9 May 2014

Francophone Africa: Changes to OHADA Rules on Operating through Branches

The Organisation for Harmonisation of Business Law in Africa's new Uniform Act provisions will impact petroleum companies operating through branches in the organisation's member states.

On 5 May, the Organisation for Harmonisation of Business Law in Africa's (OHADA's) amended Uniform Act relating to commercial companies and economic interest groups (the Companies Uniform Act) took effect and superseded the previous 1997 version. OHADA, which was created by a 1993 treaty, comprises 17 member states,[1] and its uniform acts are directly applicable in each member state, with the aim of achieving legal harmonisation across member states.

One of the key amendments is Article 120 of the Companies Uniform Act, which relates to branches of foreign corporations operating in OHADA member states. Under the old version of the Companies Uniform Act, Article 120 provided that a foreign-owned branch should be attached to a company in existence or a company to be created that is governed by the laws of one of the OHADA member states no later than two years after the branch was set up. This applied unless an exemption was obtained from the minister in charge of trade in the member state in which the branch was located. No limitation was provided regarding the duration of such exemptions or the number of exemptions that could be obtained. It had thus become customary for petroleum companies, among others, to operate in some OHADA countries through branches, rather than locally incorporated subsidiaries, by obtaining successive exemptions.

Under the amended version of Article 120 of the Companies Uniform Act, exemptions will now be limited to a one-time non-renewable exemption for a maximum period of two years, subject to special regimes (such regimes are not defined in the Companies Uniform Act). Failure to comply with these new provisions may lead to the branch being struck from the *registre du commerce et du crédit mobilier* (trade and personal property credit register) with potentially adverse consequences.

The maximum time period for operating as a branch in an OHADA member state will thus be four years if an exemption is granted (or two years without an exemption). Any branch registered in an OHADA member state will afterwards need to be attached to a company governed by the laws of an OHADA member state.

In practice, the transaction to achieve that attachment could take the form of the business and assets of the branch being contributed to a local subsidiary in exchange for the issuance of shares of that subsidiary, or the sale of assets to a pre-existing or newly incorporated subsidiary. The tax implications of such an attachment, however, will need to be managed through careful tax planning and structuring to seek to minimise taxation (in particular, possible capital gains or transfer taxes), and to maximise favourable tax regimes, such as those usually applicable to petroleum companies. Government or other third-party consents may also need to be obtained under applicable legal or contractual provisions.

1. OHADA's member states are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, the Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo, and the Democratic Republic of Congo. These countries have adopted French as one of their official languages, except for Guinea Bissau, which is Portuguese speaking.

© 2014 Morgan, Lewis & Bockius

Morgan Lewis

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact the following Morgan Lewis lawyer:

London/Paris

Olivier Chambord	+44 (0)20 3201 5641	ochambord@morganlewis.com

About Morgan, Lewis & Bockius

Founded in 1873, Morgan Lewis offers more than 1,600 legal professionals—including lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—in 25 offices across the United States, Europe, Asia, and the Middle East. The firm provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some jurisdictions. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2014 Morgan, Lewis & Bockius. All Rights Reserved.