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Benin

PROJECT FINANCE

Contributor

Hélène Paty Law Firm



Hélène Paty Kounake

Managing Partner | helene@paty.legal

This country-specific Q&A provides an overview of project finance laws and regulations applicable in Benin.

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BENIN

PROJECT FINANCE



1. What are the typical ownership structures for project companies in your jurisdiction? Does this vary based on the industry sector?

We can list three (03) typical ownership structures for project companies in Benin.

1.1 Limited liability company (SARL)

The liability of the manager is limited and the partners are only liable up to their contributions to the capital. The manager may not be a Beninese. The foreign manager whose stay in Benin exceeds 3 months must complete the administrative formalities at Benin Office for Emigration and Immigration to obtain a residence permit and subsequently a residence card. As a manager, he does not need a work permit. But if the manager combines his function with an employment agreement, he will need a work permit.

The minimum capital according to article 311 of the uniform act relating to commercial companies and economic interest groups (AUSCGIE), and unless otherwise provided, shall be one million. It is divided into equal shares whose nominal value cannot be less than CFA F 5,000.

It is possible to create a limited liability company by private deed or by notarial act.

Other information about SARL:

- The shares must be subscribed in full by the shareholders upon incorporation. They shall be paid in full when they represent contributions in kind. The shares representing contributions in cash shall be paid upon subscription of the capital by at least half of their nominal value. The payment of surplus shall be made once or by instalments within a period of two (2) years from the registration of the company with the registry of commerce and securities, pursuant to the terms provided in the articles of association.

- The SARL shall be established by at least one natural or legal person, no nationality requirement.
- The duration of SARL is 99 years.
- The SARL is not required to appoint an auditor and a supervisor unless it meets two of the following conditions at the end of the financial year:
 - a balance sheet total exceeding XOF125 million;
 - an annual turnover exceeding XOF250 million; and/or;
 - a permanent staff of more than 50 persons.

1.2 Joint stock company (SA)

In terms of advantages:

- Third parties are very confident with the SA;
- The great capacity to mobilise funds, i.e. the SA can call on public savings;
- The risk is limited to the contributions with the possibility of paying up only a quarter of the capital at the time of creation;
- The partners are free to sell their shares.

As a constraint, the minimum capital is quite high:

- 10,000,000 if there is no public offering;
- 100,000,000 in the event of a public offering.

In addition, the administrative system is very cumbersome owing to the legal requirement for a Board of Directors and auditors.

Other information about SA:

- The SA shall be established by at least one natural or legal person (no nationality requirement);
- The duration of SARL is 99 years;
- The SA must appoint a statutory auditor and an alternative.

1.3 Simplified Joint Stock Company (SAS)

The SAS is suitable for small and medium-sized companies that wish to adopt a flexible legal structure.

It offers a great deal of contractual freedom to investors who wish to opt for a flexible company with a strong *intuitu personae*.

First of all, it should be noted that the rules of the SA apply to the SAS as long as they are compatible with the specific provisions for the SAS in the AUSCGIE. For the rest, bylaws have a great deal of freedom.

Indeed, no minimum share capital is required, unlike for the SARL and the SA. The share capital can be variable, which makes it easier for investors to enter the capital during the life of the company.

The principal mandatory body is the president, who may be a natural or legal person. The company may therefore have only a president or it may have one or more managers and/or intermediate bodies (councils, committees) whose operating procedures are entirely determined by the articles of association. The bylaws also determine the modalities of the general meetings and the decisions that must be submitted to the partners collectively with the exception of certain operations.

Finally, OHADA legislation allows for the issuance of ordinary or preference shares within the framework of an SAS. It should also be noted that inalienability, approval and pre-emption clauses may be stipulated in relation to securities. A change of control in a company related to the SAS may result in an obligation to inform the SAS. This measure makes sense in the context of a group of companies.

However, the great freedom offered to SAS partners in drafting the articles of association also has its drawbacks: The drafting of SAS statutes is quite complex and requires good skills. Some partners will also have to be careful because they will benefit from a rather weak legal framework, unlike that provided for SARL and SA, whose operation is strictly regulated.

Other information about SAS:

- The company is established by one or more partners (i.e. no nationality requirement) and whose statutes freely provide for its organization and operation. The duration of SAS is 99 years;
- The company shall be referred to by a name which shall immediately be preceded or followed by the words "société par actions simplifiées" or by the abbreviation "SAS"

written in legible words.

Specific legal form is required for certain sectors. For instance banks must be incorporated as joint stock company (*Société Anonyme*) pursuant to the provision of the banking law.

2. Are there any corporate governance laws or accounting practices that foreign investors in a project company should be aware of?

Yes.

The laws on corporate governance include the following:

- The OHADA Uniform Act on the law governing commercial companies and economic interest groups;
- The OHADA Uniform Act on accounting law and financial information;
- Uniform Act relating to general commercial law;
- Law No 2020-20 of 2 September 2020 on the establishment, organization and operation public companies in the Republic of Benin;
- Law 2020-03 of 20 March 2020 on the promotion and development of micro, small and medium-sized enterprises in the Republic of Benin;
- Law n°2020-02 of 20 March 2020 on the Investment Code in the Republic of Benin;
- The General Tax Code updated each year.

3. If applicable, what forms of credit support from sponsors or host governments are typically provided?

N/A

4. What types of security interests are available (and suitable) for a project financing in your jurisdiction?

The securities listed below are generally granted by the companies.

- a. the Bank Accounts Pledge Agreement;
- b. the Equipment Pledge Agreement;
- c. the Receivables Pledge Agreement;
- d. the Share Pledge Agreement;
- e. mortgage.

5. How are the above security interests perfected?

To be valid and enforceable, security interests must be drafted and executed in accordance with the provisions of the OHADA Uniform Act on security interests. They must be registered with the tax authorities and filed with the commercial register.

6. Please identify how security is enforced (notably the enforcement options available for secured parties) both pre and post insolvency/bankruptcy of the project company?

Enforcement of securities Lenders typically have three enforcement options:

- a. sale of pledged assets by the Court;
- b. petition to the Court for appropriation of an asset; or
- c. conventional allocation of the pledged asset without Court order, if agreed between the parties to the security agreement.

The beneficiary of a share pledge agreement which has an enforceable Court order can proceed to sell the assets the subject of the security after an eight-day court-issued summons. In that case, the beneficiary will be entitled to be paid first on the proceeds from the sale.

Specifically, the process is described below:

Equipment Pledge Agreement

When an Enforcement Event occurs, and subject to the existence of a definite liquid and due claim under the Secured Obligations and remains unpaid, the Pledge Creditor, without prejudice to its other rights under the Pledge Agreement, may exercise over the Pledged Equipment, all the rights, actions and privileges that the law recognises for a creditor benefiting from such a pledge of professional equipment and, in particular, realise the Pledge by public sale, by judicial allocation or by transfer in full ownership in accordance with the provisions of articles 104 and 105 of the Uniform Act on Security Interests.

Appropriation of full ownership shall take place on expiry of a period of eight (08) days from receipt by the Constituent of a formal notice sent by the Security Creditor, by registered letter with acknowledgement of receipt, which failed to have any effect (the date of receipt of the said formal notice being understood to be the date of first presentation of the registered letter).

For the purposes of this contractual allocation, the value of the Pledged Equipment shall be determined by an expert appointed amicably by the Parties or by the competent Court President.

Share Pledge Agreement

When an Enforcement Event occurs, and subject to the existence of a definite liquid and due claim under the Secured Obligations and remains unpaid, the Pledge Creditor, without prejudice to its other rights under the Pledge Agreement, may, at any time, exercise all rights, remedies and actions whatsoever, and in particular the rights conferred on it by Articles 144 et seq. of the Uniform Act on Security Interests.

In the event of realisation of the Pledge by way of conventional allocation, the Pledged Creditor shall become the owner of the Pledged Shares in accordance with the provisions of Article 104 of the Uniform Act on Security Interests, eight (8) days after a formal notice to pay sent by bailiff to the Constituents has remained without effect.

For the purposes of this contractual allocation, the value of the Pledged Shares shall be determined by an expert appointed amicably by the Parties or, failing this, by the President of the competent Court President.

Bank Accounts Pledge Agreement

The Pledged Creditor is entitled to exercise on the credit balance of the Pledged Accounts, within the limit of the Secured Obligations, the rights conferred on it under the conditions and within the limits of Articles 127 and sequence and article 136 and sequence of the Uniform Act on Secured Transactions.

When an Enforcement Event occurs, and subject to the existence of a definite liquid and due claim in respect of the Secured obligations that remained unpaid, the Pledged Creditor, after having sent notification of enforcement to the Account-Holding Bank (with a copy to the grantor by registered letter with acknowledgement of receipt or by hand-delivered letter against receipt and without it being necessary to complete any other formalities may exercise on the Pledged Accounts all the rights, actions and privileges vested in it pursuant to the Pledge Agreement in accordance with the provisions of Article 134 of the Uniform Act on Security Interests.

From the date of receipt by the Account Holder Bank of the Notification of Completion, the Account Holder Bank may not carry out any debit transaction on the Pledged Accounts subject to the settlement of current transactions initiated by the Account Holder Bank prior

to the date of receipt of the Notification of Completion by the latter.

The Pledged Creditor shall automatically become the holder of the sums credited to the Pledged Accounts after the settlement of the outstanding transactions, upon expiry of a determined period from receipt of the Enforcement Notice by the Account-Holding Bank.

Receivables Pledge Agreement

When an Enforcement Event occurs, and subject to the existence of a definite liquid and due claim under the Secured obligations that remained unpaid, the Pledged Creditor, without prejudice to its other rights under the Pledge Agreement, may at any time exercise all rights, remedies and actions whatsoever, and in particular the rights conferred on it by Article 134 of the Uniform Act on Security Interests, which the applicable law grants to the beneficiaries of a pledge of the same nature as the Pledge, for the purpose of realising the Pledge.

In the event of realisation of the Pledge by way of conventional allocation, the Parties generally agree that the Pledged Creditor may, at its discretion and without having to resort to any judicial allocation procedure, automatically allocate ownership of the Pledged Receivables in accordance with the provisions of Article 134 of the Uniform Act on Security Interests eight (8) days after formal notice sent to the Pledgor has remained without effect.

The Pledged Creditor shall apply the Pledged Receivables to the repayment of the Secured Obligations in accordance with the payment clauses of the Financing Documents.

7. What are other important considerations in relation to the security regime in the jurisdiction that secured parties should be aware of?

All above.

8. What key project risks should lenders be aware of in project financings in your jurisdiction? This may include, but may not be limited to, the following risks: force majeure, political risk, currency convertibility risk, regulating or permitting risk, construction/completion risk, supply or feed stock risk or legal and regulatory

risk).

Lenders must comply with the governing law of the project sector to make sure that all Transaction documents, especially the various agreements and securities are enforceable.

For example, if a public procurement is concerned, the lenders can request a legal opinion on the legality of a direct award of the EPC contract.

9. Are any governmental / regulatory consents required and are any financing or project documents requirement to be filed with any authority in order to be admissible in evidence in a court of law, valid or enforceable?

The loan agreement and securities must be registered with the tax services.

In addition, the securities will be filed with the commercial register.

10. Are there are any specific foreign exchange, royalties, export restrictions, subsidies, foreign investment, that are relevant for project financings (particularly in the natural resources sectors)?

Pursuant to the provisions of Article 4.3 of Regulation No. 09/2010/CM/WAEMU of the West African Economic and Monetary Union ("WAEMU") of 1 October 2010 on the external financial relations of WAEMU Member States, the execution of transfers not exceeding five hundred thousand CFA francs (XOF) (500,000) is generally authorized. When the amount exceeds 500,000 CFA francs (XOF), the person requesting the transfer must obtain a foreign exchange authorization from the Monetary and Financial Affairs Directorate (Direction des Affaires Monétaires et Financières) of the Treasury and Public Accounting Directorate (Direction Générale du Trésor et de la Comptabilité Publique : DGTCP)

11. Please set out any specific environmental, social and governance issues that are relevant. For example, are project companies subject to certain ESG laws, reporting requirements or regulations?

Environmental and social impact assessments report and

an environmental compliance certificate issued by the Beninese Environment Agency (ABE) are often required and reviewed during in the due diligence report.

12. Has any public-private partnership models or laws been enacted in the jurisdiction, and if so, are they specific to certain industry sectors?

Law No. 2016-24 on the legal framework for public-private partnerships in the Republic of Benin and Directive No. 01/2022/CM/WAEMU on the legal and institutional framework for public-private partnerships in WEAMU are the main governing laws. They are not specific to a certain sector.

13. Will foreign judgments, arbitration awards and contractual agreements to arbitrate be upheld?

Yes. Subject to their exequatur, foreign judgments, arbitration awards are enforceable in Benin.

14. Is submission to a foreign jurisdiction and waiver of immunity effective and enforceable?

Yes, the waiver of immunity is effective and enforceable. This rule is also applicable to public entities pursuant to article 30 of the uniform act organizing simplified recovery procedures and enforcement measures of November 2023.

15. Please identify what you consider to be (a) the key current issues for project financing in your jurisdiction; and (b) any emerging trends or topics which should be considered or focused on by project financing stakeholders.

Lenders must conduct efficiently they due diligence on the borrower after the company confirmation step and set the right conditions precedent where there are some red flags. This will help them to guarantee the loan reimbursement.

16. Please identify in your jurisdiction what key legislation or regulations have been implemented (or will / plan to be) for

projects in connection with the energy transition?

The energy transition is governed by the Law 2020-05 of 1 April 2020 on the Electricity Code in the Republic of Benin.

17. Please identify if there are any material tax considerations which need to be taken into account for a project financing in your jurisdiction, and if so, how such tax issues can be mitigated.

Withholding IRCM tax (Investment Income Tax) is applicable to the amount of interest paid at each due date. The rate is set by article 88 of the current General Tax Code and is 15%. The lender has to make sure that the borrower is tax compliant by requesting a tax clearance certificate.

18. What types of funding structures (e.g. debt, equity or alternative financing) are typical for project financing in your jurisdiction. For example, are project bond issuances, Islamic finance and - in the context of mining deals - streams or royalties, seen as attractive (and common) options for stakeholders?

Debt, bond issuance, sovereign borrowing, private equity, Islamic finance.

19. Please explain if there are any regional development banks or export credit agencies, and if so, what is their role in project financing in your jurisdiction and beyond.

There are regional development banks in Benin involved in project financing.

These include the ECOWAS Bank for Investment and Development (EBID – BIDC), the African Development Bank (ADB- BAD) and the West African Development Bank (WADB – BOAD).

Each of these institutions provides financial support for any project likely to initiate or boost the economic development.

20. Please explain if there are any important insurance law principles or considerations in connection with any project financing in your jurisdiction.

It is strongly recommended that the project company subscribes to a civil liability and all risks project insurance.

Contributors

Hélène Paty Kounake
Managing Partner

helene@paty.legal

