

JuriSTEP

LEGAL ASPECTS OF THE
SANTOMEAN COMPANY LAWS

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INTRODUCTION

The Santomean legal framework of companies is almost entirely based on the Portuguese Law from the colonial period. In fact, the main legislation on companies is comprised of laws in force before the country become independent in 1976. Since then, there have been insignificant changes to this legislation.

This means on the one hand, due to the old Portuguese colonial legal system, it is not an easy task to identify the legislation (and subsequent modifications therein) that continues in force in Sao Tome and Principe and under the Article 158 of the Santomean Constitution. On the other hand, it means that the Santomean legislation does not provide modern and flexible solutions for company's business practice. In fact, there are some modern issues not regulated in the law.

This paper covers only the general regime of companies, and not the special regimes, namely regarding financial institutions and offshore companies.

APPLICABLE LAWS

The main legal framework of companies in Sao Tome and Principe is set up in the Commercial Code, of 1888 and the Quotas Company Law (QCL), of 1901. There are also other specific laws outside the Commercial Code applicable to specific matters (namely the Decree-law no. 49.381, of 15 November, 1969 regarding the auditing of joint stock corporations). The Civil Code may be applicable in case of omissions. Analogies and creation of rules by the lawyer are allowed in certain conditions.

GOVERNING LAWS

Companies

As regarding the company governing laws, the Commercial Code provides as follows:

- Companies incorporated in Sao Tome and Principe or incorporated in a foreign country with its head-office and main activity is located in Sao Tome and Principe are deemed as Santomean and governed by the Commercial Code and/or the QCL;
- Companies incorporated overseas and with its head-office and main activities outside Sao Tome and Principe are deemed foreign companies and governed by the law of the country where they were incorporated. However, when willing to carry out its activity in Sao Tome and Principe, foreign companies are subject to the Santomean laws.

Branches and Representative Offices

Foreign companies may choose to operate through registered branches and representative offices.

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.

INCORPORATION ACTS

Under the Commercial Code and QCL, the companies' fundamentals and regulations must be set in the Articles of Association (AoA) which are executed by public deed. Shareholders may freely adopt any AoA model, subject to the mandatory requirements set by the laws. The AoA are also subject to registry and gazetting.

(Please refer to our practical guide '[How to set up a company in Sao Tome and Principe](#)', for further details on the necessary legal steps and formalities to incorporate a company. Available at www.juristep.com.)

LEGAL PERSONALITY AND CAPACITY

Upon registry, commercial companies acquire legal personality with rights and obligations necessary, useful or convenient to the achievement of their objects, with the exceptions mentioned in the law and in the companies AoA (i.e., it can not exceed the powers conferred by the laws or by its AoA), and those arising from the nature of legal entities.

TYPES OF COMPANIES

The Commercial Code provides for 3 types of companies: (i) Unlimited liability companies (*sociedades em nome colectivo, Cia.*); (ii) Stock Corporations (*sociedades anónimas, S.A.R.L.*); and (iii) Limited partnerships (*sociedades em comanditas, em Comandita*). In addition, the QCL provides for the Limited liability companies (*sociedades por quotas, Lda.*).

The most frequently adopted types of companies in Sao Tome and Principe are:

- Limited liability Companies – mainly governed by the QCL, and suitable for small and medium-sized business or small number of partners. The partners are jointly liable for the total amount of the share capital, although in case of bankruptcy, only the company's assets can be used to pay the creditors; and
- Stock Corporations – governed by the Commercial Code. Stock corporations can be public or private: (i) public stock corporations are those which the share capital is offered to public subscription; (ii) the others are private corporations. The partners are liable in the amount of the share capital they own in the company.

MINIMUM PARTNERS

Limited liability company

Limited liability companies may be incorporated by a minimum of 2 partners (individuals or companies, referred to as quotaholders).

Stock corporation

Stock corporations can be created by a minimum of 10 partners (individuals or companies, referred to as shareholders).

CAPITAL

Limited liability company

The legal minimum capital amounts were not updated (amended) after the country has become independent in 1975. Therefore, in practical terms, 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 carry out the company activities. Advisedly, one can establish as criteria for establishing the minimum capital the sufficient amount to conduct the companies' activities and object. Usually, USD 1,000.00 is deemed sufficient to incorporate a limited liability company.

The share capital is represented by *quotas* and can be paid in cash only or in cash and assets. When paid in assets, the partners must state the assets value.

Stock corporation

There is no legal minimum capital for incorporation a stock company. However, lately, stock corporations have been incorporated with USD 5,000.

The share capital of a stock corporation is represented by shares.

TRANSFER OF SHARES

Limited liability company

Under the QCL, the transfer of *quotas* is done by public deed. Quotaholders can introduce in the AoA certain requirements regarding the transfer of quotas, such as obtaining the company's prior consent or giving partners' pre-emptive rights to the purchase. Any transfer of *quotas* (provided they fulfil the requirements required in the AoA) is effective against the company after written notice.

Limited companies can purchase its own quotas after they are fully paid by the quotaholder.

Stock corporation

There is no mandatory contractual form to the purchase and sale of shares, although companies must keep a record of the issued shares. However, transfer of shares is allowed only after the process of incorporation is complete. Corporations can not purchase its own shares, unless the AoA provides otherwise.

SPECIAL RIGHTS

Any special rights granted to the partners (e.g., right of management or pre-emptive rights) must be declared in the AoA. Special rights of patrimonial nature can be transferred with the respective *quota* or share, except if they were created *intuitu personae* (i.e., for reasons of individual and personal consideration).

DISTRIBUTION OF DIVIDENDS AND PROFITS

In both limited liability companies and stock corporations, the partners may discuss and decide about distributions of dividends in the general meeting. The dividends can be paid freely out of the profits, without prejudice of the amounts necessary to keep the legal reserves (i.e., 5% of the annual profits until it represents 20% of the share capital). Unless otherwise established in

the AoA, the division of dividend is made proportionally to the share capital owned by each partner.

DISSOLUTION OF COMPANIES

Dissolution of companies 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 general meeting by a resolution passed by a 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.

Any creditor has legitimacy to request from the court a declaration of dissolution of a company due to the occurrence of any legal cause of dissolution.

LIQUIDATION OF COMPANIES

Upon the dissolution, the company enters into liquidation, which aims to the settlement of company's debts and the division of any remaining assets amongst the partners. A company in liquidation continues to have legal personality.

PROTECTION OF CREDITORS

Creditors can exercise the company's credits rights against the partners to reimburse their credits. In case of liquidation, creditors are paid before the partners.

COMPANY BODIES

Limited liability company

Under the QCL, Limited liability companies must adopt the following company bodies:

[1] ADMINISTRATION

The administration of limited liability companies is performed by one manager or a board of managers take(s) the day-to-day management decisions, as follows:

- Composition

The QCL does not set rules limiting (minimum or maximum) the number of managers in a limited liability companies.

- Appointment, term, removal and renewals

Managers may not be appointed among the quotaholders and are nominated either by the AoA or by quotaholders' decision, made in a general meeting, pursuant to the company's AoA appointment rules. Unless provided otherwise in the AoA, the appointment of managers has no term. Under the law, managers can be removed at any time by the quotaholders, except where the appointment is a special right of a quotaholder; in this case, the removal has to have the quotaholder's consent. Notwithstanding, removals without cause may give raise to compensation. Renewals are allowed if provided in the AoA.

- Remuneration

The partners in the AoA or in a general meeting can set out the criteria for the remuneration of the managers.

- Powers

Subject to the AoA, the quotaholders' resolutions and of the auditing body's decisions (if adopted) managers are responsible for undertaking all acts necessary to carry out the company's objects.

- Decision making

Unless otherwise provided in the AoA, the decisions are approved by the majority of the managers.

- Binding of company

As general rule, the company is bound by the acts practiced:

- (i) By either of the managers acting in company's behalf and signed with the company's firm; or
- (ii) By the jointly signatures of two or more managers (when the company has not adopted a firm).

The AoA can require additional requirements.

- Delegation of powers

Unless otherwise provided in the AoA, the board of administration can delegate the powers to represent the company or decide certain issues to one of its members.

- Duties and liabilities

The managers must perform their duties in the interest of the company and act in a diligent and ordered manner. Consequently, the managers may be civilly (personally and jointly) liable to the companies and third parties for all damages caused by their acts (and omissions) in violation of their legal or contractual duties.

- Conflicts of interest

The managers of limited liability companies can not personally practice other acts of commerce or industry of the same type of the company to which they are appointed, except when duly and expressly authorized

by the general meeting of the partners. Likewise, they can not enter into contracts with the companies to which they were appointed, during their terms. In addition – and as an implicit duty of performing their duties in interest of the company –, the managers can not take decisions to benefit themselves in prejudice of the company.

- Disclosure of information, accounts and books

The annual accounts, reports and other information regarding the company's activities must be made available to the quotaholders at the registered office of the company. The AoA can set out requirements regarding the availability of information. When a company has not adopted an auditing body, the annual accounts and the management reports of the accounting period must be available to the quotaholders at the company office for at least 15 days prior to the date when the ordinary general meeting is to be held.

[2] GENERAL MEETING

The general meeting is the company's deliberative body and is competent to take the relevant decisions in the company. The regulatory framework of the general meetings is as follows:

- Powers

Partners gathered in general meeting may exercise, namely, the following voting rights:

- (i) Pass amendments to the AoA;
- (ii) Demand for and refund of supplementary payments;
- (iii) Give consent or exercise any other right provided in the AoA regarding the *inter vivos* transfers of shares;
- (iv) Decide on distribution of profits;
- (v) Decide on merger, division, transformation and dissolution of the company;
- (vi) Appoint and approve the final accounts by liquidators.

- Meetings

A mandatory annual general meeting must be held in the first 4 months after the closing of activities to:

- (i) Approve the annual financial statements;
- (ii) Replace managers (if necessary);
- (iii) Approve any other relevant issue for which it was convened.

Other meetings can be convened to approve on any legal or contractual competence powers of the general assembly, pursuant to the legal and contractual requirements.

- Formalities to convene the meetings

As general rule, general meeting are convened by the managers or by the auditing body (when adopted). In addition, the quotaholders representing at least 5% of the share capital (or higher percentage if so provided by the AoA) may request the chairman of the general assembly to convene a general meeting. The call for general meetings must be made by means of announcement, addressed to the shareholders. The announcement must contain the call notice and the meeting agenda, and must be sent at least 15 days before the date of the meeting, except when the AoA requires a longer period or additional requirements.

The law allows the partners to decide in writing on any subject without a general meeting (except on any amendment to the AoA or the dissolution of the company) if all partners agree in written that:

- (i) The such method of deliberation may take place; and
- (ii) The partners may validly deliberate on the subject.

- Voting rights

The AoA may set out the voting rights of the *quotas* for the meetings.

- Majorities

As general rule, and without prejudice to cases in which the law or the AoA require a higher percentage of votes, decisions are approved by simple majority of the votes.

The law requires a higher majority (three quarters of the share capital), notably to:

- (i) Pass amendments to the AoA;
- (ii) Decide on the (voluntary) dissolution of the company;

- Conflicts of interests

Partners can not (personally or by powers of attorney) vote on any subject regarding his own interests.

- Liabilities

Partners who approve and/or expressly accept a decision approved in breach of the law or the AoA are unlimited (i.e., personally) and jointly liable for all damages caused to the company or to third parties.

[3] AUDITING BODY

In a limited liability company, the adoption of an auditing body – either individual auditor or an auditing committee – is optional.

- Powers

The auditing body is competent to oversee the management activities and to audit the company's accounting books and reports. When adopted, the auditing body functions as follows:

- Composition

The auditing committee must be comprised by at least 3 partners.

- Appointment, term, removal and renewals

The members of the auditing committee are appointed for a 3-year term, removable at any time. The appointments can be renewable if the AoA so provides.

- Remuneration

The partners in the AoA or in a general meeting can set out the criteria for the remuneration of the auditing committee.

Stock corporation

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

[1] ADMINISTRATION

The administration of stock corporations is performed by a Board of Directors competent to make the day-to-day management decisions. The rules governing the Board are the same as referred for the limited liability companies, with the following differences:

- Composition

The Commercial Code does not set rules regarding the number of directors in a stock corporation.

- Appointment, term, removal and renewals

Directors are appointed or elected among the shareholders for a period of not longer than 3 years. The first directors must be appointed in the AoA. Subsequent appointments are made in a general meeting, pursuant to the company's AoA appointment rules. Under the law, directors may be removed at any time by the shareholders, but removal without cause may give rise to compensation. Renewals are allowed if provided in the AoA.

- Remuneration

The partners in the AoA or in a general meeting can set out the criteria for the remuneration of the Board members.

- Delegation of powers

The company's AoA may set the rules regarding the delegation of powers.

- Disclosure of information, accounts and books

The Board must submit to the Auditing Committee a summary of company balance sheets in a quarterly basis. By the end of the fiscal year, the Board must submit to the Committee the annual accounts, reports and other information regarding the company's activities, which after analysis and opinion of the Committee must be made available to the shareholders at the registered office of the company for a period of at least 15 days. The balance sheet and a copy of the Committee's opinion must be sent to the every shareholder. After those formalities have been fulfilled, the balance sheets and other relevant documents are submitted to the general meeting discussion and approval. After approval, the documents must be gazetted.

[2] GENERAL MEETING

The considerations made for the limited liability company are applicable, *mutatis mutandis*, to the stock corporations, except for the following:

- Formalities to convene the meetings

The same rules as for the limited liability company, except that the law does not allow the partners of a stock corporation to decide on any subject in writing without gathering in a meeting.

Additionally, shareholders living overseas represent at least 25% of the share capital may gather in conference to decide, notably on the following matters:

- (i) Analyze and discuss the annual accounting documents, including the Committee's opinion;
 - (ii) Elect one or more shareholder to represent them in the annual general meeting. These representatives may exercise the number of votes that the shareholders they represent hold.
- Voting rights

The AoA may set out the voting rights (limit or establish differences) of each type of shares (not with reference to individual shares hold by any

shareholder). Notwithstanding, there are some mandatory limitations regarding the exercise of the shareholder representing the majority of the share capital. In every case, shareholders holding shares with no vote can take part in a meeting.

- Liabilities

Under the general rules of civil liability (set out in the Civil Code), the partners who approve and/or expressly accept a decision approved in breach of the law or the AoA may be held liable for all damages caused to the company or to third parties.

[3] AUDITING COMMITTEE

In a stock corporation, the adoption of an auditing committee or individual auditor is mandatory. The Auditing Committee (or *mutatis mutandis*, the individual auditor) is governed as follows:

- Powers

The Auditing Committee is competent, namely, to:

- (i) Examine the companies accounting books;
- (ii) Convene a general meeting *in lieu* of the Chairman of the general meeting in cases of omission of duty to convene the general meeting;
- (iii) Supervise the Board, by verifying the existing cash and the stocks of any type of goods or values belonging to the company;
- (iv) Verify the compliance of the law and the AoA;
- (v) Give opinion on the annual accounts of the company;
- (vi) Perform all other obligations mentioned in the law and in the AoA.

- Composition

The Auditing Committee must be comprised by at least 3 members and 2 deputy members, who may or may not be partners. However, one of

the members must be an accounting auditor or a firm of accounting auditors. When appointed an individual auditor, the auditor must be an accounting auditor. Additionally, there have to be a deputy auditor.

- Appointment, term, removal and renewals

The members of the auditing committee are appointed for a 3-year term, removable with cause. The appointments can be renewable if the AoA so provides. In certain conditions, the courts may be requested to appoint members of the Auditing Committee.

- Remuneration

The partners in the AoA or in a general meeting can set out the criteria for the remuneration of the auditing committee. When appointed by a court, the court sets out the remuneration of the appointed member or members.

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