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Monthly Focus

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CÔTE D'IVOIRE

the Oil Industry's Corporate Form Dilemma

The choice of the most appropriate corporate vehicle to carry out operations is at the top of the agenda of legal, tax and business development managers of oil companies and service providers when venturing into new frontiers in Africa. The traditional question faced by industry players is whether they should opt for a locally incorporated company or for registering a branch of a group entity.

Branches are typically favored, and particularly so in the oil industry as they are usually the most efficient option from a tax perspective. In effect, most African jurisdictions recognize the concept that a branch is not a separate legal entity from its parent company and, for that reason, the transfer of profits from the branch to its head office does not qualify as distribution of dividends and is not therefore taxable. Though some African countries have introduced a branch remittance tax to capture these cash movements between branches and parent companies, most jurisdictions are still amenable to the idea that branch profits should not be taxed twice – on the income attributable to the branch and then on the profits transferred up to the head office.

Sometimes, though, oil companies and service providers elect (or are statutorily required) to incorporate a local company – whether a subsidiary is considered a stronger commitment to do business in the country, and companies wish to signal this to host governments; because local content rules often require that national entities hold an equity participation in the vehicle used to carry out business (this is especially common on the services side of the oil industry); or because the corporate legislation limits the ability of foreign companies using a branch to carry on their operations and requires them to incorporate a subsidiary under the laws of the country.

The most restrictive corporate laws in terms of allowing companies to use branches are found in West and Central African jurisdictions which have adhered to the Organization for the Harmonization of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – “OHADA”). OHADA seeks to create a single business legal framework in its member countries by enacting uniform acts which lay down common rules (i.e., applicable to all OHADA jurisdictions) on several matters of business, corporate and commercial law. Pursuant to Article 10 of the OHADA Treaty, Uniform Acts are directly applicable and binding in all member States, notwithstanding any conflicting provisions of national law, be they previous or subsequent. According to the opinion issued in April 2001 by the OHADA Common Court of Justice and Arbitration, the effect of each uniform act is to

abrogate and to prohibit for the future any national legislative or regulatory provision which has the same purpose as the uniform act and conflicts with it. The practical consequence is rather simple: uniform acts rank above national laws.

One of the most important uniform acts is the Uniform Act on Commercial Companies and the Economic Interest Group (the Corporate Act), which constitutes the common corporate law of OHADA countries and sets out the rules, the conditions, and the limitations for the use of branches in those countries.

Côte d'Ivoire is a founding member of OHADA, having signed the OHADA constitution treaty on October 17, 1993. Companies – including in the oil industry – doing or planning to do business in the country must therefore look at the Corporate Act and consider its provisions when deciding the type of corporate vehicle they will use to carry out local operations.

The original Corporate Act was adopted on April 17, 1997 and entered into force on January 1, 1998. It applied to commercial companies with their registered offices in one of the OHADA member States and branches registered by foreign companies in an OHADA country. Companies incorporated since January 1998 became subject to the Uniform Act forthwith and existing companies and branches were given two years to adapt to the provisions of the Corporate Act. The original Corporate Act did not abrogate laws applicable to companies subject to a special regime (such as, in the case of Côte d'Ivoire, oil and gas companies).

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A revised Corporate Act was adopted in 2014. Again, while companies and branches set up after its effective date are subject to the revised UACC forth with, those already in existence were given two years to become compliant with the revised Corporate Act. However, in contrast with the original Corporate Act, the revised Corporate Act applies to companies subject to a special regime, save to the extent they are

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exempted from the Corporate Act's provisions or subject to specific obligations under special legislation.

Pursuant to Article 120 of the former Corporate Act, a branch belonging to a company with registered offices in a non-OHADA country should be "transferred" to an existing company or a new company with registered offices in an OHADA state within a maximum period of two years as from the date of the branch's creation, unless the company was exempted from this obligation by the Minister in charge of trade in the state where the branch is located. Since Article 120 of the former UACC did not limit the powers of the Minister in charge of trade to grant an exemption from the two-year limitation, at least in theory the exemption could be granted at any time and for an unlimited period of time, or even indefinitely.

Article 120 of the revised Uniform Act, however, provides that, save in the case of companies exempted by a special regime, the Minister in charge of trade (in Côte d'Ivoire, the Minister of Commerce) can only extend the exemption from the obligation to comply with Article 120 for a two-year period, which is not renewable. In addition, Article 120 of the revised Corporate Act provides that if its requirements are not complied with in respect of a branch, the mercantile registrar must cancel the registration of the branch as per a court order, which can be obtained by the Registrar or any interested party.

Now, Article 120 of the revised Uniform Act applies to companies under a "specific regime" subject to the rules and regulations with which they are required to comply. The Petroleum Code of Côte d'Ivoire provides that the state may authorize both Ivorian and foreign corporations to carry out petroleum operations and that foreign companies that enter into a petroleum contract with the government must have a permanent establishment in Côte d'Ivoire for the duration of the contract, either through a locally incorporated company or through a branch. The main questions are thus to determine whether oil companies are deemed to be subject to a "specific regime" and, if so, if the rules of this regime exclude the application of Article 120 of the Corporate Act.

In other words: can oil companies operate in Côte d'Ivoire through a branch for the entire duration of their contracts – as indicated in the Petroleum Code – or must they eventually convert the branch into a local company, as required by the Uniform Act? And, if so, by when must they complete such conversion?

The Minister of Commerce recently issued an Order (*Arrêté* No. 017, of October 13, 2016) setting out the conditions that foreign petroleum companies with branches registered in Côte d'Ivoire need to satisfy to

be exempted from the obligation to transfer their branches to an Ivorian company under Article 120 of the Corporate Act. The Order lists the documents that must be filed to benefit from the exemption and provides that the exemption shall be granted for a period of 10 years and can be renewed one or more times.

When compared with other OHADA member states (e.g., Gabon), the regime established by the Minister of Commerce's Order seems to be rather favorable and flexible, allowing oil companies to use branches for a guaranteed long period of time (10 years), with no limits to the number and duration of the renewals. This may, in practical terms, allow NOCs to operate through a branch for the entire duration of the respective upstream contract (which production period can run for a maximum of 25 years). Such possibility will, of course, depend on whether the exemption to incorporate a local company is granted and if it is subsequently renewed throughout the duration of the contract – something which will always depend, to a greater or lesser extent, on the discretion of the Ivorian authorities.

A question remains, though, on the legitimacy of an Order from the Minister of Commerce limiting the effects of a provision foreseen in a higher ranked statute (the Petroleum Code). While the Petroleum Code sets forth what seems to be an unlimited right to use branches (creating an exception which is allowed by the Corporate Act itself), the *Arrêté* has come to define the precise terms which shape the exemption and to place a time limit on operations carried out through a branch. Although this raises complex issues in terms of harmonizing the regimes established in different national and international statutes, we tend to believe that there are legal arguments to sustain that oil companies have a reasonable claim that they are entitled to rely on the rules set out in the Petroleum Code – and therefore use a branch for the entire duration of their contracts without being dependent on the Ivorian authorities will (or lack thereof...) to issue or renew exemptions to that effect.

Be it as it may, industry players should keep a close eye on these issues and on how they will develop over time, as the type of corporate vehicle used in their operations in Côte d'Ivoire may have a significant impact on the financials of the venture and on the level of local law compliance requirements that must be met. 

About the Author

Nuno Cabeçadas is a partner at Miranda & Associados, a full service law firm with offices in 11 African countries. He co-heads the Firm's practice in Mozambique (where he was based for a period of six years) and is the head of Miranda's Côte d'Ivoire practice. Nuno has extensive experience in advising oil companies and service providers in Africa.

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