Joint ventures

AUSGIE is being given to updating AUSGIE. (particularly French) company law. Consideration is currently given to the views of the shareholders. This can be a subtle given to the views of the shareholders. This can be a subtle
management and administration of such joint ventures often requires delicate negotiation between shareholders in order to ensure a proper balance is achieved between control of management and strategy, voting rights and rights to dividends. While the DRC has already adopted a series of progressive and modern codes relating to various industrial sectors (like a Mining Code, a Forestry Code and an Investments Code) which have succeeded in making those sectors attractive to foreign investors, existing company law makes it difficult for parties to joint ventures to enshrine certain controls (particularly shareholder control over management) to protect their interests. Joint venture parties have had to introduce these controls through private joint venture agreements which do not always “fit” well into the current legislative framework and which raise issues of their enforceability against the joint venture itself.

The implementation of AUSGIE will make it easier for joint venture parties to conclude such arrangements in a manner consistent with the legislation applicable to the joint venture and rendering such arrangements enforceable against the joint venture and third parties. In future these arrangements may be incorporated in the joint venture’s statuts or articles of association which are filed with the local commercial registry and are a matter of public record.

Main forms of commercial companies

AUSGIE creates two forms of companies, the société à responsabilité limitée or SARL (limited liability company) (“SARL”), and the société anonyme (joint stock company) (“SA”) which are the equivalents of company forms well known throughout continental Europe. This will enable joint venture parties to negotiate arrangements within a familiar framework. Subject to certain limitations, parties are free to create different categories of shares with diverse voting and dividend rights, and enjoy a certain measure of freedom in determining how the company’s management will be performed.

The OHADA SARL does not have a board of directors and management is exercised by one or several managing directors (gérants). However certain decisions may as a matter of law only be made by the shareholders. The challenge for investors using this form of company is ensuring that certain strategic decisions are not decided by the gérants without due consideration being given to the views of the shareholders. This can be a subtle process given that as a matter of law, the gérant is fully entitled to represent the company vis-à-vis third parties unless such third parties have actual notice of any requirement for shareholder approval (the mere fact that the statuts are a matter of public record is not sufficient to provide such notice to third parties).

The OHADA SA by contrast normally has both a board of directors (conseil d’administration) and management consisting either of a single Chairman and Chief Executive Officer (Président-Directeur Général) or, at the option of the shareholders, a separate Chairman of the Board (Président) and Chief Executive Officer (Directeur Général), both of whom are appointed by the Board. This allows for a balance of power and control particularly well suited to joint ventures concluded between foreign investors concerned more with long-term strategic decisions and local parties who may be better suited to deal with the day-to-day management of the company. Alternatively, in companies with less than three shareholders, it is possible to opt for management by a single managing director.
(administrateur général) similar to the OHADA SARL. This form of management can be particularly useful in the case of wholly-owned subsidiaries. Indeed, the single shareholder SA is also specifically authorised under AUSGIE and is an improvement on the seven shareholder société par actions à responsabilité limitée currently used in the DRC.

It is noteworthy that, to avoid the overly burdensome regime for SARLs formed under the current DRC law (as described above), most DRC companies were incorporated as a société privée à responsabilité limitée (or SPRL) notwithstanding that the SPRL was initially intended for privately held or closed companies (such as family-owned businesses). As a consequence of the implementation of the OHADA Treaty, DRC companies will be required to bring their constitutional documents (statuts) in line with the rules governing the relevant corresponding OHADA type of company. This implies that a company established as a SPRL could opt for the OHADA SARL form, which provides the most comparable and similar regime. However, it may be advisable for certain businesses that are incorporated “by default” as SPRLs to convert into an OHADA SA (the typical open capital company), which is in practice likely to be the most suitable form to conduct their business.

Corporate Governance

AUSGIE and the other OHADA Uniform Acts which will come into force in the DRC in September 2013 could also present other challenges for foreign investors which will need to be considered closely by them in conjunction with their international and local legal and financial advisors. Limitations on the number of offices that directors or officers may hold simultaneously in different companies could make it more difficult to source local talent for such positions. Detailed criteria have been established for holding shareholder meetings and (where relevant) the board of directors. Although considerable latitude is provided for the mechanics of these meetings to be set out in the statutes of the company, it still appears necessary for an actual meeting to take place in certain circumstances. This will mean that the adoption of resolutions by simple signature of unanimous “actions in writing” by directors and members of management located in different places will not be possible. Certain “interested party” transactions concluded between an SA and members of its management or board of directors (or with other companies in which such managers or directors are also interested) are either prohibited outright or (unless they are routine transactions concluded at arms’ length) are subject to prior approval by the board of directors (with the “interested” director/s required to abstain). This restriction can render the process of concluding intra-group transactions complex. It is hoped that several of these issues will be dealt with in the modifications to AUSGIE currently under consideration.

Accounting and Auditing

Similarly, other modifications to the legislative framework will present both incentives and challenges for investors. All SA companies and certain SARL companies meeting certain thresholds of share capital, total annual turnover or levels of employment, are required to designate official statutory auditors (commissaires aux comptes) who review and certify the company’s accounts. This provides a safeguard against irregularities in the accounts (and all of the major international accounting firms maintain offices in several OHADA member states) but it also grants such auditors the power to trigger “alert proceedings” requiring management to respond to queries in the event of financial difficulties. The OHADA Uniform Act on Accounting Law (AUL) creates a comprehensive framework for accounting rules and procedures but these may differ from the international accounting standards used by major international companies. For example the AUL rules require the alignment of a company’s financial year with the calendar year and imposes an obligation to close annual accounts on 31 December.

Insolvency

The OHADA Uniform Act on Insolvency Proceedings also provides a comprehensive framework not only for companies encountering financial difficulties and seeking relief from the demands of creditors, but also for creditors to file their claims.

Transition to OHADA

The changes to DRC law resulting from the DRC’s adherence to OHADA are as significant as they are welcome, and are likely to require adjustments to the articles of association of most existing DRC companies. For this reason, AUSGIE provides a transition period of two years for companies to modify their articles of association to bring them into line with AUSGIE. The existing articles of association will continue to apply to such companies until they are so modified, but after the two-year period, i.e. from 12 September 2014, any provision of the articles of association of any company that has not been modified to be compliant with AUSGIE will be considered inapplicable and will be replaced by the relevant AUSGIE provisions. However uncertainty exists as to the entry into force of other provisions such as the AUL, which upon its adoption on 24 March 2000 provided for a one to two year transitional period, but contains no transitional regime for companies in jurisdictions that become subject to the AUL after that date. In light of the above, investors in the DRC should decide at an early stage how best to ensure compliance of existing DRC companies with OHADA.

Taxation

The general system of taxation in the DRC is based on the principle of territoriality and tax is accordingly levied on all income that is derived from the DRC. The following are the main taxes:

- corporate tax at 40%
- corporate tax for mining companies at 30%
- withholding tax on income from movables at 20% and for mining activity at 10%
- personal income tax rate is based on a sliding scale with a maximum of 30%
- property tax is levied from US$0.30 to US$1.50 per square metre of the built property
- tax on rental income at 22%
- Valued Added Tax ("VAT") at the uniform rate of 16% on the local sale, import and provision of services. The law introducing VAT was promulgated in 2010 but its effective date was 1 January 2012. VAT replaced turnover tax which is no longer applicable in the DRC.

Investment Climate and Exchange Control

DRC welcomes all foreign investment. The exchange control regulations currently in effect are very liberal and commercial banks are authorized, subject to relevant tax being paid, to freely transfer dividends, capital gains and interest and capital on foreign loans out of the country. Upon disinvestment, investors may
freely remit capital without any restriction. Residents of the DRC are authorized to hold foreign currency accounts with local commercial banks.

**Intellectual Property**
Patents, trademarks, designs, and commercial names are protected by the provisions of the Intellectual Property Law. There is a general registry located at the Ministry of Economy where trademarks, patents and designs may be registered. DRC is a member of the World Intellectual Property Organization (WIPO).

**Incentives**
The DRC has promulgated an Investment Code to encourage the investment of local and foreign capital in activities which contribute to the economic and social development of the country. The Code provides for one general regime under which Code benefits may be granted. For a project to benefit from the provisions of the Code, the investment must be at least US$ 10,000 for small and medium sized businesses and US$200,000 for other enterprises.

The Investment Code provides the following concessions and incentives:
• duty-free imports of all new plant, machinery and equipment associated with the project as well as spare parts up to 10% of the Cost, Insurance and Freight (CIF) value of the equipment
• duty free exports of local semi-finished or finished products
• exemption from corporate tax and tax on share capital
• exemption from real estate or property taxes.

The duration of these exemptions depends on the location of the investment and may vary from three to five years.

**Business Opportunities**
There are opportunities for investments in the mining sector, petroleum, agricultural production, forestry exploitation, local manufacturing, infrastructure and tourism in the eastern part of the country.

**Membership of International and Regional Organisations**
The DRC is a member of the International Monetary Fund (IMF), World Bank, United Nations (UN), African Union (AU) and African Development Bank (ADB). The DRC’s adherence to OHADA will promote the rule of law by constituting the OHADA Common Court of Justice and Arbitration as the highest court of appeal with the power to overturn decisions by local DRC courts.