

OHADAC MODEL LAW
ON COMMERCIAL COMPANIES

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OHADAC MODEL LAW ON COMMERCIAL COMPANIES

TITLE I FOREIGN ORIGIN, OPERATIONS AND INTERNATIONAL DEVELOPMENT OF COMMERCIAL COMPANIES

Chapter I Conflict-of-law rules

Article 1.- *Scope of application.*

The provisions of the present law shall apply for the purposes of determining the international rules applicable to commercial companies.

Article 2.- *Universality.*

The laws declared applicable by the provisions hereof shall be applied regardless of their State of origin, subject only to exceptions on public policy grounds.

Article 3.- *Lex societatis.*

1. The law applicable to commercial companies shall be that of their country of formation. In order to determine which country is concerned, special consideration shall be given to the company's compliance with the substantive and procedural requirements for its formation, in accordance with the laws of the country in question.
2. Should a company fail to comply with those requirements, it shall be governed by the laws elected by its shareholders or members.
3. In the absence of agreement, the laws of the company's place of *de facto* administration shall apply.

Article 4.- *Matters governed by lex societatis.*

The law applying to the commercial company shall govern the following matters:

- a) The formation and termination of the company.
- b) Legal capacity and capacity to act, without prejudice to the application of any rules on recognition, or rules restricting the activities of foreign commercial companies within the country in question.
- c) The registered name of the commercial company.
- d) The regime whereby the company expresses its intentions.
- e) Internal relationships, particularly those existing between the commercial company and its shareholders.
- f) The representation of persons acting on behalf of the commercial company.
- g) The commercial company's liability for debts.

Article 5.- *Creation of places of business by foreign companies.*

1. The creation of a place of business in a foreign country shall be governed by the law applicable to the commercial company and the laws of the country where the place of business is to be set up.
2. The law governing the commercial company shall be applied in order to establish the legality of the creation in compliance with its bylaws and the requirements to which it is subject.
3. The law of the country in which the place of business is to be created shall be applied to the requirements to be met in that country. The said law shall determine, in particular, the mandatory nature of registration, the obligations and controls imposed on places of business of foreign companies once they have been set up, and the consequences of failure to register.

Article 6.- *Rules applicable to commercial companies concerning incapacity, representation and liability*

Any lack of capacity or limitations to the power of representation of a body or representative, or to the commercial company's liability regime shall not be invoked where the said lack of capacity, or limitations to the power of representation or liability regime are not known to concern comparable entities in the country in which action has been taken on behalf of the commercial company, provided that one of the following circumstances obtains:

- a) the commercial company acted through a branch registered in the said country and the limitations do not result from such registration;
- b) the commercial company acted without a registered place of business, but third parties were not aware of, or could not have been aware of, given the circumstances, such limitations to capacity, to representation or to the liability regime.

Article 7.- *Shareholders' agreements*

1. Any agreements between all or some of the shareholders and subordinating the exercise of their rights to the observance of certain procedures or to compliance with certain acts, independently of the provisions of the partnership agreement or the bylaws, shall be valid only where such validity is acknowledged by the provisions of the law applicable to the contractual instrument which contains them, and by the law applicable to the commercial company whose functioning is concerned by such agreements.
2. Should such agreements be null and void by virtue of the law applicable to the commercial company, the said law shall be applied to determine the effects of the invalidity.
3. Non-performance of this type of agreement may give rise to a right of action in respect of the commercial company's acts on the sole condition that such an effect is provided for by the laws governing the company.

Chapter II **Substantive provisions**

Section One Recognition of legal personality

Article 8.- *Recognition of commercial companies.*

1. Only foreign commercial companies endowed with legal personality pursuant to the laws of their State of formation shall be recognized *ipso jure*.
2. Under no circumstances shall the legal capacity of foreign commercial companies exceed the capacity extended to legal persons formed under the law of the State of recognition.
3. *Ipso jure* recognition does not preclude the State from verifying the existence of the legal person in accordance with the law of its place of formation.
4. For the purposes of such verification, the State shall accept the validity of the certificates of incorporation issued by the registries with which the commercial companies are registered, provided such documents meet the authenticity requirements necessary to be admitted by way of proof.
5. The State may set out exceptions to the recognition of foreign legal persons where the seat of effective management or principal center of business thereof is situated on its territory.

Section Two Foreign companies pursuing an activity with or without a place of business

Article 9.- *Registration of foreign companies and local publicity requirements.*

1. The competent authority of a State may require companies incorporated in a foreign country to register with the companies registry of the said State, notwithstanding their registration in the country of their formation, in the following cases:
 - a) where the foreign company carries on, or intends to carry on its activity regularly or permanently on the territory of that State;
 - b) where the foreign company already has a place of business, a branch or an agency in that State.
2. The authorities of the State requiring new registration shall endeavor not to request compliance from foreign companies in circumstances other than those outlined in the previous paragraph, without prejudice to any provisions relating to specific sectors of activity.
3. In order to comply with the obligation set out in paragraph one of the present article, foreign companies shall submit, as a minimum requirement, the duly legalized documents substantiating the legality of the creation of the new place of business, the existence of the company, the bylaws currently in force and the powers of attorney for legal representation on the territory concerned.

4. In compliance with the provisions of the laws of each country, the following particulars at least shall be supplied for the purposes of registration:
 - a) Type of activity to be pursued by the new business.
 - b) Activity start date and planned duration.
 - c) Location, with full postal address, of the local office.
 - d) Capital allocated to operations.
 - e) The full names of the representatives and officers of the new place of business, who shall be granted full power of attorney to oversee its operations and shall reside within the territory concerned.
 - f) Where applicable, the extent to which the shareholders' liability for the company's debts is limited.
 - g) The company's full postal address in its country of formation and the details of registration with the competent registry in the said country.
 - h) The full names and postal addresses of the company's officers.
5. Dissolution, liquidation, the opening of insolvency proceedings, and any amendments to the bylaws of the foreign company, or any changes in the circumstances affecting the particulars enumerated in the previous paragraph, shall also be duly registered, within sixty days from the occurrence thereof.

Chapter III

Restrictions related to the company's foreign origin

Article 10.- Assimilation.

Unless otherwise provided for by special legislation, foreign commercial companies shall enjoy the same civil rights as those of national companies.

TITLE II

INTERNATIONAL STRUCTURAL CHANGES

Chapter I

International mergers

Section One

Definition and nature of operation

Article 11.- Definition and possibility of merger.

1. The merger of companies governed by different laws shall be possible.
2. A merger is understood as the joining together of several companies into one through the complete transfer of their assets to an existing company (absorbing company) or to a newly created company.

3. Only those operations entailing the disappearance of participating companies, with the exception of the absorbing company where appropriate, shall be deemed to constitute a merger.
4. The absorbing company or newly created company resulting from the merger shall acquire the rights and obligations of the company or companies dissolved as a result of that merger.
5. Should one of the companies participating in the merger transfer part of its assets, as part of the merger process, to a number of other companies – unless all the companies to which the assets are to be transferred are involved in the merger – the operation concerning the said company shall be deemed to constitute a demerger governed by the rules set out in chapter two of this title and shall necessarily be completed prior to the start of the merger process. A demerger from the absorbing company or newly created company, or a demerger from which those companies may benefit, may also take place following the initial merger even if no link of any kind exists between the merger and the demerger.
6. Where the companies participating in the merger are all governed by the same laws, but have branches in States others than the State by whose laws they are governed, the rules of articles 16.4 and 18.4 on international demergers shall apply.

Article 12.- *Companies registry.*

For the purposes of the present chapter, companies registry means the registry set up in each State to publish notices of incorporation, dissolution, change in legal form and any other circumstances relevant to the company.

Section Two
Merger procedure

Article 13.- *Merger plan.*

1. The merging parties shall draft a joint merger plan.
2. The merger plan shall contain the following information:
 - a) Registered name, legal form, registered office and laws governing the merging parties, together with the company's incorporation details as registered with the companies registry of the relevant country. Moreover, the absorbing company or the new company resulting from the merger shall be expressly identified. The date from which the merger is to become effective shall be clearly stated in the plan, and such date may under no circumstances be prior to the registration of the merger with the relevant companies registry for the absorbing company or for the new company resulting from the merger.
 - b) All the information required by the merger rules contained in the laws governing each of the merging companies.
 - c) The merger plan shall take into consideration the distinctive features of the laws governing the various companies taking part in the operation, particularly concerning any restrictions imposed on mergers for certain legal forms of companies, any

guarantees afforded to the creditors of the company, and the right to withdraw for shareholders who do not approve of the operation.

Article 14.- *Merger approval.*

1. Each of the merging parties shall express its approval following the procedure set out in the company's governing laws. The terms of the resolution shall be consistent with the content of the joint merger plan.
2. The merger resolution shall be registered with the companies registry of the State by whose laws the participating company is governed. The registration of the said resolution shall preclude any additional registrations relating to the company that may prove incompatible with the merger resolution. The cancellation of the registration shall not become effective until the merger is duly registered with the relevant companies registry for the absorbing company or the new company resulting from the merger.
3. Once the resolution has been adopted and all the legal requirements to make it effective have been complied with in accordance with the provisions of the laws of the State which governs the company, a certificate attesting to the adoption of the said resolution and to compliance with the said legal requirements shall be issued. The certificate shall be issued by a competent official or authority of the State in which the company's registered office is located.
4. Should the merger not be completed, the provisional and partial freezing of the register shall be lifted for the merging party. Such cancellation shall come into force only once an authenticated document has been produced certifying that the company has abandoned its participation in the initiated merger procedure. Should the certificate provided for in paragraph 3 of this article already have been issued, a certificate of revocation shall in turn be issued and if possible, forwarded to the relevant companies registry for the company which previously appeared as beneficiary of the merger in the joint merger plan.

Article 15.- *Merger registration.*

1. Once the merger has been approved by all the companies taking part in the operation, the said operation shall be registered with the relevant registry for the absorbing company or the new company resulting from the merger.
2. The authority responsible for the registry with which the merger is to be registered shall issue, after the operation has become effective, a certificate attesting to the completion of the merger.

The said certificate shall be submitted to the relevant registries for the companies involved in the operation so that the registrations of the companies that have ceased to exist as a result of the merger may be cancelled.

Chapter II **International demergers**

Section One

Definition, nature and governing principles of international demerger

Article 16.- *Definition of demerger.*

1. Demerger occurs where one company transfers all or part of its assets to one or several existing or newly formed companies. The complete transfer of assets to a single company shall be deemed to constitute a merger and the rules set out in the previous chapter shall apply.
2. Demerger shall be deemed international where it concerns companies governed by different laws, or where it affects the foreign-based branches of a demerging company.
3. International demerger shall be possible.
4. The demerger operation shall be carried out in compliance with the rules on company formation and on the setting up of branches, as in force in the States involved.
5. Should the demerger entail the dissolution of the demerging company, the beneficiary companies shall assume the rights and obligations pertaining to the former in proportion to their participation in the demerger, jointly vis-à-vis third parties, unless otherwise provided for in the demerger plan or the laws governing the demerging company.

Section Two

Demerger procedure

Article 17.- *Demerger plan.*

1. The legal representatives of the demerging company shall draw up a demerger plan compliant with the provisions of the laws governing the said company. The plan shall comply with the requirements set out in the laws governing the beneficiary companies. In any event the plan shall include the registered names of the demerging company and the beneficiary company and the effective date of the demerger, which shall under no circumstances be prior to the execution of the requirements set out in the laws governing the companies involved in the demerger, without exception, or to the execution of the requirements set out in the laws of the State where the branches of any demerging companies or beneficiary companies involved in the operation are situated.
2. The demerger plan shall be approved by the demerging company in compliance with the requirements of its governing laws. Should the beneficiary companies already be in existence at the time of the demerger, their approval of the demerger plan in compliance with the requirements of their governing law shall also be mandatory.

Article 18.- *Demerger approval.*

1. The demerger plan shall be approved by the demerging company in accordance with the provisions set out in its governing laws, and it shall comply with any requirements for the

protection of creditors and shareholders and with any other requirements related to demergers provided for in the said laws.

2. Once all the demerger requirements provided for in the State of the demerging company have been met, the operation shall be registered with the relevant companies registry. Registration of the demerger shall entail the partial and provisional freezing of the register in respect of the demerging company in order to prevent any changes to the company that may affect the demerger. The competent authority of the State of the company shall issue a certificate attesting to its compliance with the said requirements.
3. Upon approval of the demerger in the State of the demerging company it will become possible to form new companies resulting from the demerger or to transfer to the beneficiary companies the part of the demerging company allocated to them in the operation.
4. Where the transfer of assets as set out in the previous paragraph entails the creation of new branches or a change in the holder of title thereto, the requirements of the laws governing the company creating the branch and the requirements of the State where the branch is to be situated shall be complied with.
5. Upon registering new companies which are to become beneficiaries of the demerger, or branches created as a result thereof, the merger [*sic*] plan shall be declared. Even if the demerger does not entail the setting up of new companies or branches, the demerger resolution shall be registered with the relevant registry in the country of the beneficiary companies. Such registration shall be carried out before the demerger becomes effective.
6. Once the demerger has been registered with the companies registry in the country of the beneficiary companies, the competent authority for the relevant registry shall issue a certificate attesting thereto, which shall be submitted to the registry of the demerging company in order to cancel its registration where the demerger entails its dissolution.

Article 19.- *Subsidiarity clause.*

The rules on mergers contained in the previous chapter shall apply to any matters not otherwise provided for in the present chapter.

Chapter III **International transfer of registered office**

Section One

Definition, nature and governing principles of registered office transfer

Article 20.- *Possibility and conditions of registered office transfer.*

1. The transfer of a registered office to a foreign country shall be possible without requiring the dissolution of the company.
2. As a result of the transfer of the registered office and from the time when that change of registered office becomes effective, the laws governing the company shall be the laws of the State to which the registered office has been transferred.
3. For the purposes of the present chapter and unless otherwise provided, the registered office shall be as stipulated in the company's bylaws.
4. The transfer of a company's registered office shall only be possible where the laws governing the company so allow and under the conditions provided for in the relevant legislation.
5. The transfer of the registered office of a company to another State shall only be possible where the laws of the State to which the registered office is to be transferred allow such transfer while preserving the legal personality of the company.

Section Two

Transfer procedure

Article 21.- *Plan for registered office transfer.*

1. The officers of any company wishing to transfer its registered office to a foreign country shall submit a plan for the transfer of the registered office indicating at least:
 - a) The identification of the company whose transfer is envisaged.
 - b) The new registered office of the company.
 - c) Any information making it possible to identify the company in the place of its new registered office.
 - d) The bylaws adapted to the laws of the country to which the transfer is to be carried out.
 - e) The guarantee scheme devised to protect shareholders and creditors.
 - f) The transfer schedule, clearly expressing the effective date of the transfer, which can under no circumstances be prior to the date of registration of the transfer in the relevant registry for the company's new registered office.
2. The plan shall be made public and remain available for consultation within the State of the company for a period of at least three months prior to the adoption of the transfer resolution so that the creditors and shareholders may have a chance to study it and, where appropriate,

request any additional guarantees that may appear necessary or oppose the proposed registered office transfer should there be grounds for so doing.

3. In the course of the said three-month period the competent authorities of the State of the company shall also be entitled to oppose the proposed transfer, provided it is in the public interest to do so.

Article 22.- *Approval of transfer.*

1. The registered office transfer shall be approved by the competent decision-making body of the company by the same majority as is required by the laws applicable to the company for a change in its legal form.
2. The approval of the transfer, which is to be carried out concomitantly with that of the amendment of the bylaws in order to adapt them to the new governing laws of the company, shall be registered with the relevant companies registry. It shall be verified that the resulting changes do not alter the company's structure any more than is necessary to ensure adaptation to its new governing laws. Registration shall entail the provisional freezing of the register in respect of the company.
3. For a period of one month from the approval of the transfer, any shareholders having opposed it shall be entitled to exercise their right of separation. This right shall be exercised in compliance with the provisions of the laws of the State where the company's registered office was situated prior to the transfer.
4. Following the said one-month period, provided all the formalities necessary for approving the transfer have been complied with, the competent authority of the State of the company shall issue a certificate attesting to the approval of the transfer of the registered office to a foreign country.

Article 23.- *Registration.*

1. The transfer shall be registered with the companies registry of the State to which the company's registered office is transferred. For this purpose it will be necessary to verify that the adoption of the transfer resolution is consistent with the information contained in the certificate referred to in the previous article.
2. The competent authority of the State of the new registered office shall verify that the bylaws comply with the provisions of its law. It shall also verify that the company's assets cover the registered capital to the extent required by the rules of its laws in the event of the formation of a new company.
3. The transfer shall only be possible if the migrating company adopts a legal form equivalent to its previous legal form in its State of origin.
4. Once the conditions set out in paragraphs 1, 2 and 3 of the present article have been complied with, the competent authority of the State of the company's new registered office shall register the transfer with its registry. Once the registration has been completed, the registry shall issue the certificate, which shall be submitted to the corresponding registry in

the State of origin so that the competent authority may cancel the registration of the company.

5. Any registrations regarding the company that may be contained in the companies registry of the State of origin shall be transferred to the new companies registry.
6. Should the transfer operation not be completed, the competent authorities of the receiving State shall issue a certificate attesting thereto, thereby allowing the registration of the registered office transfer to be cancelled and the provisional freezing of the register to be lifted.
7. If within one year of registering the transfer of the registered office in the State of origin the certificate provided for in paragraphs 4 or 5 of the present article is not submitted to the said State, the competent authority of the companies registry of the State of origin shall consult the companies registry of the receiving State to ascertain whether or not the transfer operation has been completed.

Chapter IV

Dissolution of companies operating abroad

Section One

Competent authorities and applicable laws

Article 24.- *Conditions of and reasons for dissolution.*

1. The authorities of the State in accordance with whose laws the company was formed, or those of the State in which the company's registered office is established, should the said office not be established in the State of formation, shall alone be competent to decide on the invalidity of the company or on its dissolution.
2. The company may only be declared invalid or dissolved as a result of the reasons provided for in its governing laws, as determined in accordance with the provisions of article 3 of the present law.
3. Where provided for by the laws governing the company, dissolution shall be possible through the adoption of a resolution by its shareholders or by the company's competent decision-making body. The resolution shall be adopted in the manner prescribed by the said laws. Under paragraph 1 of the present article, the competent authorities alone may determine the validity or effectiveness of the resolutions referred to in the present paragraph.

Section Two

International effect of decisions regarding invalidity and dissolution

Article 25.- *Recognition and enforcement of invalidity, and dissolution of foreign companies.*

1. Any decisions emanating from the competent authorities, in accordance with the previous article, declaring the invalidity or dissolution of a company shall be recognized and, where appropriate, enforced, unless they are incompatible with public policy in the State where their effects are sought.

2. Resolutions of the company's decision-making bodies leading to the dissolution of the company shall be deemed to have effect both in the company's State and in any other State, provided that they are adopted by the competent body in compliance with the requirements set out in the company's governing laws under the conditions and in the manner provided for by the said laws. Any court rulings on the effect of such resolutions shall be recognized in compliance with the provisions of paragraph 1 of the present article.

Section Three Liquidation

Article 26.- *Laws applicable to liquidation.*

1. A dissolved company shall be liquidated in compliance with the rules of the laws governing the company as defined in article 3 hereof. The authorities of the State by whose laws the company is governed shall be competent, where required, to appoint the liquidators of the company and to address any other matter relating to the liquidation.
2. Without prejudice to the foregoing, where the company subject to liquidation has assets located outside the State by whose laws the company is governed, it shall be possible to appoint liquidators in the State in which the company's assets are located in order to pursue any commercial transactions pending at the time when the liquidation procedure is initiated or to enter into any new transactions that may be necessary, and also for the purposes of disposing of the company's assets and satisfying any creditors in the State in which the company's assets are located.
3. The appointment of a liquidator as provided for by the previous paragraph shall be carried out in compliance with the provisions of the legislation of the State in which the company's assets are located. The persons or authorities competent to oversee the liquidation procedure according to the provisions of the laws governing the company shall be able to request the appointment of the said liquidator.
4. The persons responsible for the liquidation of the company in States others than the State by whose laws the company is governed shall report on any action they may undertake to the liquidators appointed in accordance with the provisions of paragraph 1 of the present article, and the latter shall ensure that the company's assets are appropriately distributed, in compliance with the provisions of its governing laws.

TITLE III GROUPS OF COMPANIES

Chapter I General provisions

Article 27.- *Definition of group.*

1. A group shall be deemed to exist where two or more entities are connected, *de facto* or *de jure*, by some form of control.
2. A group of companies shall be understood as lacking legal personality.

Article 28.- Control.

Control shall obtain where a natural or legal person directly or indirectly, *de facto* or *de jure*, or by virtue of an agreement with other natural or legal persons:

- a) holds the majority of the voting rights needed to adopt any resolutions at the general meeting of a company; or
- b) has the power to appoint or dismiss the majority of the members of the executive or non-executive board of the said company.

Article 29.- Parent and subsidiary entities.

Under the present law, a legal person is a parent entity where it exercises control over one or more companies, and any company controlled by the parent entity is its subsidiary.

Chapter II
Rules on relationships between companies within a group

Article 30.- Law applicable to contractual relationships between companies in a group.

1. The principle of the autonomy of the parties shall be applicable to any contractual relationships or legal transactions between entities of the same group, unless prohibited or limited by the bylaws or any other relevant constitutive documents, or by any shareholders' agreements between the companies of the group.
2. Should the parties be unable to choose a governing law, the law applicable to contractual relationships between the companies of a group shall be defined in accordance with the provisions of article 46 of the OHADAC Model Law pertaining to private international law.
3. Without prejudice to the exceptions provided for under paragraph 1 of the present article, the governing law elected by the companies of the group shall not be applied within the framework of a contract or of any other legal transaction if its effects are incompatible with the public policy of the State of formation of any of the companies participating in the contractual relationship, or with the public policy of the State in which the contract is to take effect.
4. Public policy encompasses any provisions or principles of a mandatory nature from which the parties may not derogate in each of the States of formation of any companies in the group that are involved in the legal relationship, or in the State in which the contract or legal transaction is to take effect.

Article 31.- Legal transactions entered into between companies in the same group.

Companies belonging to the same group shall be able to enter into any legal transactions they deem appropriate, on the condition that:

- a) they do not infringe any mandatory norms in compliance with the provisions of paragraphs 3 and 4 of article 30 hereof, and

- b) they are carried out in market conditions.

Article 32.- *Financing or security granted by companies in the same group.*

Any financing and security on real or personal property granted between companies of the same group shall be valid, provided that:

- a) such grant, at the relevant time, does not cause prejudice to the creditors of the company providing the financing and/or security; and
- b) they are granted in market conditions.

Chapter III

Liability regime applicable to the parent company in respect of debts incurred by its subsidiaries

Article 33.- *Principle of non-liability.*

Unless otherwise agreed, the parent company of a group of companies shall not be held individually liable for any obligations undertaken or any debts incurred by any of its subsidiaries.

Article 34.- *Exception to non-liability.*

Without prejudice to the provisions of the previous article, the parent company shall be liable as principal debtor in respect of the creditors of its subsidiaries, where the competent judicial authority has established an abuse of the principle of independent legal personality of the subsidiaries.

Article 35.- *Abuse of legal personality.*

1. An abuse of legal personality shall be deemed to have been constituted, and therefore the principle of non-liability of the parent company shall be excluded, where the independent legal personality of its subsidiaries is used for the evasion of statutory provisions in order to infringe public policy, or to commit fraud to the detriment of the rights of shareholders or third parties.
2. In order to take legal action against any abuse of legal personality, the complainant party shall have the obligation to demonstrate before the competent judicial authority, in compliance with any applicable procedural rules, the effective use of a subsidiary company as an instrument to achieve the objectives mentioned in the previous paragraph.
3. Indications of abuse of legal personality within a group of companies shall arise from the determination of some of the following situations, among others:
 - a) The parent company's assets cannot be distinguished from its subsidiary's assets.
 - b) Undercapitalization of the subsidiary.
 - c) The parent company assumes and performs the obligation to pay the salaries of the employees of the subsidiary, and to cover other expenses, losses and debts corresponding to the subsidiary, on a habitual and continuous basis.

- d) The opening and use of a single bank account for all the companies of the group.
- e) Common interests and pooling of assets among the companies of the group.
- f) The habitual granting of financing and inter-group security that does not comply with the requirements set out in article 32 hereof.
- g) Transfers of assets and funds in breach of the relevant procedural requirements and without a well-founded basis.
- h) The sharing of executive or management personnel among various companies of the group, and the holding of combined meetings of the boards of directors.
- i) The inducing of creditors to negotiate with the group as a single entity, thereby creating confusion in the minds of the creditors.

Chapter IV

Consolidated annual financial statements regarding groups of companies

Article 36.- *Obligation to consolidate group statements and exceptions.*

1. Any parent company controlling one or more companies shall have the obligation to draw up consolidated annual financial statements and a consolidated management report, unless it falls within one of the exceptions to the obligation to consolidate statements expressly regulated by the State where the parent company has its registered office.
2. The legal form, nationality, State of the registered office and laws applicable to subsidiary companies notwithstanding, the parent company bound by the obligation to consolidate annual accounts shall include in the latter all its subsidiary companies.

Article 37.- *Presentation of consolidated statements and group management report; content, verification and approval.*

1. The decision-making body of the parent company shall draw up the consolidated annual accounts and the group management report within the prescribed period, in accordance with the law of the State where the parent company has its registered office and in conformity with the principles and accounting standards generally acknowledged in the said State.
2. The consolidated annual financial statements shall give a true and fair view of the assets, financial situation and results of the group of companies encompassed in the scope of consolidation.
3. The consolidated management report shall provide, at least, a true picture of the development, business results and the financial situation of the group of companies encompassed in the scope of consolidation, and shall contain, where applicable, a description of the principal risks or uncertainties facing the group.
4. The documents contained in the consolidated annual financial statements, and any formalities, specific indications and documents to be included in the management report of the group, in order to provide the information required in paragraphs 2 and 3 of the present article, shall be those required in the State where the parent company has its registered

office, and shall comply with the accounting rules and principles applicable in the said State.

5. The consolidated annual financial statements and the group management report shall be verified by an auditor, unless one of the exceptions to the obligation to audit accounts is applicable pursuant to the law of the State where the parent company has its registered office.
6. The procedure and conditions for appointing auditors to audit the consolidated statements and the group management report, together with the rules applicable to such audits, shall be governed by the law applicable to the parent company.
7. The general meeting of the parent company shall be responsible for approving, within the prescribed period in accordance with its applicable law, the consolidated annual accounts and the group management report.

Article 38.- *Information and publication regarding consolidated annual financial statements.*

1. The parent company shall provide, without delay and at no cost, at the request of any of the shareholders of the entities which form part of the group, the consolidated annual financial statements and the group management report and, if appropriate, the auditors' report.
2. The parent company shall publish the legally approved consolidated annual financial statements and the group management report, in accordance with the formalities set out in the laws of the State in which it has its registered office.
3. Where the consolidated annual financial statements, group management report and, if applicable, the audit report, are subject to filing and registration, the procedure shall be implemented in accordance with the rules of the companies registry with which the parent company is registered.
4. The consolidated annual financial statements, the group management report and, where applicable, the audit report, may also be filed and registered with the companies registry with which one of the subsidiaries is registered, where required by the law governing the subsidiary.
5. Without prejudice to the rules on publication formalities regarding the consolidated annual financial statements and any possible exceptions that may be applicable in the State in which the parent company has its registered office, the parent company shall keep the consolidated annual financial statements, the group management report and, where applicable, the audit report, available to the public at its registered office.
6. Any sanctions that may be imposed on the decision-making body of the parent company and the extent of its liability for a breach of the obligation of information and publication in respect of the group's consolidated accounts, shall be determined, in each case, in accordance with the law of the State in which the registered office of the parent entity is located.

Article 39.- *Voluntary consolidation.*

The provisions of the present Chapter shall be applicable where a parent company voluntarily presents consolidated annual financial statements and a group management report, although being under no legal obligation to do so.

**TITLE IV
INSOLVENCY OF ENTITIES PURSUING INTERNATIONAL OPERATIONS**

**Chapter I
General provisions**

Article 40.- Definitions.

The following definitions shall apply to the present Title:

A) Center of main interests: the place where the debtor habitually and continuously exercises the management of its interests and which is ascertainable by third parties.

In the alternative, where the management is divided between more than one place of business, the center deemed to be of a principal nature for such purposes shall be as follows:

- (i) That which coincides with the registered office of the entity, any change of registered office in the course of the immediately preceding year being deemed ineffective.
- (ii) Should the place of business not coincide with the entity's registered office, if the entity itself has initiated the insolvency proceedings, the center of main interests shall be deemed to be:
 - a) that designated by the entity, unless proved otherwise; or
 - b) the registered office, if the insolvency proceedings were initiated by a creditor; or
 - c) in the event that more than one set of proceedings is initiated by more than one creditor, or by creditors and the debtor, the place designated in the earliest insolvency proceedings.

B) Control: control shall be understood as defined in article 28 hereof.

C) Entity: any legal person whatever its legal form, pursuing or benefiting from an economic activity, which may, if appropriate, undergo insolvency proceedings in accordance with the law applicable thereto.

D) Entity declared insolvent: entity undergoing insolvency proceedings.

E) Parent company: parent company shall be understood as defined in article 29 hereof.

F) Place of business: any place of operations in which an entity habitually and continuously pursues an economic activity using assets and human resources.

G) Group of entities: group of entities shall be understood as defined in article 27 hereof.

H) Applicable law: legislation of the country in which an entity's center of main interests is located.

I) Insolvency proceedings: collective proceedings entailing some form of judicial or administrative supervision, including of a provisional nature, initiated in accordance with

the insolvency legislation of the country in which the entity's center of main interests is located, and aimed at the reorganization and/or liquidation of the entity, as detailed in Annex 1.

- J)** Main proceedings: insolvency proceedings in accordance with the applicable law, initiated against the entity declared insolvent.
- K)** Secondary proceedings: insolvency proceedings initiated on an exceptional basis against a fixed place of business, concerning exclusively its assets and creditors, provided that main proceedings have been initiated.
- L)** Insolvency proceedings register: an official register kept by the State or the territory, accessible online at no cost and in two languages, which contains at least the basic information on each set of insolvency proceedings initiated in the said State or territory.
- M)** Court-appointed administrator: the person or body, including those temporarily appointed, authorized to oversee the reorganization or liquidation of the debtor's assets or affairs, in insolvency proceedings, as detailed in Annex 2.

Chapter II

Competent authorities in matters of insolvency, international effectiveness of decisions and international cooperation

Article 41.- *Authority competent to initiate insolvency proceedings.*

The authorities of the State or territory in which the center of main interests of the entity is located shall have sole and exclusive competence to initiate insolvency proceedings, and therefore to determine the opening, organization and closing of the said proceedings.

Article 42.- *Recognition of a single set of insolvency proceedings for the entity declared insolvent.*

1. Any insolvency proceedings initiated in a foreign country in accordance with the provisions of the previous article shall be recognized, independently of any appeal lodged in another State or territory, and shall be binding, producing the same effects as insolvency proceedings carried out under domestic law, in respect of all matters not expressly governed by the present law.
2. Should the entity have one or more places of business in various States or territories which are separate from the center of main interests of the entity, the provisions of article 41 hereof shall be applied, and any act contrary thereto shall be deemed null and void.
3. None of the previous provisions shall affect or impair the mandatory coordination and collaboration between competent authorities in the various States or territories or the work of the court-appointed administrator, the objective being to protect the interests of the creditors and preserve the assets of the entity declared insolvent in other States or territories. The competent authorities shall take action and provide any necessary assistance to the court-appointed administrator, as if the insolvency proceedings had been initiated in their jurisdiction, without prejudice to the provisions of Title IV of the OHADAC Model Law pertaining to private international law.

Article 43.- *Exceptional recognition of secondary proceedings for an entity declared insolvent.*

1. As an exceptional measure, based on a significant volume of assets or the amount of debt contracted by an entity declared insolvent through a fixed place of business located in a foreign State or territory, secondary proceedings may be initiated before the competent authorities of the State or territory in which the fixed place of business is located. The secondary proceedings may only be initiated where expressly and reasonably requested before the competent authorities in the country in which the center of main interests is located, and where authorized by those authorities, albeit not necessarily in a firm and final manner. The said proceedings may be initiated:
 - (i) by the court-appointed administrator of the entity declared insolvent before the competent authority of the State or territory in which the fixed place of business is located; or
 - (ii) by one or more creditors having entered into a contract with the entity declared insolvent through the fixed place of business, in which case the views of the court-appointed administrator, who is entitled to accept or reject the request of the creditors, shall be heard.
2. The competent authorities which initiated the secondary proceedings and their court-appointed administrator shall work in coordination and collaboration with the competent authorities of the State or territory in which the main proceedings were initiated, and with the court-appointed administrator of the entity declared insolvent, with the aim of conducting the secondary proceedings in coordination with the main proceedings and, in any event, for the benefit thereof. In particular, the closing of the secondary proceedings by means of a recovery plan, an arrangement with creditors, liquidation or any similar measure, shall constitute the most appropriate result in relation to the main proceedings. Consequently the views of the court-appointed administrator in the main proceedings shall, in any event, be heard and the said administrator shall be entitled, in accordance with the procedures provided for by the law applicable to secondary proceedings, to oppose or appeal any decision to close the proceedings that the administrator may regard as not being consonant with the interests of the main proceedings.

Article 44.- *Cooperation and communication between authorities.*

1. The opening of insolvency proceedings in a foreign country, in accordance with the provisions of article 41 hereof, shall produce the effects provided for by the applicable law, no additional formality being required, with effect from the date of the opening of the said proceedings, and without prejudice to the provisions of Title IV of the OHADAC Model Law pertaining to private international law.
2. The insolvency proceedings register shall be duly updated. The competent authorities at the various stages of the proceedings shall, in any event, indicate any information relating to the liquidation, recovery plan, arrangement with creditors or any similar measure they may intend to adopt. They shall also mention any relevant information concerning the rights of creditors in respect of such decisions, whether or not a liquidation, recovery plan,

arrangement with creditors or any similar measure was adopted, and whether or not any remedies have been exercised in respect of the decision in question. The basic information to be provided shall be: registered name of the debtor entity, competent authority, type of proceedings initiated, date of opening of the proceedings, contact details for the debtor company, identity of the court-appointed administrator, contact details for the court-appointed administrator, deadline and minimum requirements for the purposes of filing claims.

3. Should the said register not be created or where the updating thereof is suspended for a period of more than one month, the competent authorities which initiated the insolvency proceedings in accordance with the provisions of article 41 hereof, with the aim of protecting the creditors and the assets located in other States or territories, shall without delay notify the competent authorities of any other State or territory in which the debtor has a fixed place of business, or in which the creditors of the entity declared insolvent have their center of main interests, of the opening of the proceedings, so that such authorities may, where applicable, enter the relevant proceedings in their respective register.

Article 45.- *Rights and obligations of court-appointed administrators.*

1. The rights, duties and obligations of the court-appointed administrator who is appointed in the insolvency proceedings initiated in accordance with the provisions of article 41 hereof shall be those conferred on him by the applicable law, without any limitations other than those set out by mandatory or public policy rules.
2. Where the local law confers greater rights upon the court-appointed administrator, those rights shall be recognized, and the court-appointed administrator shall enjoy, for matters circumscribed to the insolvency proceedings, the same rights as a court-appointed administrator appointed in accordance with the local law.

Article 46.- *Foreign creditors' access to proceedings pursuant to the insolvency rules of another State or territory.*

Foreign creditors shall enjoy the same rights as national creditors with respect to the opening of insolvency proceedings and to their participation therein, without prejudice to the order of payment to creditors in pending proceedings, in accordance with the applicable rules on insolvency.

Chapter III **Rules applicable to international insolvency**

Article 47.- *Applicable law.*

1. Insolvency proceedings shall be governed by the applicable law without prejudice to the effects of such proceedings on contractual and extra-contractual obligations, assets, the recognition of foreign proceedings or the effects of such recognition, being distinguished from insolvency proceedings *per se*, which shall be governed by the law resulting from the application of the OHADAC Model Law pertaining to private international law.

Chapter IV
Insolvency proceedings concerning a group of international companies

Article 48.- *Authority competent to initiate insolvency proceedings and applicable law.*

The provisions of articles 41 and 47 hereof shall remain in full force and effect where an entity declared insolvent, even the parent company, is part of a group of companies.

Article 49.- *Recognition of more than one set of insolvency proceedings affecting each entity in a group of entities declared insolvent.*

1. Should a group of companies have entities in more than one State or territory, the authorities of the State in which the center of main interests of the entity to be declared insolvent is located, shall be competent to initiate insolvency proceedings in accordance with the applicable law. However, where an abuse of legal personality is determined in accordance with article 35 et seq. hereof, the parent company shall undergo a single set of insolvency proceedings, without prejudice to the exceptional recognition of secondary proceedings for the entity declared insolvent under article 43.
2. None of the foregoing provisions shall affect or impair the mandatory coordination and collaboration between competent authorities in the various States or territories, or the work of the court-appointed administrators, having regard to the protection of the interests of the creditors and the preservation of the assets of each of the entities declared insolvent which belong to the same group of entities.
3. In particular, the closing of secondary proceedings concerning an entity not deemed to be the parent company, by means of a recovery plan, arrangement between creditors, liquidation or any similar measure, shall give precedence to the interests of the parent entity and its group of entities. Consequently, the views of the decision-making body of the parent entity, or of its court-appointed administrator if it was declared insolvent, shall in any event be heard. They may also oppose or appeal, by using any remedies available under the law applicable to the proceedings concerning the entity distinct from the parent entity, any decision to close the proceedings which they may regard as not being best adapted to the interests of the entity declared insolvent, and as causing prejudice to the parent company or other entities in the group.

Chapter V
Public policy

Article 50.- *Public policy exceptions.*

None of the provisions of the present law shall prevent a competent court from refusing to adopt a measure governed thereby where such measure is manifestly incompatible with public policy.

TITLE V
TRANSITIONAL AND FINAL PROVISIONS

Article 51.- *Temporal scope of application.*

- 1 The present law shall apply to any international actions undertaken by companies and to any proceedings initiated subsequent to the date of its entry into force, without prejudice to any rights acquired under previously enacted legislation.
- 2 Any legal acts or actions provided for under the present law that may have been performed by commercial companies prior to its entry into force shall retain their legal effects and the previous law shall be applicable thereto. However, they shall henceforth be governed by the present law.
- 3 Any legal action that may have been dismissed by a court or authority owing to a lack of jurisdiction prior to the entry into force of the present law may be brought again if the jurisdiction in question is provided for by the present law, provided the claim in question may be validly raised.
- 4 Any applications for the recognition and enforcement of foreign decisions that were pending prior to the entry into force of the present law shall be governed by the latter in respect of the conditions for such recognition and enforcement.

Article 52.- *Priority clause.*

The application of any prior provisions that may be incompatible with the object of the present law shall be excluded.

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