim for damages), meaning that shareholders will have the comfort of being able to rely on their initial contractual agreement. This may, to some extent, narrow the interest of recourse to shareholders' agreements except where specific matters have to remain confidential. It is noteworthy that the validity of shareholders' agreements is now expressly recognised subject to their compliance with both the R-UAC and the articles of association (which must themselves comply with the provisions of the R-UAC unless the contrary is allowed).

We detail below some of the key features of the SAS which we frequently use in practice:

- **Share capital and securities:** no minimum share capital is required, and there is no minimum par value for shares. The SAS is authorised to issue various forms of securities, including preference shares and hybrid securities (see below). In contrast with an SA, the SAS can neither offer its shares to the public nor be listed, but this has limited short-term significance due to the modest current development of capital markets within the OHADA region.

- **Representation of the SAS:** the SAS must have a Chairman (*Président*), who may be a corporate entity (represented by an individual) or an individual, vested with full powers of management. Such powers may be restricted by the articles of association, but as in an SA, such restrictions are not binding *vis-à-vis* third parties.

- **Governance issues:** apart from certain shareholder reserved matters, such as approval of financial statements, increases or decreases in share capital and mergers, the articles of association freely allocate the powers between shareholders and governance bodies and determine the quorum and majorities for shareholders' meetings. This allows for the implementation of bespoke reserved matters and veto rights, neither of which is permitted in an SA, except in the form of board majority requirements. Also, the articles of association can provide for multiple voting rights to attach to certain shares, with no restriction as to the number of voting rights granted; in contrast, only double voting rights are permitted in an SA (see below).

- **Share transfer restrictions:** share transfer restrictions are freely determined by the articles of association. This is very commonly used in practice, especially in the context of joint ventures, consortia, minority interests etc. whether in the context of private deals or private equity investments because it allows to tailor the capital of the companies closely to their investment and strategy. In addition, shareholders' exclusion clauses (*clauses d'exclusion*) may be inserted in the articles of association, and may in particular be triggered in the case of breach of the articles of association or a change of control of a shareholder.

- **Governance:** finally, the articles of association may also determine alternative forms of management, such as a board, committees, general manager or deputy general manager, although in all cases the Chairman remains the legal representative with full powers to bind the company, notwithstanding any other provisions in the articles of association.

What is OHADA?

OHADA stands for "*Organisation pour l'harmonisation en Afrique du droit des Affaires*" (Organisation for Harmonisation of Business Law in Africa) and is applicable in 17 states of West and Central Africa (the "Member States"). Almost all Member States are francophone (except for the Republic of Guinea-Bissau and Equatorial Guinea) and use the Euro-pegged "CFA Franc" currency (except for the Republic of Guinea and the Democratic Republic of Congo). OHADA provides for a uniform system of business law directly applicable in its Member States through "Uniform Acts" which have been largely inspired by French law as it was in the late 1990s (when the initial Uniform Acts were adopted). There are currently nine Uniform Acts, covering matters such as corporate law, security, insolvency, arbitration and recognition of foreign courts' decisions.

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2. Introduction of new types of securities for the SA and SAS

2.1 Preference shares[1]

The introduction of preference shares (*actions de préférence*) will enable coverage of a wide range of structures which are tailored to specific investments. Preference shares can notably cover non-voting shares, shares with double voting rights, shares conferring special rights to dividends (priority dividends, non-proportionate dividends) or special information rights, on a temporary or permanent basis. They can benefit certain shareholders only, subject to a specific procedure. However, non-voting shares cannot exceed more than half of the share capital. In addition to the structuring of private investment transactions seen in other jurisdictions, the mechanism of preferred shares is likely to be a useful tool for "free-carried" (non-contributive, non-dilutable) shareholdings granted to public entities, particularly in natural resources projects.

2.2 Hybrid securities

The R-UAC introduces various forms of hybrid securities and bonds (*valeurs mobilières composées*) that can be issued by both an SA and an SAS and clarifies a position that was inferred under the previous UAC. This will be an important tool for the financing of OHADA companies, in particular in the context of the expected growth of the private equity industry within the region.

> Structuring of complex financing schemes... involving mezzanine and subordinated debt will be facilitated.

A number of securities which are convertible into shares or otherwise are now clearly dealt with, such as convertible bonds (*obligations convertibles en actions*), bonds with share warrants (*obligations à bons de souscriptions d'actions*), bond warrants (*obligations à bons de souscriptions d'obligations*) and equity notes (*obligations remboursables en actions*). Structuring of complex financing schemes which exist in other markets involving mezzanine and subordinated debt will thus be facilitated, since bonds are reimbursed prior to shares in an insolvency and since it is permissible to provide in the articles of association for ranking among the various categories of securities issued.

2.3 Key management incentivised through allocation of free shares

> This tool... may enable companies to attract or incentivise certain directors and employees.

Both an SA and an SAS are now permitted to allocate free shares to employees and directors under a similar regime as in French law. The total number of free shares which may be allocated cannot exceed 10 per cent of the share capital of the company. Employees must retain the shares for at least two years or such greater period as determined in the shareholders' decision, while directors must retain all, or in some cases a specific part, of the shares until termination of their duties.

This tool, which is well known in the French market, may enable companies to attract or incentivise certain directors and employees, including top management used to these kinds of retributions.

3. Extension of the share transfer restrictions within the SA

In addition to the position for the SAS, where share transfer restrictions are freely determined by the articles of association, the limitations to the transferability of shares allowed in the SA are extended.

The validity of lock-up clauses (*clauses d'inaliénabilité*) is expressly recognised, provided that they do not exceed a period of ten years and that they are supported by a serious and legitimate reason. The latter requirement does not exist under French law, and its exact significance and impact are still to be assessed.

> Validity of lock-up clauses is expressly recognised

Also, while the possibility of providing for an approval right (*agrément*) is maintained only for non-listed companies, the validity of pre-emption clauses is now expressly acknowledged.

One of the most important contributions of the R-UAC is the clarification of the enforceability regime of these clauses: any transfer in breach of these provisions will be void if the relevant provision is set out in the articles of association or, subject to

[1] Previously, only double voting rights for registered shares held for at least two years were available under the SA regime. Categories of shares with special rights (*avantages particuliers*) were also provided but there was uncertainty as to the enforceability of certain structures in the absence of clarification as to the nature of the rights capable of being granted. The R-UAC therefore provides both for more possibilities and more certainty.

OHADA reform process:

OHADA is engaged in a reform process of the Uniform Acts. Revised Uniform Acts on Security Interests (see Revised security regimes in Africa: the OHADA reforms), on Commercial Law and now on Companies have recently been adopted and the Uniform Act on Insolvency is in the process of being revised. All such reforms are being undertaken with the active involvement of a number of international institutions such as the World Bank.

Recent accession of the DRC:

The completion of the accession of the Democratic Republic of Congo to OHADA in September 2012 was another major recent event (see The DRC completes its accession to OHADA).

demonstrating that the transferee was or ought to have been aware of it, in a shareholders' agreement. This was claimed to be the case before but, absent any express provision or case law, uncertainty prevailed. The R-UAC therefore provides certainty as to the enforceability of these clauses, which are often seen in practice.

4. Other corporate law implementations

> **Recourse to videoconference:** the right to have recourse to new technologies to convene meetings and participate and vote in shareholder or board meetings is now expressly admitted for all forms of companies if provided for in the articles of association and subject to certain limitations. This clarifies what sometimes happened in practice and is welcome in particular in the context of international investments.

> **Extended control over related party transactions:** the definition of related party transactions is extended, in respect of both an SA and an SAS, to transactions entered into with shareholders owning ten per cent or more of the company, and transactions in which such shareholders may be interested.

> **Share capital increase and delegation of powers:** shareholders of an SA can delegate to the board of directors their powers to implement a share capital increase (within the limits and conditions fixed by the shareholders and during a limited period only).

> **Creation formalities:** the R-UAC provides that formalities can be completed online. Practical implementation of this provision remains to be seen as the various companies registries (such as the *Registre du Commerce et du Crédit Mobilier*) have not yet been computerised in practice, despite the fact that this is already provided for in the Uniform Acts. However, having recourse to a notary remains mandatory for the establishment and amendment of the articles of association.[2]

Outlook

The R-UAC is undoubtedly a significant step in demonstrating the willingness of OHADA Member States to adopt a more modern and business-oriented corporate regime.

In order for the new regime introduced by the R-UAC to be fully successful, certain further steps are needed. The role of the RCCM, which will be responsible for registering the creation of new companies and transformation of existing companies, will be key. Case law and practice will also play an important role in clarifying the position in respect of certain new provisions.

Our approach to African transactions

Our Paris team is a central component of our Africa practice and its ability to assist on transactions in Francophone Africa is greatly enhanced by its ability to leverage off its experience in OHADA Member States. We recognise that the most effective way of doing business in Africa involves achieving the correct balance of sector/ transaction expertise, legal understanding and linguistic ability. A key strength of our Paris team is its ability to optimise efficiencies across Francophone civil law jurisdictions (including West/Central Africa and North Africa).

Our experience also covers other community systems such as UEMOA/ WAEMU and CEMAC/ECCAS that apply in West Africa and Central Africa respectively. It encompasses matters such as foreign exchange and certain economic sector regulations including mining, telecommunications and competition. A common code on insurance known as the CIMA code is also of use in a number of instances.

Where these common systems do not apply, our general civil law expertise enables us to rapidly get to grips with local law issues.

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[2] This was one of the reasons for delays in the adoption of the reform, as it was originally intended to be removed; but this triggered strong pushback from affected stakeholders. This is a point to bear in mind given potential ad valorem fees.

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