MOZAMBIQUE
JLA ADVOGADOS

FIRM INFORMATION

Website address : **www.jlaadvogados.com**
Languages spoken : **Portuguese, English**
Telephone : +(258) 21 317 159 , **Mobile:** (+258) 85 010 0001
Address : Rua dos Desportistas, n.º 691, Edifício Jat 6.1, 13.º Piso, Fracção Norte, Maputo, Mozambique
Contact : Zara Jamal (Partner)
Email : zara.jamal@jlaadvogados.com

MOZAMBIQUE I JLA ADVOGADOS

COUNTRY INFORMATION

Mozambique has a 2.470 kilometres coastline and a total land area of 801.590 square kilometres. It is a tropical country with two seasons, a hot and wet season from October to March, and a dry season from April to September. The country´s official language is Portuguese. The official currency is the Metical but the U.S. Dollar, the South Africa Rand and the Euro are widely used and accepted in business transactions.

TYPE OF GOVERNMENT

Democracy is exercised through elected representatives.

POLITICAL SYSTEM

Multiparty Democracy.

LEGAL SYSTEM

Mozambique´s legal system is based on Roman and German Law. The Courts have exclusive jurisdiction to settle disputes by judicial means unless the parties have agreed to submit a dispute to arbitration. The state Courts operate according to the principle of the separation of powers and are classified as sovereign bodies under the Constitution of Mozambique. The law differentiates between judicial Courts, administrative Courts and other special Courts. The Courts include the Supreme Court, the Supreme Appeal Courts, the Provincial Courts and the District Courts.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. liquidation)?

A debtor company will be held to be insolvent if it is experiencing financial difficulties and believes that it will not be granted a judicial business rescue. Namely, a company will be declared insolvent if:

- it does not pay on maturity, without justification, a net obligation which has materialized;
- having been ordered to pay any net amount, it does not, within the legal timeframe, pay, deposit or list, for attachment purposes, sufficient assets to cover the debt;
- it practices any of the following acts, except if they form part of a rescue plan:
  - proceeds with a hasty liquidation or resorts to ruinous or fraudulent means to make payments;
  - performs, or attempts to perform, in order to delay payments, or to defraud creditors, a simulated/false transaction or disposal, partial or totally, of its assets to a third party, whether such third party is a creditor or not;
  - simulates the transfer of its principal business for the purposes of defrauding the law or in order to harm a creditor;
  - gives or strengthens security granted to a creditor, without keeping sufficient free and clear assets to pay its liabilities;
  - becomes absent, without leaving a legal representative with enough resources to pay the creditors, abandons its business establishment or tries to hide from its domicile, place of registered office or main business establishment; and/or
  - fails to comply, within the prescribed period, with an obligation imposed on it in respect of any rescue plan.

What are the tests for financial distress?

A debtor company will be held to be in financial distress (and accordingly judicial business rescue would be appropriate) if the company is experiencing a financial crisis but nonetheless complies with all requirements necessary for the commencement of business rescue, namely, it:

- is not insolvent, and if it was, its obligations arising therefrom have been declared extinct by a final judgment;
- has not obtained, within the previous 2 years, the concession for a rescue;
- has not been convicted, or is not in the process of being convicted, as director or dominant shareholder, of an offence in respect of Mozambican law.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Judicial insolvency (i.e. liquidation) is instituted in the jurisdiction of the Court where the company is domiciled, has its principal place of business or, if it has a registered office outside of Mozambique, where the company has its branch office in Mozambique. A judicial insolvency is instituted before the Court by the debtor company itself, the surviving spouse, any heir of the debtor or the estate´s administrator ("cabeça-de-casal"), the shareholders of the debtor company in terms of the law or in terms of the Articles of Association of the company and/or any creditor of the company.

Formal restructuring procedures

In terms of the insolvency and rescue legislation in Mozambique, there are 2 distinct approaches. A company, although it is experiencing financial difficulty, is deemed to be "rescuable" through the creation of a rescue plan. This may arise judicially, with a judicial business rescue, or extra-judicially, by agreement among the creditors. A judicial business rescue is initiated at the instance of the debtor who, at such moment, exercises its activity regularly for more than 12 months and who:

- is not currently insolvent or, if it was insolvent, the liabilities have been declared extinct by final judgment;
- for 2 years preceding the request for judicial business rescue, has not been granted a judicial business rescue; and
- has not been convicted, or does not have as its administrator or controlling shareholder, a person convicted of an insolvent crime.

Informal insolvency or restructuring procedures

Extra-judicial business rescue is possible in Mozambique. It may be initiated by the debtor company if the debtor company fulfils the requirements for a judicial business rescue and provided the creditors agree to it. This procedure is conducted in terms of the rules for conciliation, mediation and arbitration in Mozambique. However, an extra-judicial business rescue process only binds the company and the creditors that have agreed to it, which means that any other creditor may seek a declaration of insolvency in Courts even though the company is in a process of informal business rescue.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation is to ensure the efficient promotion, in social and economic terms, of the liquidation of the assets of the insolvent company and to thereafter distribute the proceeds obtained from a sale of the company's assets to the creditors. Further, it allows for the discontinuation of the activities of the debtor in order to preserve and optimize the property, assets and productive resources, including any intangible assets, belonging to the company.

Process required to commence a liquidation

The insolvency process commences upon the submission to Court of a request for the declaration of insolvency by:

- the debtor company itself;
- the shareholder of the debtor company; and/or
- by any creditor of the debtor company.

At what point does the liquidation process commence?

As soon as the judge declares the insolvency and the insolvency administrator is nominated, the insolvency process is said to have commenced. It should be noted that the judge fixes the legal term of the insolvency and may make it retroactive up to 90 days from the date that the application for insolvency is submitted.

Duration of the liquidation process

The law does not provide for a specific timeline for the completion of the liquidation process. Such timeline is determined by the judge who orders the insolvency.

Extent of court involvement in the liquidation process

The Mozambican Court is involved in every aspect of the liquidation and generally in respect of insolvency procedures.

Management of the company whilst in liquidation

The management of the company whilst in liquidation is handled by the insolvency administrator. The board of directors relinquish their responsibilities except to the extent that they are required to assist the liquidator in the winding-up of the affairs of the company. Further, from the moment insolvency is declared or the assets have been seized, the debtor loses the right to manage or dispose of its assets, although maintaining the right to supervise the administration of the company and seek assistance for the preservation of its rights or seized assets.

Filing of claims

Upon publication of the decree of insolvency in the Government Gazette, creditors have 10 days, commencing from the date of such publication, to prove any claim that such creditor believes it has against the company. Claims must be submitted before the insolvency administrator in writing and with all documents supporting such claims. The insolvency administrator will, within 30 days, publish a notice indicating the place, time as well as the deadline in terms of which anyone may oppose a creditor's claim.

Factors Which Influence the Period of the Administration in a Liquidation

There are no specific factors which influence the duration of the administration of a liquidation. Each matter is dependent on the facts and circumstances of the company.

Effect of insolvency on employees

The claims of employees maintain priority ranking over other creditors. Furthermore, employment claims that are of a compensatory nature and which became due within 3 months preceding the date of the decree of insolvency are paid, but limited to a maximum amount of 5 months wages, are payable as soon as cash is available.

Effect of insolvency on contracts

Bilateral contracts are not terminated as a result of the commencement of insolvency. They may be complied with by the insolvency administrator, subject to authorization from a committee of creditors (comprised of members elected by the general assembly of creditors) if compliance preserves or reduces the liability of the insolvent estate or the assets of the company. The contracting party may, within 90 days of the date of the commencement of the insolvency administrator's term of office, request the insolvency administrator to declare, within 10 days of the date of such request, if he intends to honour the contract. Non-compliance with bilateral contracts gives rise to a right to compensation by the creditor. Unilateral contracts may, however, subject to authorization from the creditors' committee, remain in place and be honoured by the insolvency administrator if compliance preserves or reduces the liability of the insolvent estate or the assets of the company.

Effect of insolvency on shareholders

Despite the insolvency of a company in Mozambique, the shareholders retain their shareholding. In Mozambique, there are companies with limited liability (where the shareholders limit their liability to the subscribed share capital of the company) and those with unlimited liability (where shareholder liability is not limited). When companies with unlimited liability are declared insolvent, the shareholders themselves are similarly declared insolvent and become liable for the debt of the company. The personal liability of shareholders of limited liability companies is determined by the Court that declares the insolvency.

Effect of insolvency on creditors

A declaration of insolvency requires creditors to exercise their rights in respect of the debtor company´s assets in accordance with the prescripts of insolvency law. When the debtor company is declared insolvent by a Court, the judge that issues the insolvency order will order that the declaration of insolvency be published in the Government Gazette. This notice will contain the important aspects of the order as well as a list of known creditors. Within 10 days from the date that the declaration of insolvency is published, the creditors must present their claims or objections to the list published, to the insolvency administrator. The insolvency administrator will verify the claims of the creditors by having regard to the accounting records of the company. Further, the decree of insolvency suspends any rights that a creditor may have to retain assets belonging to the company and these must be returned to the insolvency administrator.

Pending claims, litigation and arbitration

The judgment declaring the insolvency of the debtor company must, among other things, order the suspension of any and all claims and executions against the insolvent company with the exception of claims instituted or executed by employees, which remain in force.

Voidable/ineffective transactions

The law determines which acts are deemed ineffective, namely:

- payments by the debtor company of debts which are not due for payment;
- the payment of debts due and payable, within their legal term, in any manner not provided for in the contract;
- the practice of acts, free of charge, within a period of 2 years prior to the decree of insolvency;
- the repudiation of an inheritance or legacy within a period of 2 years prior to the decree of insolvency;
- the sale or transfer of the business of the company without the express consent of, or payment to, all creditors; and/or
- the registration of a real right and the transfer of ownership thereafter, or the endorsement on immovable property, made after a decree of insolvency.

The ineffectiveness of the above mentioned acts may be declared ex officio by the judge, or following a claim during the proceedings.

Any act committed by the company prior to the commencement of insolvency, done with the intent to harm creditors, is revocable, provided it has been done in collusion with the creditor or third party and has the effect of prejudicing the insolvent company's estate.

How is the liquidation process terminated?

Having realized all the assets and distributed the proceeds among the creditors, the insolvency administrator submits a preliminary report to the judge. Thereafter, the insolvency administrator submits a final report which details the value of the assets and the proceeds realized from a sale of such assets, the value of the liabilities of the insolvent company and the payments made to the creditors and the responsibilities that will continue to be incumbent on the insolvent estate. After receiving the final report, the judge terminates the liquidation by handing down a judicial sentence which is published by edict in the Government Gazette.

Director or officer liability

In terms of the Mozambican Commercial Code, the directors of a company will be liable to the company for damages caused by acts or omissions in breach of their legal and statutory duties unless they can prove that they acted without fault. Any proceedings initiated by the company need the support of a simple majority of the shareholders and need to be brought within a period of 3 months from the date on which the decision has be taken. If the proceedings are not brought by the company itself, they can be brought by the shareholders (of an unlimited liability company) or by the shareholders holding at least 10% of the share capital of the company. In terms of creditors, the directors will be liable if they neglect a legal or statutory provision which affects the protection ordinarily available to creditors or when the net assets of the company become insufficient for the satisfaction of the creditors´ claims. Whenever the company or the shareholders have not instituted proceedings, the creditors may do so, provided they have enough evidence to show that there has been a reduction in the company´s net assets. This is also applicable to the managers and representatives of the company.

Within the scope of insolvency or rescue processes, the following acts carried out by directors will result in them being held liable and may, give rise to criminal charges:

- defrauding creditors (falsification of documents, inaccurate accounting, simulation, concealing of documents, creation or aggravation of losses or profits), whether this occurred before, during or after the insolvency or rescue process – is punishable as a crime of theft;
- illicit disposition, dissipation or encumbrance of patrimonial assets, during the insolvency or rescue process – punishable as crime of theft;
- appropriation, dissipation, concealment of assets, during the insolvency or rescue process – are punishable as crime of theft;
- the lack of organized and adequate commercial bookkeeping, before or after the insolvency or rescue process, is punishable by imprisonment.

On the other hand, it should be noted that, for example, in the case of judicial rescue in which the administrators normally remain in office, they are dismissed if, in addition to the above, they have performed any of the following acts:
(i) made personal expenses manifestly excessive in relation to the financial situation of the company;
(ii) made expenses that are unjustified by their nature or value, in relation to the capital or type of business, the movement of operations and other similar circumstances;
(iii) unjustifiably decapitalized the company or carried out operations that were detrimental to its regular operation;
(iv) simulated or omitted credits;
(v) refuses to provide the information requested by the Insolvency Administrator or members of the Committee;
(vi) has its withdrawal provided for in the judicial reorganisation plan.

Therefore, it can be said that any of the above situations may result in the director being liable for the insolvency of the company (with due reservation to the provisions of the Commercial Code, which 104 stipulates that a director is not responsible for an act based on a shareholder’s decision, save if such shareholder decision was made under a proposal made by the directors). Note, however that liability of directors, in the context of insolvency proceedings, will be determined by the insolvency Court itself.

CONSEQUENCES OF DIRECTOR OR OFFICER LIABILITY

Civil Consequences

Without prejudice to any right that a party has to be compensated in accordance with the law, if a director or officer of a company is convicted of a crime that is prohibited by insolvency law, such person may be
(a) disqualified from being a director of any company or from running a business; and/or
(b) precluded from managing any company under any mandate or business management.

Criminal Consequences

Depending on the nature of the crime committed, the consequence of such crime ranges from a range of fines to a range of prison sentences.

BUSINESS RESCUE/ADMINISTRATION

Process Required to Commence a Business Rescue

A business rescue may be petitioned by the debtor company through its board of directors (alternatively by the heirs, executor or remaining shareholders of the company, if any) who, at the time of the petition, conducted the business of the company for more than 12 months and which company cumulatively meets the following requirements:

- is not insolvent, and if it was insolvent, its responsibilities have been declared extinct by final judgment;
- has not obtained, within the previous 2 years, the concession for business rescue; and
- has not been convicted, or is not in the process of being convicted, as director or dominant shareholder, of an offence in respect of Mozambican law.

At What Point Does Business Rescue Commence

A judicial business rescue commences when the judge orders that the company be placed in business rescue.

Duration of Business Rescue

The business rescue process should continue for no longer than 2 years from the date that the business rescue is approved by the judge.

Extent of Court Involvement in the Business Rescue

The Court is barely involved in the extra-judicial business rescue process (informal procedure) as this process is conducted by the Centre of Arbitration. The Court is only involved in this process when it receives the agreement agreed to by affected parties. With a judicial business rescue, the Court is more involved although it does not participate in every step in the process. The process is conducted by the insolvency administrator together with directions received from the creditors´ committee.

Management of the Company Whilst in Business Rescue

The management of a company is placed in the hands of the insolvency administrator whilst the company is in business rescue. The insolvency administrator is appointed for his competence in:

- supervising the activities of the debtor and implementing the provisions of the rescue plan;
- requesting a declaration of insolvency from the Court in the event that the rescue plan does not succeed;
- submitting a monthly report about the debtor´s activities to the judge; and
- submitting a report about the execution of the rescue plan to the judge upon termination of the rescue process.

During the business rescue process, the debtor or its directors are expected to conduct the business under the supervision of the creditor´s committee, if any, and under the supervision of the insolvency administrator.

Filing of claims

If the judge accepts the request for business rescue, a notice of such acceptance is sent to the creditors by letter and the same notice is published in the Government Gazette and in a newspaper with wide circulation in the place where the judicial business rescue is petitioned. The creditors, thereafter, have 10 days within which to submit their claims, or objections, to the insolvency administrator. Creditors may also contest the commencement of business rescue and the rescue plan itself (within 30 days of the date on which the notice, enclosing the rescue plan and creditors' list, is published).

Factors which influence the period of business rescue

A number of factors may influence the rescue process, including, but not limited to, any opposition instituted in respect of the provisions of the rescue plan, removing the board of directors or members of the board of directors and appointing an insolvency administrator.

Funding of the Company Whilst in Business Rescue

Provided agreement is sought from the creditors´ committee and the insolvency administrator and that provision is made for it in the rescue plan, the company may be funded through, among others, an increase in the share capital of the company, a sale of some of the assets of the company, a transfer of shares and a novation of the debt of the company.

Effect of Business Rescue on Employees

The rescue plan must ensure that payments due to employees arising from labour legislation or work-related incidents are made within a period of 1 year from the date of the commencement of the business rescue. Moreover, the business rescue plan may not, in respect of the payment of the minimum of 5 month's salary as is applicable, delay payment to such employees for a period in excess of 3 months.

Effect of Business Rescue on Contracts

After submission of the request to the Court for judicial business rescue, the debtor company is not allowed to transfer or encumber any assets or rights of its permanent estate. Exception is made for those contracts, transfers or encumbrances already contemplated in the rescue plan.

Effect of Business Rescue on Shareholders

Shareholders retain their shareholding in the company; however, such shareholding may be affected by the terms of the business rescue plan. In terms of Insolvency Law, the business rescue plan may contemplate the division, incorporation, merger, transformation of the company, transfer of shares (provided shareholders´ rights are complied with) as well as the increase in the share capital of the company and issuance of securities. These may affect the shareholding structure.

Effect of Business Rescue on Creditors

Creditors of the debtor in business rescue retain all their rights and liens against all liable parties. In the case of creditors holding fiduciary titles of ownership over immovable or movable assets, or being an owner or promissory seller of immovable assets, and which contracts contain irrevocable clauses, including accessions of real estate or ownership in contracts with the retention of ownership titles, the property and/or assets and the contractual terms, prevail for all purposes.

Pending Claims, Litigation and Arbitration

When judicial business rescue commences, creditors and claimants may not continue with or institute legal proceedings in any forum, including arbitrations, against the company. The extra judicial business rescue process, on the other hand, does not give rise to the suspension of rights, actions or execution procedures against the debtor company and does not prevent the creditors from applying to Court to declare the company insolvent.

Effects of the Moratorium

When judicial business rescue commences, it suspends, for an irrevocable period of 180 days, the course of all pending claims and all actions and executions against the debtor company.

Voidable Transactions

Upon the submission of the request for business rescue to the Court, the debtor may neither dispose of, nor encumber, its assets or the rights of its permanent estate, unless there is a clear benefit for doing so, which is recognized by the judge after hearing the views of the creditors´ committee and the insolvency administrator. Exception is made for transactions concluded during the business rescue period which transactions cannot be set aside if the company is later declared insolvent. There is no time period, prior to commencement of business rescue, in respect of which transactions will be set aside upon the commencement of business rescue.

The Business Rescue Plan

The Business rescue plan has two phases, the first in The rescue plan is submitted by the debtor company to the Court, by the insolvency administrator, within 90 days of the date of the publication of the decision to accept the filing for business rescue. The rescue plan must contain

(a) a detailed statement of the recovery procedures to be employed and their justification;
(b) a demonstration of the economic viability of the company; and
(c) the economic-financial report and valuation of the debtor´s assets (signed by a suitably qualified person).

The judge must order that a notice be published to the creditors advising that the rescue plan has been submitted to the Court for information and contestation purposes. Interested parties, and creditors, may inspect the plan and lodge any formal objections that they have within 30 days as of publication of the plan.

Voting on the plan

If the rescue plan is submitted to the creditors for approval, all classes of creditors must approve the rescue plan. With regard to
(i) creditors holding ordinary rights, with special privileges, general privileges or with subordinate privileges; and
(ii) creditors holding real rights, the rescue plan must be approved by creditors that represent more than half of the total value of the credit submitted to the general assembly of creditors and cumulatively, by a simple majority of the creditors present at the general assembly session. In respect of creditors holding rights arising from labour legislation or from accidents occurring at work, the rescue plan must be approved by a simple majority of the creditors present at the creditors' general assembly session, regardless of the value of their credits or claims.

Cram down on creditors

The judge may declare that a plan is binding on all creditors even if it has not been approved by all classes of creditors in the same general assembly of creditors, if the:

- affirmative vote of creditors representing more than half the value of all claims submitted to the assembly, regardless of the classes, supported the plan;
- approval of the plan was received from 2 classes of creditors or, if there are only 2 classes of creditors, approval was received from at least 1 of them; and
- in respect of any class that rejected the plan, an affirmative vote of more than one third of the creditors supported the plan.

Implementation of the plan

The rescue plan is implemented by the debtor company under the supervision of the creditors committee (if there is one) and the insolvency administrator.

Discharge of claims

Once the rescue plan is submitted to the Court, the claims of creditors will not be discharged or waived unless express consent is given for such discharge or waiver by all creditors. In other words, the claims of creditors are not waived unless provided for in the plan.

Effect on suretyships

If a creditor´s claim has been discharged or waived, the creditor may not pursue its claim against a guarantor or surety as they are subsidiary to the debtors.

How is the process terminated?

Two years from the date on which a judge orders the commencement of business rescue, and once all obligations in the rescue plan have been fulfilled, the judge hands down a judgment in which he declares that the business rescue process has been terminated and orders the:

- payment of the fees of the insolvency administrator;
- determination of the balance of the legal fees to be charged;
- presentation of a detailed report from the insolvency administrator (within 15 days from the date of the judgment);
- dissolution of the creditors' committee and the termination of the mandate of the insolvency administrator; and
- communication to the Registry of Legal Entities that business rescue has been terminated.

What is the Status of the Company after Business Rescue?

If business rescue is successful, the company continues to trade in the ordinary course. If business rescue is unsuccessful, the company will be declared insolvent at the instance of the insolvency administrator or
by decision of the assembly of the creditors.

Director and Officer Liability

In addition to the civil and criminal consequences listed below, the general assembly of the creditors (which approves or rejects the rescue plan) may submit to the judge a proposal for destitution of the debtor´s administrators who contributed to the financial distress of the debtor. In addition to the civil and criminal consequences that directors or officers of a company may face, arising from the law, a creditor may apply to Court to hold a director or officer liable for having led the company into the financial position in which the company finds itself.

Within the scope of insolvency or rescue processes, the following acts carried by directors will result in their being liable and may also give rise to criminal charges:

- fraud to creditors (falsification of documents, inaccurate accounting, simulation, concealing of documents, creation or aggravation of losses or profits), whether this occurred before, during or after the insolvency or rescue process – punishable as crime of theft;
- illicit disposition, dissipation or encumbrance of patrimonial assets, during the insolvency or rescue process – punishable as crime of theft;
- appropriation, dissipation, concealment of assets, during the insolvency or rescue process – punishable as crime of theft;
- the lack of organized and adequate commercial bookkeeping, before or after the insolvency or rescue process, is punishable by imprisonment;

On the other hand, it should be noted that, for example, in the case of judicial rescue in which the administrators normally remain in office, they are dismissed if, in addition to the above, they have performed any of the following acts:

(i) make personal expenses manifestly excessive in relation to financial situation of the company;
(ii) make expenses that are unjustified by their nature or value, in relation to the capital or type of business, the movement of operations and other similar circumstances;
(iii) unjustifiably decapitalize the company or carry out operations that are detrimental to its regular operation;
(iv) simulate or omit credits;
(v) refuses to provide information requested by the Insolvency Administrator or other members of the Committee;
(vi) has their removal provided for in the judicial recovery plan.

Civil Consequences

Without prejudice to any right that a person or entity has to be compensated for damages in accordance with the law, if a director or officer of a company is convicted of a crime that is prohibited by law, it will result in such person being

(a) disqualified from being a director or running the administration of a company or a business; and/or
(b) unable to manage any company under and in terms of any mandate or by way of business management.

Criminal consequences

Depending on the nature of the crime committed, the consequence of such crime could be a range of fines and a range of imprisonment terms.

SECURITY

Types of security

There are 2 types of security available in Mozambique - real rights such as a mortgage or pledge and personal securities such as suretyships or promissory notes. Real guarantees over immovable assets located in Mozambique must be constituted in terms of Mozambican law and are subject to the Mozambican Courts. All other guarantees that do not constitute real rights over immovable or movable assets and/or means of transportation may be constituted and governed by the laws and subject to the jurisdiction that the parties choose.

Taking of security

Real rights must be subjected to Mozambican law and made by public deed (in the case of mortgages) or through private instruments (in the case of pledges). Perfection of such security is affected by registration in the relevant public office or other forms of publicity stipulated by the law.

Security Trustees or Special Purpose Vehicles

Although the trustee arrangements are not specifically foreseen for purposes of taking security, it is a commonly understood and frequently utilised structure in Mozambique.

Most Robust Form of Security Available to Lenders

A mortgage is the most robust form of security as it is made by public deed, it is real security, legally required to be registered in order to be perfected and it must describe the asset being secured. Also, it subsists until its registration is either changed or until it is deregistered.

Registration of security

Securities are typically registered by the beneficiary. Registration is effected before the relevant registry (for example, a mortgage over immovable property is registered in the Real Estate Registry, whereas a mortgage over an aircraft must be registered in the Civil Aviation Registry). Registration is given effect to by submitting the security contract, names and domicile of the parties to the contract, in particular the debtor and creditor, and a certificate in respect of the relevant asset that is secured, to the beneficiary of the security. Security taken over immovable assets or movable assets subject to registration (e.g. vehicles, vessels and aircrafts) must be made by public deed.

It should be noted however that the Law on Movable Securities was promulgated in Mozambique in 2019 and its respective regulations in force in 2020 (together referred to "Legislation on Movable Securities"). Under this new legislation any security over a movable asset – including, but not limited to, any security over shares of a company – is subject, in addition to the specific regulations applicable to such asset (e.g., security over shares is also regulated by the Mozambican Commercial Code), to the Legislation on Movable Securities.

The Legislation on Movable Securities establishes that perfection of any security constituted over a movable asset is obtained through its registration at the Movable Securities Registration Centre or, in case of bank accounts, financial titles and assets (including book-entry shares) or intermediated financial assets, by a Control Agreement.

Stamp Duty

Stamp duty is calculated on the value of the contract and, for some forms of security, determined by the time in respect of which the guarantee or security is to remain in place. A mortgage, pledge or other security incorporated for a period longer than 5 years or with no period established attracts duty at a rate of 0.3% of the value of the contract. All other security that is not a mortgage, pledge or that has been constituted for a period of less than 5 years attracts duty at a rate of 0.02% and 0.2% if it is greater than 1 year but less than 5 years. Stamp duty is payable from the moment that the security is constituted at the Tax Authorities or with the Notary that assists the execution of the security agreement. An exemption of stamp duty over the security may apply if it is executed simultaneously with the financing agreement to which it serves as collateral.

Registration Costs

The calculation of registration costs depends on the actual security being registered and the maximum secured amount by the security.

Requirements for Assignment or Transfer of Security

Security may be transferred or assigned as long as the assignment and transfer follows the same form as that utilized when the security was created and registered. In addition, one may only transfer or assign security with the consent of the creditor holding the security.

Instances in Which Securities Might Be Vulnerable to Attack

Securities incorporated fraudulently and illegally are subject to being contested and declared invalid. There is no provision in Mozambican law which states that security granted just before the company is declared insolvent or under business rescue should be set aside.

Methods of enforcement of security

A pledge may be enforced extra-judicially if the debtor agrees to it. If not, the Court may only enforce the security as Mozambican law does not permit self-help measures. A mortgage may only be enforced by a Court.

Problems experienced when enforcing security

Other than the instances in which securities might be vulnerable to attack, there are no problems experienced when enforcing all forms of security.

Financial assistance requirements

Under the Commercial Code, a company may not provide personal or real security in respect of a third parties´ obligations, save if the company has an interest in granting such security, which must be justified in writing by the directors of the company, or when the security is granted between group companies. If the financial assistance is to be made by way of a loan, such act must be, depending on the type of company and the provisions in the Articles of Association, approved by a resolution of shareholders and/or board of directors.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Any judgment obtained outside of Mozambique (a foreign judgment) must be recognized by the Supreme Court. The Supreme Court will not look at the merits of the case and will not change any of the rulings contained in the judgment.

Requirements for recognition of a foreign judgment

A foreign judgment will, in principle, be recognized by the Supreme Court and will be enforced by the Mozambican Courts if such judgment complies with the following requirements for the recognition of foreign judgments, that:

- there is no doubt about the authenticity of the document bearing the sentence or regarding the correctness of the decision;
- the judgment has been executed in accordance with the laws of the country in which it was delivered;
- judgment was handed down by a competent Court according to the rules of conflict in Mozambique;
- the exception of double jeopardy may not be invoked, except if the foreign Court determined the jurisdiction;
- the accused was duly summoned, save if it is a cause for which the Mozambican law would dispense with the initial summons, and if the accused was immediately convicted due to lack of opposition to the request, that the summons was delivered to the actual person;

- it does not contain decisions contrary to the Mozambican principles of public order; and
- having been delivered against a Mozambican, it does not offend the provisions of Mozambican law when the matter should have been resolved in accordance with the Mozambican rules of conflict of laws.

Requirements for the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner

Trustees are not recognized in Mozambique. Local business rescue practitioners or insolvency practitioners would need to be engaged. It is worth mentioning that in July 2016 the Mozambican Association of Insolvency Administrators (AMAIN) was officially created to ensure the administration of the Insolvency Assets and Business Rescue. The Insolvency Administrator must cumulatively meet the following requirement:

- suitable professional, preferably a lawyer, economist, business administrator, accountant, with at least 5 years of professional experience;
- be a Mozambican Citizen or Mozambican legal person specialized in one of the professional activities mentioned above, or, if a foreigner, have permission to work in the country, be part of a duly registered Insolvency Administrator company (a Mozambican company);
- participate in specific training program/s; and
- pass the entrance exam.

The Insolvency Administrator must be a competent, trustworthy person, preferably a lawyer, economist, business manager or accountant, having practiced as such for a minimum period of 5 years and who is mandatorily certified and registered with the Regulatory Authority.