

SAO TOME AND PRINCIPE AND NIGERIA:

COMPANY LAWS AT A GLANCE

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INTRODUCTION

In order to temporarily settle their dispute over the overlapping zone of the two Exclusive Economic Zones, Sao Tome and Principe and Nigeria entered into the Treaty on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of Sao Tome and Principe and Nigeria. Under the Treaty, the Member States created the Joint Development Zone (JDZ), and an international legal entity, the Joint Development Authority (JDA), to manage the JDZ and a regulatory framework to the operations within the JDZ.

Under paragraph 5.3 of Regulation 5 of the Petroleum Regulations 2003, governing petroleum operations in the JDZ, the exploration licences, oil prospecting licences, oil mining leases and petroleum sharing contracts may only be granted to companies incorporated either in Sao Tome and Principe or in Nigeria. Subsequently, international oil companies and other companies wishing to undertake business operations in the JDZ will have to decide whether to locate their business in Sao Tome and Principe or in Nigeria. Thus, in order to make an investment decision such as incorporate a company, investors, businessmen and lawyers have to know the main features of each country's company laws, and other related matters. The following analysis is based on the legal systems of each country, and intends to give an overview of the legal aspects governing the most frequently adopted types of company in each country.

As always, knowing a legal system is not only a matter of knowing the law in the books, but also the law in action, such as other laws related to the business (labor, tax, investment incentives, environment, licenses, settlement of disputes, etc), the practices of the courts, public notaries, registers, and the Administration, and the existence of a business operations networks (roads, ports, communications, distribution channels, etc.). In order to have a complete picture on how to choose their place of incorporation, companies should refer to adequate legal, audit, advisory, tax or other professional advice, consultation or service. This paper is just a legal road map for start looking for the answers.

APPLICABLE LAWS

Sao Tome and Principe

The legal frameworks of companies in Sao Tome and Principe are mainly set up in the Commercial Code, of 1888 and the Quotas Company Law (QCL), of 1901. The Civil Code may be applicable in case of omissions.

Nigeria

The legal framework of companies in Nigeria is set up in the Companies and Allied Matters Act (Companies Act), of 1990.

NATIONALITY OF COMPANIES AND GOVERNING LAWS

Sao Tome and Principe

As regarding the nationality of companies and their governing laws, the Commercial Code provides as follows:

- Companies incorporated in Sao Tome and Principe or incorporated in a foreign country with the head-office and main activity in Sao Tome and Principe are deemed as Santomean and governed by the Commercial Code;
- Companies incorporated outside Sao Tome and Principe are deemed foreign companies and governed by the law of the place of incorporation.

Nigeria

As regarding this subject, the Companies Act provides as follows:

- Companies incorporated in Nigeria are deemed as Nigerian companies and governed by the Companies Act;

- Companies incorporated outside Nigeria are deemed foreign companies.

FOREIGN COMPANIES, BRANCHES AND REPRESENTATIVE OFFICES

Sao Tome and Principe

When willing to carry out its activity in Sao Tome and Principe, foreign companies may elect to operate through registered branches, representative offices or any other form of representation, as long as these representations of foreign complies with the Santomean laws, namely the ones concerning the commercial registry.

A branch is not a distinct legal entity from its parent, and has no formal capital as such; though for registration purposes the parent company must allocate an amount of designated capital to the branch (there is no minimum requirement on it). Nevertheless, branches have judicial capacity. Branches are governed by the parental company's governing law, except for rules regarding registry and publications, assignment of representatives and bankruptcy, which are subject to the Commercial Code.

Likewise, the representative offices have no legal personality different from their parent. In addition, the considerations made for branches regarding the governing laws are *mutatis mutandis* applicable, except that representative offices can only serve as promotional and liaison offices.

Nigeria

When having the intention of carrying on business in Nigeria, for more than 1 year, foreign companies must incorporate a branch or subsidiary company (as a separate entity), or register a representative office in Nigeria.

Before that incorporation, foreign companies cannot undertake business operations or exercise any of the powers of a registered company in Nigeria, except those necessary to incorporate the company. However, there are exemptions on the following categories:

- (i) Foreign companies invited to Nigeria by or with the approval of the Federal Military Government to execute any specified individual project;

- (ii) Foreign companies which are in Nigeria for the execution of specific individual loan project on behalf of a donor country or international organization;
- (iii) Foreign government-owned companies engaged solely in export promotion activities; and
- (iv) Engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Military Government.

A representative office cannot engage in business, conclude contracts or negotiate any letters of credit. It can only serve as a promotional and liaison office, and its local operational expenses have to be inflowed from the foreign company.

INCORPORATION ACTS

Sao Tome and Principe

Under the Commercial Code, the Articles of Association (AoA, which states the fundamentals and regulations) of commercial companies are executed by public deed. Shareholders may freely adopt any AoA model, subject to certain mandatory requirements (set by the Commercial Code or the QCL).

Nigeria

Under the Companies Act, the Memorandum of Association (MoA, which states the fundamentals of the company) has to be signed by each subscriber in the presence of at least one witness who shall attest the signature. The MoA is registered with the AoA (which sets the regulations) following the legal form and contents set out in the Companies Act. Both the MoA and the AoA are executed as a deed.

LEGAL PERSONALITY AND CAPACITY

Sao Tome and Principe

Upon registry, commercial companies become legal entities with legal personality enjoying all rights and obligations necessary, useful or convenient to the achievement of their objects and authorised business, subject to the principle of specialization (i.e., it cannot exceed the powers conferred by the laws or by its AoA), and the limitations arising from the nature of legal entities.

Nigeria

Subject to its MoA and for the furtherance of its objects and authorised business, incorporated companies have full capacity of a natural person, subject to the principle of specialization.

TYPES OF COMPANIES

Sao Tome and Principe

In Sao Tome and Principe, the types of companies are subject to the principle of *numerus clausus* (i.e., the individuals cannot create other types not provided by the law).

The Commercial Code provides for 3 types of companies:

- (i) Unlimited Liability Companies (*sociedades em nome colectivo*);
- (ii) Stock Corporations (*sociedades anónimas*); and
- (iii) Limited Partnerships (*sociedades em comandita*).

In addition, the QCL provides for the Limited Liability Companies (*sociedades por quotas*).

The most frequently adopted types of companies in Sao Tome and Principe are Unlimited Private Limited Companies – mainly governed by the QCL, and commonly used by small and medium-sized business – and Stock Corporations – governed by the

Commercial Code. Stock corporations can be public or private: public stock corporations are those in which the share capital is offered to public subscription; the others are private corporations.

Nigeria

The same principle of *numerus clausus* is applicable in Nigeria. The Companies Act sets for 3 types of companies:

- (i) Company limited by shares;
- (ii) Unlimited company; and
- (iii) Company limited by guarantee

The most frequently adopted types of companies in Nigeria are Companies Limited by Shares – commonly used by small and medium-sized business – and Unlimited Companies. Any of the mentioned types of companies may be either public or private companies. Private Companies are those companies, which the public did not subscribe its shares. Public Companies are any company other than a private company.

PARTNERS

Sao Tome and Principe

Limited liability companies may be incorporated by a minimum of 2 partners (individuals or companies, referred as quotaholders), and the Stock Corporation can be established by a minimum of 10 partners (individuals or companies, referred as shareholders).

Nigeria

Private Companies may be incorporated with a minimum of 2 shareholders (persons or legal entities), and the total number of members may not exceed 50. A Public Company must be incorporated by a minimum of 7 shareholders (persons or legal entities). When the shares of a public company are quoted, there must a minimum of 50 shareholders.

MINIMUM CAPITAL

Sao Tome and Principe

There is no minimum capital required, but the public notaries may refuse to execute the deeds if there are reasons to believe that the allocated capital is insufficient to perform the company activities. As a practical tip, one can establish as criteria for establishing the minimum capital the sufficient amount to conduct the companies' activities and object. Usually, USD 1.000 is deemed sufficient to incorporate a limited liability company.

The share capital can be paid in cash only or in cash and assets. When paid in assets, the partners must state the assets value. In a limited liability company the share capital is represented by *quotas*, while in a stock corporation the share capital is represented by shares.

Nigeria

The Companies Acts provides for several requirements regarding allocation of minimum share capital. The main requirements are as follows:

- Unlimited company must be registered with a share capital. For these purposes, the minimum capital to incorporate a private company is 10,000 Naira (approximately USD 75.58802; where the exchange rate is 1 Naira equals USD 0.007559. Source: the Central Bank of Nigeria exchange rates in 6, July 2005); and for a public company is 500,000 Naira (approximately USD 3779.401; calculated under the same exchange rate). In either case, the share capital is divided by shares of a fixed value.
- Partners of companies limited by shares may elect to allocate share capital. In this case, allocation must follow the same terms as for the unlimited companies.

When a company as a share capital, the subscribers of the MoA must take among them a total number of shares of not less than 25% of the authorised share capital.

The capital share must be paid in cash.

COMPANY BODIES

Sao Tome and Principe

Under the QCL, Limited Liability Companies must adopt the following company bodies:

- General Assembly – takes the relevant decisions in the company. The AoA may set out the proportional voting representation of the *quotas*.
- One manager or a board of managers – take(s) the day-to-day management decisions. The QCL does not set rules limiting (minimum or maximum) the number of managers in a limited liability companies. Managers may or may not be appointed among the quotaholders, and are nominated either by the AoA or by quotaholders' decision. Managers can be removed at any time by the quotaholders, except where the management is a special right granted to a quotaholder; in this case, the removal has to have the quotaholder's consent;
- Auditing – either individual auditor or an auditing committee – is optional. When adopted, the auditing body is competent to oversee the management activities and audit the companies accounting statements. The auditing committee must be comprised by at least 3 partners, who are appointed for a 3-year mandate, removable at any time.

Under the Commercial Code, Stock Corporations must adopt the following company bodies:

- General Assembly – takes the relevant decisions in the company;
- Board of directors – takes the day-to-day management decisions. The Commercial Code does not set rules regarding the number of directors in a stock corporation. However, directors may only be appointed among the shareholders, and are nominated by the AoA, and subsequently, by a shareholders' decision. Directors are appointed for no longer than 3-year term, and may be removed at any time. The AoA may provide for renewals of directors mandates;
- Advisory Board – oversees the Board of Directors activities and audit the

companies accounting statements. The auditing committee must be comprised by at least 3 partners, who are appointed for a 3-year mandate, removable at any time.

Nigeria

Under Companies Act, companies must adopt the following corporate bodies:

- General Meeting – takes the relevant decisions in the company;
- Board of directors – direct and manage the day-to-day business of the company. Companies must have at least 2 managers. Managers are appointed by the annual general meeting. Terms are removable by the general meeting, which may alternatively re-elect a manager;
- Auditor or Auditors – oversees the Board of Directors activities and audit the companies accounting statements. The auditor or auditors are appointed for a 1-year mandate, automatically renewed without any resolution being passed, unless: (i) he is not qualified for re-appointment; (ii) a resolution has been passed at that meeting appointing some other person instead of him on or providing expressly that he shall not be re-appointed; or (iii) he has given the company notice in writing of his unwillingness to be re-appointed.

TRANSFER OF SHARES

Sao Tome and Principe

The transfer of companies shares under the Santomean laws proceeds as follows:

- Limited Liability Company – Under the QCL, transfer of *quotas* are done by public deed. Quotaholders can introduce in the AoA certain requirements regarding the transmission of quotas, such as obtaining the company's prior consent or a partner's pre-emptive to the purchase. Limited companies purchase its own quotas after they are fully paid by the quotaholders.

- Stock Corporation – There is no mandatory contractual form to the purchase and sale of shares, although companies must keep a record of issued shares. No transfer of shares is allowed before the company is duly incorporated. In addition, corporations cannot purchase its own shares, unless expressly allowed by the AoA.

Nigeria

The transfer of shares under Companies Act is as follows:

- Private companies are bound to restrict the transfer of shares in the MoA;
- Public companies are free to transfer shares without legal restrictions, unless otherwise provided in the AoA.

Purchase and sale of shares are made by instrument of transfer.

DISTRIBUTION OF DIVIDENDS AND PROFITS

Sao Tome and Principe

Partners may declare and vote dividends in general assembly. The dividends can be paid freely out of the profits, provided the mandatory legal reserves are kept. Unless otherwise established in the AoA, the division is made proportionally to the share capital own by the partners.

Nigeria

Under Companies Act, shareholders may declare and vote dividends, in general meetings, in respect of any year or other period only on the recommendation of the directors. These dividends may be pay from time to time as recommended by the directors, out of the distributable profits of the company. The shareholders may decide to decrease the amount recommended by the directors, but to increase the recommended amount.

TERMINATION / WINDING UP OF COMPANIES***Sao Tome and Principe***

Dissolution of a private limited company or a stock company may occur when:

- The company duration period has expired (and not extended), pursuant to the AoA;
- The company purpose or object is extinguished or deemed impossible;
- The company purpose or object is entirely fulfilled;
- The company is declared bankrupt;
- The company share capital remains below half of the approved share capital;
- The partners voluntarily agreed by the in a resolution at the general meeting by a legal mandatory majority of (at least) three quarters of the voting rights;
- The company merges with other company;
- The number of partners is reduced and remains below the legal minimum for more than 6 months.

In the event of a company has terminated, the partners may be reliable pursuant to the adopted type of company.

Nigeria

Under Companies Act, companies may be wound up in the following terms:

- (i) Judicial winding up.

A company may be wound up by the Federal High Court within whose area of jurisdiction the registered office or head office where the company is situate if:

- The company has by special resolution resolved that the company be wound up by the court;
- Default is made in delivering the statutory report to the Commission or in

holding the statutory meeting;

- The number of members is reduced below two;
- The company is unable to pay its debts;
- The court is of opinion that it is just and equitable that the company should be wound up.

(ii) Voluntarily winding up may occur:

- When the period, if any, fixed for the duration of the company by the AoA expires, or the event, if any, occurs, on occurrence of which the articles provided that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
- If the company resolves by special resolution that the company be wound up voluntarily.

(iii) Winding-up Subject to Supervision of Court:

- If a company passes a resolution for voluntary winding up, the court may on petition order that the voluntary winding up shall continue but subject to such supervision of the court, and with such liberty for creditors, contributories, or others to apply to the court, and generally on such terms and conditions, as the court thinks just.

In the event of a company being wound up, every present or past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and for the costs, charges and expenses of the winding-up and for the adjustment of the rights of the members and past members among themselves. The law sets forth the provisions for qualifications of such liabilities.

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