Newsletter

Special issue on Labor law

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MAME ADAMA
GUEYE & PARTNERS

EXPERIENCE

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TO YOUR ACTIVITIES.

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EDITORIAL

Dear readers, we are pleased to share this special edition of our Newsletter dedicated to labor law.

The diversity of sources is one of the main characteristics of labor law, defined as the set of legal rules governing the relationship between an employer and an employee.

Its constant evolution has been marked by the influence of supranational, community, and national standards and their coexistence with its traditional legal framework (Labor Code and application texts, collective agreements, etc.).

Various legal texts have progressively enriched the legal framework of salaried work: OHADA uniform acts relating to company law, securities, collective procedures and enforcement, rules and regulations on personal data, ordinances and regulations about intellectual property, etc.

The corollary of this dynamic normative production is the growing complexity of issues related to labor law and the need for interdisciplinary teams of legal advisors and lawyers dedicated to this discipline to support better and inform clientele and readers with diverse needs.

The articles in this special edition, which align with this approach, should therefore be the first in a long series of contributions devoted to labor law.

We wish you pleasant reading of this new issue of our Newsletter and hope that the subjects treated will be helpful to you.

Author :

Me MAME ADAMA GUEYE

Managing Partner
Former President of the
Senegalese Bar Association

The protection of the worker's compensation

A worker's compensation is defined as all the benefits paid in cash and provided in kind by the employer as remuneration for the employee's services. To protect the worker, the Labor Code establishes a principle of non-discrimination in determining pay according to which, under equal conditions of work, qualification, and performance, the salary is equal for all workers, regardless of their origin, sex, age, and status.

Under Article L.118 of the Code, remuneration includes wages, salary incentives, vacation allowance, and bonuses. Indemnities and benefits of any kind, sums due for the termination of the employment contract, and damages are also components of the remuneration.

The provisions governing his protection are in the Labor Code, the Code of Civil Procedure, the OHADA Uniform Act Organizing Simplified Collection Procedures and Enforcement Measures, and the OHADA Uniform Act Organizing Securities.

From this corpus results a reinforced protection expressed by :

- the establishment of privileges and guarantees (I) and
- the framework for salary deductions (II).

I. Establishment of privileges and guarantees

A. A privileged and secure claim

Over all other privileges, general or special. It is a «super privilege» exercised over the employer's movable and immovable property. Indeed, articles 225 and 226 of the Uniform Act Organizing Securities, which organize the order of price distribution following a garnishment, classify remuneration as a superprivileged claim.

Therefore, in the event of bankruptcy or judicial liquidation of the employer, Article L.121 of the Labor Code provides that within ten (10) days of the bankruptcy or judicial liquidation judgment, the receiver or liquidator must pay the worker's claims by simple order of the bankruptcy judge.

The protection is further strengthened if the funds prove insufficient. In this case, Article L.121 of the Labor Code stipulates that claims must be paid from the first cash inflow before any other claim. This is a genuine guarantee of the payment of the worker's claim.

This guarantee also extends to benefits in kind. Thus, a worker housed by the employer before the judicial liquidation or bankruptcy, retains his right to housing until the date of payment of his last claim. In the case of a displaced worker, this right continues until the date of the means of transport made available to him to return to his usual residence.

Finally, with the same aim of safeguarding the rights relating to remuneration, the Labor Code requires the employer to comply with certain formalities.

Therefore, in the event of a dispute concerning the payment of remuneration, non-payment is irrefutably presumed if the employer is unable to produce the register of employees payments, duly signed by the worker or witnesses under the disputed mentions, or the duplicate signed under the same conditions, of the pay slip relating to the disputed payment or a certification from a banking or postal institution attesting to the worker's payment.

B. An appeal for exess power

LThe worker's action for payment of his remuneration and any other sum owed to him by the employer shall be barred after five (05) years.

The same applies to actions for providing benefits in kind and/or their reimbursement. The limitation period runs from the date the salary is due. It is suspended when there is a stopped account, a schedule, an obligation, a legal summons that has not expired or proceedings before the labor courts.

When the statute of limitations has expired, the employee to whom the statute of limitations is opposed may, however, refer the oath to the employer or his representative as to whether the wages claimed have been paid. If the oath is not taken, or if it is acknowledged, even implicitly, that the sums or benefits claimed have not been paid, provided, or remitted, the limitation period is 10 years. The same applies in the event of an interruption of the limitation period.

II. Control of payroll deductions

The Labor Code distinguishes three types of wage deductions, namely :

- legal deductions relating to compulsory contributions, deposits that may be provided for in collective agreements and individual employment contracts, and the reimbursement of accommodation and food expenses provided for in articles L.106 and L.107 of the Labor Code ;
- withholdings subject to enforcement ;
- deductions by the offset of receivables.

A. Legal deductions

the employer must deduct the employees' contributions to the mandatory or authorized social security institutions from their wages. Under the same conditions, the employer must deduct from the wages the amount of the worker's contribution to his union at the written request of the worker.

The ceiling for legal deductions depends on the size of the deduction made. For example, the ceiling is 63,000 CFA francs for family benefits and 250,000 CFA francs for the Health Insurance Company. Any other deduction is prohibited. The provisions of a collective agreement or an employment contract derogating from this principle are null and void.

The sums withheld from the worker in contravention of this principle shall bear interest for his benefit at the legal rate from the date he should have claimed them until the statute of limitations expires. The statute of limitations is suspended for the duration of the contract.

B. Deductions made in the context of enforcement proceedings

The deductions related to enforcement are those resulting from the employee's debt to the employer or a third-party creditor. The procedure applicable in this matter is laid down in the Uniform Act organizing simplified collection procedures and enforcement measures and the Code of Civil Procedure.

1. Deductions subject to the procedure for garnishment of remuneration

Sometimes, the employee may be indebted to the employer or a third party. In the first case, the Labor Code limits the amount of loans or advances the employer grants to six times the assignable portion of the salary.

Faced with the default of the debtor employee, his creditors may proceed to a garnishment of remuneration to obtain payment of their claims. Indeed, the Uniform Act relating to enforcement measures provides that any creditor in possession of a writ of execution recording a liquid and due debt may proceed to the garnishment of the remuneration due by an employer to his debtor.

In Senegal, the total amount of money garnished or voluntarily transferred cannot exceed the following limits set in Article 381 of the Code of Civil Procedure. Although this article has been repealed, its provisions continue to be used, in practice, because of the legal vacuum caused by the repeal.

The basis for the calculation of the deducted part of the remuneration is the total gross salary or wages, including all incentives, minus :

- taxes and statutory levies withheld at source ;
- expense allowances ;
- benefits, surcharges, and supplements for family responsibilities ;
- compensation declared exempt from garnishment by the rules and regulations of each State Party.

➢ **The remuneration garnishment procedure**

Before the garnishment, an attempt at amicable mediation shall be made. The request for mediation shall be made by petition addressed to the competent court by the creditor. A report of the appearance of the parties shall be drawn up at the end of the mediation. In the event of mediation. The conditions of the arrangement shall be mentioned to end the proceedings. In the absence of mediation, the garnishment shall be carried out after the president has verified the amount of the claim in principle, interest and costs and, if need be, resolved the disputes raised by the debtor.

Within a period of eight (08) days following the decision of non-mediation or eight (08) days following the expiry of the time limits for an appeal, if a decision has been rendered, the court clerk shall notify the act of garnishment to the employer by registered letter with acknowledgement of receipt or by any means in writing. The notification of the act of garnishment renders the seized portion of the wages unavailable. Therefore, the employer must send the sum withheld from the garnishee's wages every month to the clerk's office or the organization within the seizable portion.

The garnishee shall have fifteen (15) days from notification of the decision to lodge an opposition using a declaration to the registrar. The decision not opposed within fifteen (15) days shall become final. It is executed at the request of the most diligent party on a copy delivered by the clerk's office and bearing the executory formula.

It should be noted that any creditor with a writ of execution may, without prior attempt at mediation, intervene in a procedure for garnishment of earnings in progress to participate in the distribution of the sums seized. This intervention shall be made by petition delivered or addressed to the competent court against receipt.

➢ **Remittance of funds and distribution**

Where there is only one distraining creditor, the court registrar shall pay the latter or his authorized agent with special power of attorney the amount of the recovery made as soon as he has received it from the employer. Conversely, where there is more than one creditor, the latter shall come into concurrence subject to legitimate causes of preference.

2. Deductions made in connection with a wage assignment

Sometimes a worker transfers their wages and salaries. Whatever the amount, the transfer is only possible by the declaration of the transferor in person, at the clerk's office of the court of his residence or the place where he lives.

The statement must indicate the amount and cause of the debt for which the assignment is made and the amount of the withholding to be made at each payment of the remuneration.

Considering the deductions already made from the transferor's wages, the competent court shall verify that the transfer remains within the limits of the seizable portion. Then, the clerk of the court mentions the declaration on the register of assignment and garnishment of work remunerations and notifies the employer stating :

- the monthly salary of the transferor,
- the amount of the assignable portion and the deductions made for each salary regarding the transfer granted.

The declaration is given or notified to the transferee. The latter need only produce a copy of the transfer statement to have the amount of the deductions paid directly by the employer. In case of refusal, the employer may be forced to pay the sums regularly transferred by garnishment under the conditions provided by Article 189 of the Uniform Act on the organization of simplified recovery and enforcement procedures.

C. Compensation

The set-off of claims carried out under the conditions provided in Article 215 of the Code of Civil and Commercial Obligations and Article L.130 of the Labor Code is also one of the possibilities of deductions from wages, which are very well defined.

Indeed, it can only be done by a court decision in case of termination of the employment contract attributable to the employee or as a consequence of his gross negligence. To do so, the two claims must be fungible, liquid and payable.

Author :

FATIMATA SY
Legal Counsel
fsy@magp.sn

Protection of the employee's Personal Data

Personal data are defined by law n°2008-12 of January 25, 2008, on the Protection of personal data as : *« any information relating to an identified or identifiable natural person, directly or indirectly, by reference to an identification number or to one or more factors specific to their physical, physiological, genetic, mental,cultural,socialoreconomicidentity. »*.

By the aforementioned law, any processing of personal data, in any form whatsoever, must respect individuals' fundamental rights and freedoms.

Within the framework of employment relations, the employer, being called upon to collect employees' personal data, must comply with all legal requirements.

I. The general obligations of the employer

Under the regulations in force, the employer is required, before any collection of personal data, to obtain the consent of the employee and to make a declaration or request for authorization (in the case of collection of so-called sensitive data, interconnection or transfer of data to a foreign country) to the Personal Data Protection Commission (CDP). The aforementioned commission is an independent administrative authority (AAI) instituted by law no. 2008-12 of January 25, 2008, on personal data protection.

In addition, the employer is subject to the following obligations :

- **Informing workers :** the obligation of information concerns particularly the identity of the employer, the purposes of the processing for which data are intended, the categories of data concerned, and the length of time the data are kept ;

- **respect for the employee's right to object :** the employee has the right to object to the collection of their data ;

- **respect for the right to rectification and deletion of data :** the employer must, at the employee's request, rectify, complete, update, block or delete personal data concerning them that are inaccurate, incomplete, equivocal, outdated, or whose collection, use, communication or storage is prohibited ;

- **confidentiality and security of data :** the employer must ensure the confidentiality, availability and accuracy of data collected to guarantee the appropriate protection of the data processed. It is also required to take all precautions appropriate to the nature of the data and, mainly, to prevent them from being distorted, damaged, or accessed by unauthorized third parties ;

- **Retention of personal data :** Personal data may only be kept for as long as necessary for historical, statistical, or scientific purposes.

Once the retention period for personal data has expired, the data must be destroyed, erased, deleted, or archived under the conditions in the applicable legislation on archiving administrative documents.

The CDP ensures that data controllers comply with the above obligations.

Its mission also extends to using video surveillance systems in the workplace and the geolocation of company vehicles.

II. Supervision of video surveillance and vehicle geolocation systems

With the development of new technologies, video surveillance and geolocation systems are increasingly used in the workplace.

The installation of such systems must, however, respect employees' fundamental rights and freedoms.

A. Video surveillance systems

The CDP responsible for ensuring compliance with Law No. 2008-12 and its implementing regulations has defined the rules applicable to video surveillance systems in its deliberation No. 2016- 00238 of November 11, 2016.

Thus, the installation and operation of video surveillance cameras in the workplace must comply with the following conditions :

- prior declaration to the CDP to which is attached a plan of the installation of the cameras ;
- prior information of employees and representative bodies ;
- the system should not be used for deliberate and systematic surveillance of employees in the workplace. The cameras must therefore not film employees at their workstations for permanent monitoring ;
- cameras must not be installed in the areas made available to employees for relaxation purposes, the areas reserved for staff representatives and the exits to these areas.

B. Vehicle geolocalisation systems

Deliberation n°2020-00491/CDP of October 29, 2020, governs the processing of personal data related to the operation of vehicle geolocation systems.

The use of a geolocation system for company and service vehicles must have the following objectives :

- management of the vehicle fleet ;
- personal and vehicle safety ;
- real-time monitoring and reporting of trips and itineraries ;
- control of the respect of the legal or regulatory obligation imposing the implementation of a geolocation device because of the type of transport or the nature of the transported goods ;
- control of the respect of vehicle use rules defined by the company.

Moreover, the geolocation system may monitor working time as an ancillary purpose when this monitoring cannot be carried out by any other means, subject in particular to not collecting or processing personal data.

It applies in particular to the geolocation of company and service vehicles of public and private companies.

Thus, per the aforementioned deliberation, vehicle geolocation systems must be declared to the CDP before implementation.

In addition, geolocation systems involving sensitive data or interconnected with other systems and resulting in the transfer of data to foreign countries must be subject to an application for authorization.

III. Sanctions faced by the employer

The CDP ensures compliance with the rules on the protection of personal data. Thus, any violation of the rights and freedoms of workers may, under certain conditions, be subject to sanctions (administrative or financial).

In addition, regarding criminal sanctions, Law 2008-12 refers to the Penal Code, particularly Articles 431-12 and following.

A. Administrative sanctions

LCompliance with data controllers is the main objective of the Data Protection Commission (DPC).

Indeed, the sanctions pronounced by the CDP always follow an unsuccessful formal notice.

Thus, under Article 29 of Law No. 2008-12, the Commission may pronounce the following measures :

1. a warning to the data controller who does not comply with the obligations arising from the law.
2. a formal notice to cease the violations concerned within the time limit it sets.
3. the formal notice specifies the observed breach (s) and sets the deadline by which the data controller is obliged to have ceased the observed breach (s).

The CDP, in several decisions, has called to order commercial companies responsible for the processing.

In its deliberation n°2015-00165 of November 6, 2015, the CDP ruled on a complaint related to a request for an explanation concerning the use of *« social networks during working hours, »* followed by dismissal for *« use of the work computer for purposes unrelated to thecompany's business »*.

In this case, the CDP considered the dismissal unfair for the following reasons :

- **Breach of the principle of lawfulness and fairness :** the CDP considers that collecting purely private messages constitutes a severe and constant breach of the principle of lawfulness and fairness of processing personal data in application of article 34 of the law.

- **Violation of the principle of consent and its exceptions :** the employer can only access the employee's private email to protect an overriding interest and in the presence of a bailiff or the person concerned. According to the CDP, this formality was purely disregarded by the respondent.

- **Failure to comply with the principle of proportionality :** Under Article 35 of law n°2008 12, personal data collected *«must be adequate, relevant and not excessive concerning the purposes for which theyare collected are collected and further processed »*. The CDP considered that this collection, in its duration and content, is excessive to justify the employee's use of social networks and private messaging during working hours and to safeguard the company's interest. It deduced that the respondent company had violated the principle of proportionality.

- **Violation of the employee's right to prior information :** lthe CDP considered the employer knowingly violated the right to prior knowledge of its employees. Indeed, the latter must be informed, particularly of the system's existence, its purpose, the time the connection data is kept or saved, and the modalities to exercise their rights (access, deletion or opposition).

The Commission may also impose a financial penalty on any controller who has not complied with his obligations or taken appropriate emergency measures.

B. Other sanctions and measures

- **Monetary Penalties :**

If the data controller does not comply with the formal notice sent to him, the CDP may impose the following sanctions on him after an adversarial procedure :

1. a provisional withdrawal of the authorization granted for a period of three (3) months, at the end of which the withdrawal becomes final ;
2. a monetary fine of one (1) million to one hundred (100) million CFA francs.

Since its inception, the CDP has issued monetary penalties in only one case.

This sanction was imposed against a commercial company in the context of processing personal data relating to the video surveillance system.

Indeed, by decision N°2018-0018C/CDP of October 26, 2018, the CDP had formally notified the company to stop filming employees in their workstations permanently.

A financial penalty of 5,000,000 CFA francs was imposed because Burotic Diffusion failed to comply with the formal notice.

During the on-site verification mission, the CDP control officers noticed four (04) video surveillance cameras were still operational and were filming employees in their work station permanently.

- **Emergency Measures :**

In case of urgency, when the implementation of a processing operation or the use of personal data leads to a violation of rights and freedoms, the CDP, after an adversarial procedure, may decide :

1. to interrupt the implementation of processing for a maximum of three months (3) months ;
2. to lock certain personal data processed for a maximum period of 3 months ;
3. lto temporarily or permanently prohibit the processing contrary to the provisions of this Act.

Sanctions and decisions taken by the CDP may be appealed on the grounds of abuse of power

before the administrative chamber of the Supreme Court of Senegal.

- **Criminal Sanctions :**

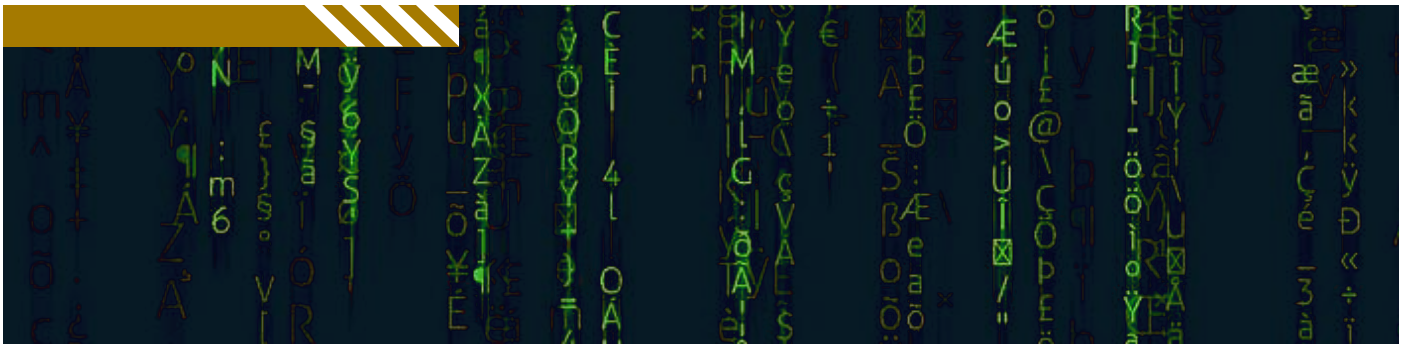
The Senegalese penal code provides for penal sanctions in the following cases of breach :

1. **General offenses against computerized data :** imprisonment for 01 to 05 years and a fine of 5,000,000 CFA francs to 10,000,000 CFA francs or one of these penalties (Articles 431-12 and 431-13 of the Penal Code);
2. **Specific violations of the individual's rights concerning personal data processing:** imprisonment for 01 to 07 years and a fine of 500,000 to 10,000,000 CFA francs or one of these penalties (Articles 431-14 to 431-27 of the Criminal Code). In addition, it should be noted that obstructing the action of the personal data commission is punishable by imprisonment of 06 months to 02 years and a fine of 200,000 CFA francs to 1,000,000 CFA francs (Article 431-28 of the Penal Code) ;
3. **Computer offenses :** a computer offense is a fraudulent introduction, deletion or fabrication of a set of digitized data by the fraudulent introduction, omission or deletion o f computerized data stored, processed, or transmitted by a computer system, resulting in counterfeit data, with the intention that they are taken into account or used for legal purposes as if they were original. Article 431-29 of the Code provides for imprisonment of between one and five years and a fine of between 5,000,000 CFA francs and 10,000,000 CFA francs, or both.

Authors :

BOUBACAR GUEYE
Legal Counsel
bgueye@magp.sn

NDEYE PENDA GUEYE
Legal Counsel
npgueye@magp.sn



The ownership of creations made within the framework of working relationships

Intellectual property is a branch of law that groups all the rules applied to human creations. Some people talk about the appropriation by a Man of his creative genius.

It comprises two branches: industrial property and literary and artistic property. Literary and artistic property includes copyright and related rights.

Industrial property includes patents, utility models, trademarks and service marks, industrial designs, trade names, geographical indications, plant variety ownership, protection against unfair competition and layout designs for integrated circuits.

Because of their economic value, these rights can be the source of ownership disputes.

These disputes may arise in the relationship between employer and employee.

Indeed, it is increasingly common for employees to make work and inventions part of their professional activity.

While the texts relating to intellectual property in Senegal deal specifically with the legal regime of ownership of creations by civil servants and employees, they are silent on the situation of creations by trainees.

Even though the applicable texts expressly provide for the legal regime of employee creations, practically, this can be unintelligible for any layperson.

Mainly in light of the revised Banana Agreement of March 2, 1977, of the African Intellectual Property Organization (OAPI) and

Of law n°2008-09 of January 25, 2008, on copyright and related rights in Senegal, we will first analyze the ownership of industrial creations (I). We will examine the ownership of literary and artistic creations (II). Finally, we will focus our attention on the particular situation of trainees' creations (III).

I. The ownership of industrial creations

The industrial creations that can be carried out in an employment relationship are limited (A) and are subject to a particular legal regime (B).

A. The typology of industrial creations in the context of an employment contract

Three types of industrial creations can be made within the framework of an employment relationship. They are inventions, utility models and industrial designs.

The Bangui Agreement governs intellectual property in Senegal and the sixteen other OAPI member states. Its provisions regulate and protect industrial property, especially in the context of employment.

The provisions relating to inventions, utility models and industrial designs are set out in Annexes I, II and IV, respectively, of the Bangui Agreement.

The latter has defined an identical legal regime for these three components of industrial property.

Thus, an invention is defined in Article 1 of Annex I as : *« an idea which allows in practice the solution of a particular problem in the field of technology »*.

The Bangui Agreement excludes discoveries, scientific theories, and mathematical methods in defining the invention. It also excludes plans, principles or methods for doing business, performing purely intellectual actions or playing, mere presentations of information, computer programs, creations of an exclusively ornamental nature, literary, architectural and artistic works or any other

aesthetic creation.

Tobe patentable, theinvention must be new, involve an inventivestep, and besusceptible to industrial application.

The utility model is defined in Article 1 of Annex II as : *« working instruments or objects intended to be used or parts of such instruments or objects in so far as they are useful for the work or use for which they are intended under a new configuration, arrangement or device and are susceptible of industrial application »*.

The legislator excludes in his definition all theories, scientific discoveries, mathematical methods and aesthetic creations, presentations of information and all plans, principles, and methods in the exercise of intellectual activity.

Finally, as far as industrial designs are concerned, Article 1 of Annex IV of the same agreement provides a definition in the following terms : *« A design shall be considered to be any assembly of lines or colors, and a model shall be deemed to be any plastic shape, whether or not associated with lines or colors, provided that such assembly or shape gives a special appearance to an industrial or craft product. »*.

Thus, the primacy of the invention patent over other industrial creations can be observed insofar as if a creation corresponds both in its definition to an invention and a design, and it will be subject to the provisions of Annex I relating to the invention patent.

B. The legal regime of industrial creations within the framework of contract

The legal regime of industrial creations of employees is set out in the Bangui Agreement, particularly in its annexes I, II and IV. This text devotes similar legal authorities to inventions, utility models and industrial designs.

- **Ownership attributed to the employer**

The employer is granted ownership of the creation in cases where the inventions, utility models, and industrial designs were made by the employee required by his employment contract to perform an inventive mission corresponding to his actual duties.

The latter also can obtain ownership of the creation made by the employee who is not bound by his employment contract to exercise an inventive activity. This is the case when the employee creates by using techniques or means specific to the company or data provided by it. In agreement with the employee, the employer must pay a fair price to the employee. The competent court determines this fair price in reasonable disagreement between the parties.

In this case, the employer is considered the author of the creation as soon as he has the role of a project manager or provides the instruments to facilitate its realization.

- **Ownership attributed to the employee**

The employee can be attributed ownership of the invention patent if he invents it using the techniques or means specific to the company or data it provides. This attribution is possible when the employee is not obliged by his employment contract to exercise an inventive activity.

Furthermore, the ownership of the creation reverts to the employee if the employer decides to waive his right in the context of inventions made by the employee in the performance of an employment contract including an inventive mission corresponding to his actual duties.

Apart from these cases, all other inventions the employee's creativity makes belong to him.

The texts in force have more or less defined the ownership of the employee's creations by attributing to him the property in the above-mentioned cases or, failing that, by granting him a fair remuneration.

The protection conferred on industrial designs by the Bangui Agreement does not exclude any rights granted by literary and artistic property.

The ownership of the creations places various obligations on the owner.

- **Obligations relating to the protection of industrial creations**

The obligations relating to protecting industrial creations are legal under the Bangui Agreement.

The employee who creates a work must inform his employer who will acknowledge receipt before its

realization.

For better protection of the creation, the parties to the employment contract must provide each other with all helpful information on the creation in question. To ensure this creation, the employer and the employee must avoid any disclosure that could compromise, in whole or in part, the exercise of the rights conferred on the owner of the creation.

In the event of an agreement between the employee and his employer, it must be recorded in writing; otherwise it will be null and void.

The creation confers on its owner exploitation rights.

II. The ownership of literaryand artistic creations

Literary and artistic creations in the context of the employment relationship are subject to copyright (A) and its legal regime (B).

A. Literary and artistic works and copyright

Before understanding the ownership of literary and artistic creations, one must first understand the notion of work.

A work is defined in Annex VII of the Bangui Agreement as any original intellectual, literary, or artistic creation. A work is the totality of a writer's or an artist's achievements. It is the expression of a conception.

The author of a work is the natural person who created it. The person who creates the work enjoys the rights to his creation.

The literary or artistic work may take several forms within the meaning of Article 4 of Annex VII of the Bangui Agreement. It may take the form :

- of works expressed in writing, including computer programs ;
- of lectures, speeches, sermons, and other works made of words and expressed orally ;
- of musical works whether they include accompanying texts ;
- of dramatic and dramatico-musical works ;
- of choreographic works and pantomimes ;
- of audiovisual works ;
- of fine arts, drawings, paintings, sculptures, engravings and lithographs ;
- of architectural works ;
- of photographic works ;
- of works of applied arts.

Regarding the originality of the work, it should be noted that the works of the mind can benefit from the protection only if they are original, under article 7 of law n°2008-09 of January 25, 2008.

A work expresses the author's personality and is characterized by its novelty, uniqueness and personal character. To demonstrate the originality of a work, it must be entirely made by the hand of the artist or its author without any other intervention. The form of the work must be guided by its creator's personal choices and discourse. Originality can be assimilated into the imprint of the author's personality. It is, therefore, the mark of the author's sensitivity, perception of a subject, and choices that have not been imposed on him.

Article 10 of Law No. 2008-09 states : *« The protection of the right provided by this law does not extend to ideas, procedures, methods of operation or mathematical concepts as such. »*.

In the same sense, Article11 oft he same law states, : *« Lhe protection of copyright provided for in this law does not extend to mere information, particularly to the news of the day »*.

B. The legal regime of literary and artistic works in the context of the employment contract

The ownership of a work may seem evident at first glance, but it is also uncertain when the author does not produce it on his own account.

In this context, law n°2008-09 of January 25, 2008, on copyright and related rights in Senegal, helps to resolve the difficulties that authors may encounter in protecting their rights.

The purpose of this law is to protect the author and his works. Moreover, its first article entitled : "Nature of copyright" states : *« The author of a workof the mind enjoys an exclusive intangible property right on this workand opposes to all »*.

This law also provides a clear and intelligible legal regime for the ownership of works in an employment relationship.

- **Who owns the work and under**

what conditions ?

It is in Title 3, Chapter 2, Section 1 of law n°2008-09 that the legislator deals with the employee author of the work. Indeed, article 17 of the law states that : *« the existence of an employment contract does not imply any derogation to the enjoyment of the copyright. »*.

Autrement dit, l'existence d'un contrat de travail n'affecte aucunement le droit d'auteur du salarié. Dans le cadre du contrat de travail, le salarié reste titulaire du droit d'auteur.

In other words, the existence of an employment contract does not affect the employee's copyright. Within the framework of the employment contract, the employee remains the owner of the copyright.

Article 18 of the law establishes the principle of the presumption of transfer of the economic rights of the work to the employer.

In an employment contract, the economic rights in the employee's work are transferred to the employer. In return, the employer must pay a remuneration distinct from the salary to the employee author to benefit from the right to exploit the economic rights related to the work. Without an agreement between the parties, a competent court will determine the amount of this remuneration.

Ultimately, copyright is the author's property even if he is bound by an employment contract, whereas the economic rights relating to the work are transferable. However, the modalities of ownership may vary in the case of a collaborative effort.

- **Ownership of collective works**

Law n°2008-09 provides a specific regime for collaborative works. They are defined by this exact text as the work of two or more authors, regardless of whether this work is an indivisible whole or consists of parts with an autonomous creative character.

Consequently, in this case, this ownership right is not individual but collective, with each co-author holding rights to the works.

As article 24 of the law specified, the economic and moral rights of the work are undivided between all the co-authors. In case of disagreement on exercising these rights, the competent judge decides.

Where there is an infringement of the property rights or moral rights of a collective work, each of the co-authors will be free to claim compensation for their participation. In collaborative work, if the personal contribution of a co-author is identifiable, he will have the opportunity to exploit it as he sees fit separately from the other co-authors.

III. The situation of the trainees creations

Before analyzing the legal regime of the trainee's creations (A), we will study the status of the trainee in Senegal (B).

A. The statuts of trainee in Senegal

In Senegal, the intern's status is mainly governed by the revised law n° 97-17 of December 1, 1997, on the Labor Code and decree n° 2015 - 04 of February 12, 2015, setting the rules applicable to the internship contract.

A trainee is a person to whom a company undertakes to ensure the acquisition of professional experience and skills to facilitate their access to a job and integration into the professional world.

This person must be at least sixteen years old and hold the following:

- a diploma of general middle or high school education ;
- a vocational and technical training diploma or professional title ;
- a higher education diploma ;

Articles 76 and 76 bis of the Labor Code set out five different types of internship contracts, including :

- **the advanced training contract :** which is a contract under which a worker or at the end of an amendment to this contract is subsequently required to undertake advanced training ;

- **the incubation internship contract :** which is a contract by which the host company prepares the trainee to carry out a professional activity as an entrepreneur using coaching, assistance and sponsorship ;

- **the adaptation internship contract :** which is a contract by which the host company ensures that the trainee acquires practical experience related to their training ;

- **the pre-hiring internship contract :** which is a contract by which the company takes on the intern intending to hire them permanently at the end of the internship ;

- **the requalification internship contract :** is a contract by which the host company provides a young graduate trained for a given job with an additional qualification enabling them to practice another job ;

The various internship agreements, except the development and educational contracts, are subject to a specific legal regime set out in Decree No. 2015 – 04 of February 12, 2015, setting the rules applicable to the internship.

B. The legal regime for the creation of trainees

Neither the Bangui Agreement nor law n°2008-09 of January 25, 2008, on copyright and related rights, expressly informs on the legal situation of trainees' works. Yet, trainees participate actively in the creative activity of the company.

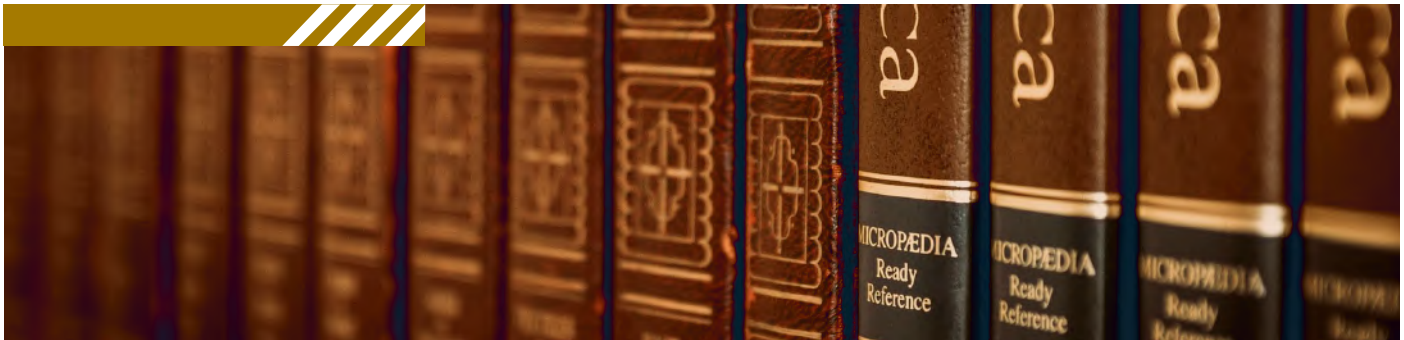
In any event, two approaches are necessary for the courts, tribunals, as well as community and Senegalese legislators. The first would be to equate the trainee with the employee. Indeed, although these statuses are different, both carry out their activities under contract and the subordination of the employer in return for remuneration (salary in the case of the employee and training allowance in the case of the trainee).

The second would be legislating on the ownership of trainees' creations clearly. This is apparently the approach adopted by France with Ordinance No. 2021-1658 of December 15, 2021, on the devolution of intellectual property rights on assets obtained by authors of software or inventors who are not employees or public servants hosted by a legal entity carrying out research.

Authors :

STYLAIN GOMA
Legal Counsel
sngoma@magp.sn

NÉNÉ SENE
Legal Counsel
nsene@magp.sn



Free allocation of shares to employees

Inspired by Anglo-Saxon practices, the free allocation of shares to employees (or AGA) can be defined as the operation whereby a company gives its shares to its employees or managers. It is a complementary compensation mechanism that aims to motivate and retain certain employees.

The Revised Uniform Act Relating to the Law on Commercial Companies and Economic Interest Groups (AUSCGIE), dated January 30, 201,4, was an opportunity for the OHADA legislator to enshrine the distribution of free shares to members of the company's salaried personnel or certain groups.

The free allocation of shares is governed by Articles 626-1 to 626-6 of the Uniform Act relating to the law of commercial companies and economic interest groups.

Therefore, the free allocation of shares is an increasingly attractive alternative to stock option plans. Indeed, whereas options are only of interest to the beneficiary if the share price exceeds the price initially foreseen for the exercise of the options, free share allocations make it possible to reap a gain, even if the share price has fallen since the allocation.

The free allocation of shares is subject to certain formalities and specific procedures.

It would therefore be appropriate to consider, on the one hand, the principles applicable to the grant of free shares (I) and, on the other hand, the procedure and terms of the offering of free shares (II).

I. Principles applicable to the granting of free shares

The free allocation of shares may benefit both employees and managers; it is specified that the beneficiaries may not hold more than 10% of the capital before and after the grant[2].

When certain conditions are met, free shares may be granted to employees or managers.

The company that allocates the shares must either increase its capital or purchase its shares for distribution.

The acquisition of shares in the company may not result in a reduction of the shareholders' equity to an amount lower than the capital plus non-distributable reserves[4].

II. The procedure and terms of the free share allocation

Power of authorization: Article 626-1 of the Uniform Act expressly and exclusively gives the extraordinary general meeting (**EGM)** the ability to authorize the free allocation of shares. It follows from this provision that in all cases, EGM must decide on the report of the managing director's board of directors (BOD), as the case may be, and on the special notice of the auditor (CAC)[5].

Quorum: the shareholders present or represented must own **1/2** of the shares on the first call; **1/4** on the second call. No quorum is set on the third call.

Majority: the EGM rules by a **2/3** majority.

The ordinary shareholders' meeting of the company that directly or indirectly controls most of the shares granted free of charge is informed by the conditions outlined in part outlined in the revised AU[6].

Authorization is given to the management bodies **(Board of Directors or Managing Director)** within a period fixed by the EGM, which can be up to 36 months.

The extraordinary general meeting decides on the beneficiaries in a very general way. Therefore, it may be up to the management bodies to

determine which persons are concerned.

The EGM must determine whether the shares to be granted free of charge will be existing shares, shares to be issued or preference shares excluding composite securities [7].

Suppose the grant concerns shares to be issued. In that case, the authorization of the EGM entails ipso facto, in favor of the beneficiaries, the waiver by the shareholders of their preferential subscription rights (DPS)[8].

The corresponding capital increase is definitively affected by the effective allocation of the shares to the beneficiaries.

Bénéficiaires de l'attribution gratuite d'actions : Under the provisions of Articles **626-1 and 626-1 2**, these are employees or a group of employees and company officers, respectively. Thus, the chairperson of the board of directors, the chief executive officer, the deputy chief executive officer, the managing director and the deputy managing director may be granted free shares. Therefore, the AGA is a legal tool for reconciling preferential access to capital for employees and corporate officers.

Without exceeding 10% of the share capital, the EGM must set the maximum percentage of the share capital that can be allocated free of charge.

An analysis of a contrario of article 626-1 2 1 makes it clear that employees and directors, each holding more than 10% of the capital are not entitled to the free allocation of shares. Therefore, the free distribution of shares only enables them to each hold up to 10% of the capital. In companies whose shares are not listed on a stock exchange, the articles of association may provide for a higher percentage, which may be at most 20% of the share capital.

Extension of employee beneficiaries : Other groups of employees may benefit from free share grants. This applies to employees of companies or economic interest groups (directly or indirectly controlling the company granting the shares or subject to the control of the latter or having a shareholding of

50% in the latter) whose percentages of capital or voting rights are consistent with those indicated in this text[9].

The vesting period of the shares: The free allocation of shares is acquired at the end of a period set by the extraordinary general meeting, which may be at most two (02) years. However, it may provide for the final allocation of the shares before the end of the vesting period if the beneficiary is disabled and unable to exercise any profession.

The rights resulting from the free allocation of shares are non-transferable until the end of the vesting period.

In the event of the beneficiary's death, his heirs may request the allocation of the shares within six (06) months from the date of death. These shares are freely transferable.

The share retention period : The beneficiaries of the free allocation of shares must keep all or part of the free shares allocated for a period set by the EGM. This period, which may not exceed two (02) years, runs from the final allocation of the shares. The beneficiary of free shares is a singular owner. Indeed, his right does not automatically grant him all the effects of the absus ; he is struck with inalienability[10.] However, the shares are freely transferable in the event of disability of the beneficiaries who cannot exercise any profession.

Suppose the Extraordinary General Meeting has set a vesting period of at least four (4) years for all or part of the shares granted. In that case, it may reduce or increase the period of the obligation to retain these shares.

Financing of the free allocation of shares : According to article 640-1 of the Uniform Act, for a free allocation of shares, a compulsory deduction is made, up to the amount of the shares to be allocated, from the share of the profits or the reserves, except for the legal reserve.

The sums deducted from the profits are placed in a reserve account until the final allocation of these shares, which only takes place after the amount of these shares has been reached. In the event of an issue, the Board of Directors or the Managing Director 19 (CA), as the case may be, is empowered to make the necessary amendments to the statutory clauses insofar as these amendments correspond materially to the operation results.

Authors :

MASSAR GAYE
Trainee lawyer
mgaye@magp.sn

ZAKARIA TANDIAN
Trainee

[1]used by companies wishing to offer their managers and employees the possibility of subscribing to or purchasing shares at the endof acertain periodat a preferential price under specified conditions.

[2]Article 626-1 2 1AUSCGIE

[3]This expression is preferred to that of «redemption of shares» because, as some authors point out, the assimilation is false in that the issue is assimilated to a sale

[4]Art 640 infine AUSCGIE

[5]Article 626-4 AUSCGIE

[6]Article 626-5 AUSCGIE

[7]Article 822 AUSCGIE: Compound securities are «securities» (subject as such to the common law on securities), but giving access to the capital or giving the right to the allocation of debt securities

[8]Article 573AUSCGIE

[9] Article 626-2 AUSCGIE : Shares may be allocated under the same conditions as those mentioned in articles 626-1 to 626-1-3 above:

1°) Or for the benefit of employees of companies or economic interest groups of which at least ten percent (10%) of the capital or voting rights are held, directly or indirectly, by the company that grants the shares ;

2°) Or to the benefit of the employees of companies or economic interest groups holding, directly or indirectly, at least ten percent (10%) of the capital or voting rights of the company that grants the shares ;

3°) Or to the benefit of salaried employees of companies or economic interest groups of which at least fifty percent (50%) of the capital or voting rights are held, directly or indirectly, by a company which itself owns, directly or indirectly, at leastfifty percent (50%) of the capital of the company which allocates the shares.

Shares not admitted to trading on a stock exchange may only be allocated under the above conditions to the company's employees making the allocation or to those mentioned in 1°.

Deliberations, decisions made,andpowersgrantedinviolationof thissectionare void. "

Information

SOME LEGISLATIVE AND REGULATORY TEXTS PUBLISHED IN THE OFFICIAL JOURNAL DURING THE YEAR 2022 AND EARLY 2023

LABOUR LAW :

- Law No. 2022-02 of April 14, 2022, supplementing certain provisions of Law No. 97-17 of December 1, 1997, on the Labor Code, relating to the protection of women in pregnancy, ***Official Journal No. 7518 of April 23, 2022 ;***

- Law No. 2022-03 of April 14, 2022, revising and supplementing certain provisions of Law No. 97-17 of December 1, 199,7 on the Labor Code, relating to non-discrimination at work, ***Official Journal No. 7518 of April 23, 2022 ;***

- Law n°2021-48 of December 31, 2021, authorizing the President of the Republic to ratify the Social Security Convention between the Republic of Senegal and the Kingdom of Spain, signed in Dakar on November 22, 2020, Official Journal n°7501 of Saturday, February 19, 2022 ;

ROAD LAW :

- Law no. 2022 of 15 April 2022 on the Highway Code (legislative part) (implementation of the points-based driving license), ***Official Journal special issue no. 7520 of 27 April 2022 ;***

- Decree No. 2021-1507 of November 16, 2021, establishing and setting the rules of organization and operation of the National Road Safety Agency (ANASER), ***Official Journal No. 7504 of March 5, 2022 ;***

TAX LAW :

- Law n°2021-43 of December 31, 2021, authorizing the President of the Republic to ratify the Multilateral Convention for the Implementation of Measures Relating to Tax Treaties to Prevent the Erosion of the Tax Base and the Transfer of Profits, signed in Paris, on June 07, 2017, ***Official Journal n°7511 of March 26, 2022 ;***

- Law No. 2022-19 of May 27, 2022, on the amending finance law for the year 2022, ***Official Journal No. 7533 of May 27, 2022 ;***

- Law No. 2022-14 of 20 April 2022 authorizing the President of the Republic to ratify the Convention between the Government of the Republic of Senegal and the Government of the Czech Republic for the avoidance of double taxation and the prevention of fiscal evasion concerning taxes on income, signed in Dakar on 22 January 2020, ***Official Journal No. 7511 of 26 March 2022 ;***

- Law No. 2022-22 of December 19, 2022, on the Finance Act for the year 2023, ***Official Journal No. 7585 of December 31, 2022 ;***

ENERGIES & MINES :

- Law No. 2021-50 of December 31, 2021, authorizing the President of the Republic to ratify Additional Act No. 2 to the Inter-State Cooperation Agreement on the development and operation of the Grand-Tortue/Ahmeyim field reservoirs and relating to the sale and leaseback of the floating production, storage and offloading vessel (FPSO), signed on August 6, 2021, ***Official Journal No. 7498 of February 14, 2022 ;***

- Law No. 2022-09 of April 19, 2022, on the distribution and management of revenues from the exploitation of hydrocarbons, ***Official Journal special number 7517 of April 22, 2022 ;***

- Law No. 2022-17 of May 23, 2022, on local content in the mining sector, ***Official Journal No.***

7536 of June 4, 2022 ;

- Decree No. 2022-1593 of September 12, 2022, on the organization and operation of the Energy Sector Regulatory Commission, ***Official Journal No. 7570 of October 8, 2022 ;***

TECHNOLOGIES & DIGITAL :

- Joint decree n°003753 of February 28, 2022, transferring the assets of ADIE to SENUM SA, ***Official Journal special number 7506 of March 15, 2022 ;***

- Decree No. 2022-247 of February 15, 2022, approving the statutes of the Société Nationale Sénégal Numérique (SENUM SA), ***Official Journal special number 7507 of March 16, 2022 ;***

- Decree No. 2022-248 of February 15, 2022, transferring the State's optical fiber infrastructure to Société Nationale Sénégal Numérique (SENUM SA), ***Official Journal special number 7508 of March 17, 2022 ;***

- Decree No. 2022-1357 of July 7, 2022, on interconnection, infrastructure sharing and access, ***Official Journal No. 7553 of August 6, 2022 ;***

MARITIME LAW :

- Law No. 2021-46 of December 31, 2021, authorizing the President of the Republic to ratify the African Charter on Maritime Safety and Security and the Development of Africa (Lomé Charter) adopted in Lomé on October 15, 2016, ***Official Journal No. 7505 of March 12, 2022 ;***

- Ministerial Order No. 0266866 of October 5, 2022, on the requisition of State Agents, ***Official Journal Special No. 7569 of October 6, 2022 ;***

PHARMACEUTICAL LAW :

- Law n°2021-45 of December 31, 2021, authorizing the President of the Republic to ratify the Treaty establishing t h e African Medicines Agency (AMA) adopted on February 11, 201,9 in Addis Ababa, Ethiopia, ***Official Journal n°7503 of February 26, 2022 ;***

- Decree No. 2022-824 of April 7, 2022, establishing and setting the rules of organization and operation of the Senegalese Agency for Pharmaceutical Regulation (ARP), ***Official Journal No. 7556 of August 20, 2022 ;***

PARAPUBLIC SECTOR & PUBLIC SERVICE :

- Orientation law n°2022-08 of April 19, 202, relating to the para-public sector, to the monitoring of the State portfolio, and the control of legal persons of private law benefiting from the financial assistance of the public power, ***Official Journal special number n°7516 of April 21, 2022 ;***

- Law No. 2022-21 of July 6, 2022, amending Law No. 61-33 of June 15, 196,1 on the general status of civil servants, ***Official Journal No. 7550 of July 30, 2022 ;***

- Decree No. 2022-1434 of July 22, 2022, amending Decree No. 78-330 of April 19, 1978, on the special status of the cadre of planning officials, ***Official Journal No. 7550 of October 8, 2022 ;***

- Decree No. 2022-1544 of August 17, 2022, amending Decree No. 77-887 of October 12, 1977, on the special status of the cadre of public health and social action officials, ***Official Journal No. 7573 of October 22, 2022 ;***

SOCIAL AND SOLIDARITY ECONOMY :

- Decree n°2022-1057 of May 03, 2022, implementing law n°2021-28 of June 15, 2021, on the orientation law relating to the Social and Solidarity Economy, Official Journal N°7526 of May 7,

2022 ;

AQUACULTURE AND BIOSECURITY :

- Law No. 2022-06 of 15 April 2022 on Aquaculture, ***Official Journal No. 7528 of 14 May 2022 ;***
- Law No. 2022-20 of June 14, 2022, on Biosafety, ***Official Journal No. 7555 of August 13, 2022 ;***

INVESTMENTS :

- Law No. 2022-12 of 20 April 2022 authorizing the President of the Republic to ratify the framework agreement for the protection of investments between the Republic of Senegal and the Arab Bank for Economic Development in Africa (BADEA) signed on 12 January 2016, ***Official Journal No. 7530 of 21 May 2022 ;***

JUDICIAL LAW :

- Organic Law No. 2022-16 of May 23, 2022, amending Organic Law No. 2017-09 of January 17, 201,7 repealing and replacing Organic Law No. 2008-35 of August 08, 200,8 on the Supreme Court, ***Official Journal No. 7531 of May 23, 2022 ;***

PUBLIC PROCUREMENT AND PUBLIC-PRIVATE PARTNERSHIP (PPP) :

- Decree No. 2022-2295 of December 28, 2022, on the Public Procurement Code, ***Official Journal No. 7592 of January 26, 2023 ;***
- Law No. 2022-07 of April 19, 2022, amending Law No. 65-51 of July 19, 1965, on the Code of Obligations of the Administration, as amended, ***Official Journal Special Issue No. 7517 of April 22, 2022 ;***
- Ministerial Order n°024730 of September 7, 2022, setting the deadlines for t h e intervention of the National Public-Private Partnership Support Unit within the framework of public-private partnership contracts, ***Official Journal N°7571 of Saturday, October 15, 2022 ;***
- Ministerial Order No. 024731 of September 7, 2022, setting the ceiling amount (excluding taxes) of the public-private partnership contract justifying the use of the restricted bidding procedure, ***Official Journal No. 7571 of Saturday, October 15, 2022 ;***
- Ministerial Order No. 024732 of September 7, 2022, setting the fees for processing files and the periods for receiving private initiative bids in public-private partnership (PPP) projects, ***Official Journal No. 7571 of Saturday, October 15, 2022 ;***

NON-GOVERNMENTAL ORGANIZATIONS :

- Decree No. 2022-1676 of September 16, 2022, establishing the modalities of intervention of non-governmental organizations (NGOs), ***Official Journal No. 7575 of October 29, 2022 ;***

MISCELLANEOUS :

- Law No. 2021-44 of December 31, 2021, on radiation protection, nuclear safety, and security and safeguards, ***Official Journal No. 7490 of January 1, 2022 ;***
- Law No. 2021-49 of December 31, 2021, authorizing the President of the Republic to ratify the Agreement between the Government of the Republic of Senegal and the Government of the State of Qatar on the operation of air services between their respective territories beyond, signed in Doha on March 16, 2015, ***Official Journal No. 7498 of February 14, 2022.***

MORE INFORMATION ABOUT OUR FIRM

SCP MAME ADAMA GUEYE & PARTNERS
Résidence Kër Diaba, Rue MZ 81 X Rue MZ 94,
Mermoz Pyrotechnie Dakar, Sénégal

Email : contact@magp.sn
Website : www.magp.sn

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