

Project Finance

Contributing editors

Phillip Fletcher and Aled Davies



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH

Project Finance 2018

Contributing editors
Phillip Fletcher and Aled Davies
Milbank, Tweed, Hadley & McCloy LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedeathrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedeathrough.com

Adam Sargent
adam.sargent@gettingthedeathrough.com

Dan White
dan.white@gettingthedeathrough.com

Law
Business
Research



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2007
Eleventh edition
ISSN 1755-974X

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between July and August 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Global overview	5	Japan	87
Phillip Fletcher and Aled Davies Milbank, Tweed, Hadley & McCloy LLP		Naoaki Eguchi, Gavin Raftery and Yasuhisa Takatori Baker McKenzie (Gaikokuho Joint Enterprise)	
The US PPP market: progress and challenges	8	Kyrgyzstan	93
Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP		Saodat Shakirova and Omurgul Balpanova ARTE Law Firm	
Angola	10	Mexico	99
Catarina Levy Osório and Irina Neves Ferreira ALC Advogados		Rogelio López-Velarde and Amanda Valdez Dentons Lopez Velarde SC	
Australia	16	Mozambique	106
Ben Farnsworth and Michael Ryan Allens		Fernanda Lopes Fernanda Lopes & Associados	
Chile	22	Netherlands	111
José Miguel Carvajal and Myriam Barajona Morales & Besa Ltda		Marieke Driessen, Frédérique Jacobse and Andrea Chao Simmons & Simmons LLP	
China	27	Nigeria	118
Sean Wang and Claude Jiang Shearman & Sterling LLP		Oluwatoyin Nathaniel and Okechukwu J Okoro G Elias & Co	
Colombia	33	Panama	123
Bernardo P Cárdenas Martínez, Catalina Pinilla and Daniela Mejía Dentons Cardenas & Cardenas		Erika Villarreal Zorita Anzola Robles & Asociados	
Denmark	41	Portugal	130
Jens Blomgren-Hansen, Søren Aamann Jensen and Michael Nørremark Kromann Reumert		Teresa Empis Falcão and Ana Luís de Sousa VdA Vieira de Almeida	
Dominican Republic	46	South Africa	135
Fabio J Guzmán Saladín, Alfredo A Guzmán Saladín and Alberto Reyes Báez Guzmán Ariza		Eric le Grange, Innes Du Preez and Calyb Soekoe ENSAfrica	
England & Wales	52	Spain	145
Andrew Petry and Rose-Anna Daukes Simmons & Simmons LLP		Gaspar Atienza and Raul Suárez Garrigues	
Hungary	62	Sweden	149
Réka Versics HP Legal Hajdu & Partners		Peter Dyer and Andreas Lindström Foyen Advokatfirma	
India	66	Switzerland	154
Santosh Janakiram and Ruchira Shroff Cyril Amarchand Mangaldas		Thiemo Sturny Walder Wyss Ltd	
Indonesia	72	Turkey	159
Emalia Achmadi, Robert Reid and Denia Isetianti Soemadipradja & Taher		Esin Çamlıbel, Grace Maral Burnett and Gizem Günel Turunç	
Italy	82	United States	164
Eugenio Siragusa Nctm Studio Legale		Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP	

Angola

Catarina Levy Osório and Irina Neves Ferreira

ALC Advogados

Creating collateral security packages

1 What types of collateral and security interests are available?

Angolan law offers a range of collateral and security types. A borrower may provide guarantee under the form of attachment, preferential credits, special guarantees such as money deposit, debt securities, precious stones or metals, pledge, mortgage or bank guarantee.

Real estate securities

Although the Angolan Constitution recognises private ownership alongside public and community ownership, it also states that the ownership of land originally belongs to the state and that it may, if considered appropriate using a public interest criterion, transfer it to private individuals or entities. While the Constitution allows private ownership with some latitude, the Land Act is much more restrictive. Hence, the transfer of ownership in some categories of land (in spite of being possible) almost never occurs. The transfer of minor land rights (eg, leasehold, right of customary dominium utile, right of civil dominium utile, right to temporary occupation) is the most usual form of allocation of rights over land. Upon prior authorisation of the holder of such minor land rights, securities over said rights may be awarded. Given that such minor land rights relate to immoveable property, the security shall be bestowed in the form of mortgage, and through the execution of a notarial deed and the subsequent relevant registration. It is worth mentioning the possibility of awarding a 'factory mortgage' over a plant, which includes not only the real estate property itself but also its contents (eg, all machines and equipment). Finally, a pledge over equipment may be granted, subject to the execution of a written agreement signed by the parties and duly certified by a notary.

Security over receivables

Under Angolan Law the creditor is allowed to secure its rights against the debtor through:

- the grant of a security over receivables;
- the assignment of receivables, rights and credits; and
- the assignment of revenues.

The grant of a security over receivables shall be executed through a written agreement. Both the grant of a security over receivables and the assignment of receivables, rights and credits can only be executed upon notification of the relevant debtor. Through the assignment of revenues – which shall be executed by notarial deed – the debtor can ascribe to the creditor the revenues generated by its immoveable and moveable assets.

Security over shares

A pledge of shares can be granted over shares of commercial companies incorporated under the laws of Angola. The grant of a pledge of shares of a limited liability company by *quotas* (where the share capital is represented by a form of nominative shares) shall be executed through written agreement, and subsequently registered with the competent Commercial Registry Office.

Security over mining rights

The 2010 Constitution of Angola ascribes the ownership of all natural resources within the Angolan jurisdiction to the state. The Angolan

jurisdiction comprises the onshore territory of Angola, the internal waters, the territorial sea, the exclusive economic zone and the continental shelf and, therefore, all oil and gas fields located in such areas belong to the public domain of Angola. All mining rights are exclusively assigned to the National Concessionaire. Moreover, all petroleum deposits existing in Angola are an integral part of the public domain, with the National Concessionaire being the exclusive holder of all mineral rights related to such deposits. Pursuant to Petroleum Activities Law, mineral rights are granted to the National Concessionaire, which cannot assign these mining rights, but may associate with an upstanding domestic or foreign company having the necessary technical and financial capacity. The associates of the National Concessionaire do not own the mineral rights nor may be deemed as a concessionaire, thus the provision of a security by a private entity over the mining rights cannot be provided since such rights cannot be encumbered, given that such rights belong to the Angolan state.

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

As a rule, the Angolan law does not require any special formalities or written documents for the perfection of securities. The exceptions to such principles are covered in question 1.

The registry and execution of the documents supporting the grant of securities (namely mortgages) is subject to the payment of a stamp duty tax. The applicable rates may vary between 0.1 per cent and 0.3 per cent. Notarial fees charged by the public notaries, whenever required, may vary according to the specific guarantee to be provided.

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

The Civil Code (CC) establishes that some credits benefit from prior ranking over others, which means that some credits are paid with preference over others. Preferential credits may be over moveable property or over real estate. Preferential credits over moveable property may be general – when they cover all moveable assets, as is the case of the credits arising from an employment contract – or special – if, otherwise, the preferential credit targets only certain assets, as is the case of the state's credits lived over donations. Conversely, preferential credits over real estate are always special given that they refer to certain real estate property (eg, state credits from property taxes). As to the order of preference, the following rules apply:

- between a third party's guarantee and a general preferential credit over moveables, the first prevails;
- however, if a special preferential credit over moveables conflicts with a third party's guarantee, the oldest credit prevails; and
- finally, between a preferential credit over real estate and a third party's guarantee over the same real estate property, the first prevails.

As per the Civil Procedural Code (CPC) after the liquidation of the debtor's assets, the creditors shall be paid according to the above-mentioned rules.

Hence, the time of registration of a security is relevant for the purposes of assuring the priority of the creditor.

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

As a rule, the enforcement of guarantees depends on judicial proceedings. However, the CC foresees some mechanisms to enable the creditors to secure their rights outside (or before) a judicial proceeding. For instance, the creditor is allowed to retain the debtor's assets until the latter complies with its contractual obligations. Moreover, in the event the debtor does not do so, the creditor may replace the debtor in the exercise of its patrimonial rights against a third party (unless, owing to its nature, such rights can only be exercised by the debtor).

5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

The bankruptcy legal framework set forth in CPC was designed to protect creditors (for instance, the assets belonging to a company that has been declared bankrupt are seized in order to protect the creditor's rights). Upon the declaration of bankruptcy by the judgment of a court, the maturity of the company's debts occurs, and all actions carried out by the company affecting the creditor's patrimonial guarantee may be deemed null, void or ineffective, upon the fulfilment of certain requirements. The ranking of the credits is addressed above, being a foreign or national creditor does not influence the ranking.

There are certain entities excluded from bankruptcy proceedings, and others that are subject to special bankruptcy proceedings:

- the Angolan Central Bank (BNA) cannot be declared bankrupt;
- the general preventive means of bankruptcy are not applicable to financial institutions (the regime governing said entities is the one set forth in the Framework Act of Financial Institutions); and
- the Public Business Sector Act is the statute governing the special procedures of liquidation and winding up of public companies.

Regarding the processes other than court proceedings available to seize the assets of the project company, see question 4.

Foreign exchange and withholding tax issues

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

The Foreign Exchange Act governs commercial and financial transactions having an actual or potential impact on the balance of payments of Angola, and is applicable to capital transactions and foreign exchange (FX) trading. The FX operations deemed most relevant are the following:

- purchase or sale of foreign currency;
- opening and operation of foreign currency accounts in Angola by FX or non-FX residents;
- opening and operation of local currency accounts in Angola by non-FX residents; and
- settlement of any transaction relating to goods, invisible items of trade or capital.

The import, export or re-export of foreign currency can only be performed by financial institutions duly authorised by the BNA to carry out foreign-exchange trade. The BNA periodically organises public auctions for the sale of foreign currency (US dollars and euros) to commercial banks. For each one of these auctions the BNA expressly decides what the currency sold may be used for, clearly identifying these specific purposes. Such auctions are attended by the BNA and financial institution duly authorised by the BNA to carry out foreign-exchange

trade. Additionally, banking institutions are authorised to trade foreign currency with each other, with other financial institutions duly authorised for such purpose, and with the public out of the sessions mentioned above, using an exchange rate freely set. The BNA is responsible for calculating the reference exchange rate. Finally, it is worth noting that the 'Legal Framework of Special Contribution over Banking Transactions' foresees that the buying and selling of foreign currency was subject to a Special Contribution over Banking Transactions of 0.1 per cent over the amount of holding the account used in the transaction, however, this special contribution was revoked by the Budget Law for 2017.

7 What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

The remittance of investment returns is only possible under a private investment project approved under the Private Investment Act (PIA). Once the private investment project has been implemented and upon proof of such implementation, the foreign investor enjoys the right to transfer profits and dividends abroad, as well as other amounts related with the investment that is made. However, and except in the case of reinvestment in Angola, the profits and dividends distributed to natural or legal persons are subject to an investment tax surcharge, levied on the amount that surpasses the share of equity, as follows:

- 15 per cent when the exceeding amount is up to 20 per cent;
- 30 per cent when the exceeding amount is higher than 20 per cent and up to 50 per cent; and
- 50 per cent when the exceeding amount is higher than 50 per cent.

The payments of principal, interest or premiums on loans or bonds is classified as a capital operation, under Decree No. 23/98, of 24 July. However, full or partial repayment of loans and other credits (whatever the form, nature or title thereof) is only deemed as a capital operation when for a term exceeding one year, with the exception of loans and other credits exclusively civil in nature. Applications for capital operations must be submitted by the interested parties to a financial institution authorised to carry out foreign-exchange trade, which forwards them to the BNA. Following authorisation of the operation and the issuance of a capital export licence, the applicant may export the capital, which can only be done through banks authorised to carry out foreign-exchange trade in Angola.

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

The PIA allows foreign investors to repatriate abroad the earnings of the relevant private investment project implemented in Angola. However, repatriation is not mandatory.

The creation of new companies or any branches abroad (as well as buying shares of companies domiciled outside the country) using capital domiciled in Angola is considered a medium or long-term capital operation, and as such is subject to the requirements of prior authorisation by the BNA. The law limits to financial institutions domiciled in Angola the ability to export capital, after authorisation by the BNA. In certain cases, this authorisation may be delegated to credit institutions. The foreign exchange attributed to the holder of a licence to export capital cannot be used for purposes other than those for which it was granted. In these cases, the amounts exported abroad must be subsequently repatriated to Angola.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Foreign currency accounts may be held by FX residents and non-residents subject to the limitations established by BNA Order No. 2/17, of 3 February 2017. According to this instrument, foreign currency credit accounts may be held and managed for the following grounds:

- funds that came from abroad; or
- funds arising from financial applications made through financial institutions.

On the other hand, foreign currency debit accounts may be held and managed when:

- exercising an exchange operation to pay Angolan nationals in national currency;
- issuing payment or transfer orders abroad;
- transfers in between banks to accounts held by FX residents that are a part of the same group;
- using electronic payment cards or other internationally accepted payment mechanism; and
- payment of any encumbrances arising from account maintenance and management.

The aforementioned BNA Order does not apply to foreign exchange operations conducted in the petroleum sector.

The opening and operation of bank accounts in other jurisdictions is subject to the grant of a special authorisation by the BNA.

Foreign investment issues

- 10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?**

Although it is arguable that the foreign ownership of commercial companies in Angola is not expressly hindered by the applicable law, in practice, the incorporation of a company held by foreign citizens or entities and the repatriation of the respective profits abroad can only be performed under a private investment project previously approved by the competent authorities (given that, according to the PIA, the incorporation of a company is deemed as a private investment operation). Under the Regulation of Private Investment Procedures such private investment project shall be approved by the ministries responsible for overseeing the principal sector of activity of the project. The ministerial department responsible for the planning of territorial development shall maintain a central registry of the investments performed in each economic sector, organised per ministerial department.

It is worth mentioning that the tax benefits and incentives foreseen in the PIA can only be granted to foreign private investment projects with a total amount equal to or higher than \$1 million and to internal private investments of amount equal or higher than \$500,000. Another constraint worth referring to is the requirement of partnerships with Angolan citizens, public owned companies or Angolan companies, within foreign private investment projects in certain areas of activity (electricity and water, hospitality and tourism, logistics and transport, construction works, telecommunications and IT, and media). Further regulating such partnerships, the PIA establishes that local partners shall own, at least, 35 per cent of the share capital and the effective participation in the management, as envisaged in the shareholders' agreement.

Despite the fact that Angola is a signatory to a few bilateral investment treaties, those do not provide relief from the requirement of putting forward an investment project for an investor intending to repatriate profits outside Angola.

- 11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?**

The conducting of insurance and reinsurance activities in Angola is limited to entities duly incorporated and authorised under the Insurance Activity Act. Such authorisation is granted by the Ministry of Finance, upon prior consulting of the Angolan Agency of Insurance Regulation and Supervision. The transfer of any amounts abroad under an insurance policy is deemed an FX operation – given that it entails the transfer of money between an FX resident and an FX non-resident. Upon the relevant authorisation of the BNA, insurance policies over project assets can be paid to foreign secured creditors.

- 12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?**

Presidential Decree No. 43/17 of 6 March 2017, as amended by Presidential Decree No. 78/17 of 24 April 2017, which has revoked

Decree No. 5/95 of 7 April, regulates the professional activity of non-resident foreign workers, along with the General Labour Law (Law No. 7/15 of 15 June 2015).

A quota rule is imposed on companies of all sizes, according to which 70 per cent of the workforce is to be composed of national workers (Angolan or foreign residents) and up to 30 per cent may be non-resident foreign workers.

Non-resident workers have to be registered, and their salaries can be paid in any currency agreed between the worker and the employer.

13 What restrictions exist on the importation of project equipment?

The conduction of import, export and re-export operations, which shall be made through the system Sistema Integrado do Comércio Externo (SICOEX), is subject to prior registration in the Registry of Exporters and Importers of the Ministry of Commerce (REI). Registration in the REI is mandatory and valid for a period of five years. The applicable law foresees two different regimes of importation: temporary and definite. The definite importation of goods into Angola under the general customs regime is subject to the payment of various charges (eg, customs duties, consumption tax and stamp duty).

As the payment of the imported goods also entails an FX operation, the procedures applicable to said payments are expressly governed by Order No. 19/12, 25 April, issued by the BNA, as amended by the Instruction No. 4/17, 27 March, also issued by the BNA. More recently (in 2014), the BNA approved a simplified and more flexible regime applicable to these operations, allowing advanced payments up to the amount of 100 million kwanza. This simplified regime is only available to entities duly registered with the BNA for such purpose and that comply with a set of requirements.

With a view to boosting the Angolan industrial sector, the importation of certain goods may be hindered or subject to quotas. For instance, in 2016 the importation of cement was expressly forbidden unless authorised by the Cement Sector Commission. The same prohibition was extended to 2017 by virtue of Joint Executive Decree No. 220/17 of 17 April 2017.

Finally, under the PIA the importation of machinery, equipment and other fixed means is a form of foreign private investment. Hence, the importation of project equipment may be performed under a private investment project.

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

According to the PIA, under a private investment project, the investor's ownership rights are protected by the Angolan state and cannot be nationalised or seized, unless a public-interest purpose is being pursued. In any event, in the event of nationalisation or seizure, the PIA foresees that the state undertakes to fairly, promptly and effectively compensate the investor.

The 2010 Angolan Constitution provides that the state respects and protects the property and further property rights of natural and legal persons, and therefore the expropriation for public utility is subject to the payment of a fair compensation, which is a prerequisite of the effectiveness of the expropriation. The procedures applicable to expropriation are further regulated by the Expropriation Regulations.

Fiscal treatment of foreign investment

- 15 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

The scope of the PIA comprises all foreign private investments (regardless of the amount) and internal private investments of amount equal or higher than 50 million kwanza, although tax benefits and incentives can only be granted to foreign investment projects of an amount equal to or higher than US\$1 million and to internal investment projects of amount equal to or higher than US\$500,000. The granting of such tax benefits and incentives must be analysed considering the objective criteria expressly provided by the PIA – in order to qualify for said benefits and incentives, the project shall meet certain prerequisites of

prime importance to the Angolan economy (eg, employment creation, production to export and value added to Angola).

The registry and execution of the documents supporting loans, mortgages, and other securities is subject to the payment of a stamp duty tax – the applicable rates may vary between 0.1 per cent and 0.3 per cent for guarantees, and between 0.1 per cent and 1 per cent depending on the financing operation. Additionally, in this context it is worth recalling that the profits and dividends distributed to natural or legal persons under a private investment project subject to the PIA are subject to an investment tax surcharge, levied on the amount that surpasses the share of equity, as follows:

- 15 per cent when the exceeding amount is up to 20 per cent;
- 30 per cent when the exceeding amount is higher than 20 per cent and up to 50 per cent; and
- 50 per cent when the exceeding amount is higher than 50 per cent.

Government authorities

16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

As already addressed above, private investment projects shall be approved by the ministerial departments responsible for the project's key sector of activity (note that mining, oil and gas and financial sectors are excluded from the PIA's scope). In addition to this approval, other licences or authorisations may be required, depending on the business carried out by the investor.

Projects in oil and gas are approved and monitored by the Ministry of Petroleum; projects in the mining sector are approved and monitored by Ministry of Geology and Mining or by the President (depending on the value of the project at issue), and projects in the financial sector are approved and monitored by the Ministry of Finance. There were recent amendments to the oil and gas sector; implementation is still ongoing and may impact the advice contained herein.

The project sectors of chemical refining, water treatment, power generation and transmission, transportation, ports and telecommunications are all included in the scope of the PIA and therefore the competent authorities for the approval and monitoring of private investment projects are the ministries responsible for such sectors.

The prerequisites for conducting different activities of course vary, and, therefore, additional or different licences may be required depending on the activity at stake.

Regarding the history of state ownership in the above-mentioned sectors, it is worth referring the following:

- the oil and gas and mining sectors are participated by the Angolan state through the national concessionaires (Sonangol and Endiama);
- the Luanda Refinery was recently acquired by Sonangol (which previously only held 30 per cent of the Luanda Refinery). Additionally, a new refinery will be constructed in Bengo, and will be 40 per cent held by Sonangol;
- within the water treatment sector it is worth noting EPAL, a public company that is engaged in the provision of water treatment services. There are also a number of private companies engaged in the water treatment sector;
- the distribution of electricity is also a sector secured by the Angolan state, through public companies (Empresa Nacional de Distribuição de Electricidade, EP); and
- the sectors of power generation, transportation, and telecommunications are greatly influenced by the private sector.

Regulation of natural resources

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

As mentioned above, the 2010 Constitution of Angola ascribes the ownership of all natural resources within the Angolan jurisdiction to the state. The Angolan jurisdiction comprises the onshore territory of Angola, the internal waters, the territorial sea, the exclusive economic zone and the continental shelf and, therefore, all oil and gas fields, minerals, water and other resources located in such areas belong to the public domain of Angola.

The state can only transfer rights over land that is part of the private domain. In any case, the transfer of rights almost never entails the transfer of ownership, but merely the transfer of minor land rights (although the applicable law foresees a wider range of land rights that can be assigned, including ownership).

Pursuant to the Petroleum Activities Law, mineral rights are attributed to the National Concessionaire (Sonangol EP), which cannot assign these mining rights, but may associate with a reputed domestic or foreign company having the necessary technical and financial capacity. Such association is usually undertaken through a production sharing agreement, under which the National Concessionaire is entitled to receive part of the profits generated by the petroleum activities.

As per the Mining Code, the mining rights of prospection, exploitation, treatment and trade of minerals are exclusively attributed to the National Concessionaire. Additionally, mining rights may also be granted to natural or legal persons, national or foreign, with proper technical and financial capacity for the performance of the mining activities, through the issuance of one of the following permits:

- prospecting permit;
- exploitation permit;
- mining permit; and
- mining pass.

Under the Mining Code, the holders of mining rights have a number of obligations connected to health and safety, training, financial commitments, environment protection, use and enjoyment of the land and use of explosives.

The acquisition or exercise of the rights at issue is not affected by the rights of aboriginal, indigenous or other recognised groups of people.

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The taxes applicable to the performance of petroleum operations, either by foreign or national entities, are the following:

- petroleum production tax;
- petroleum revenue tax;
- petroleum transaction tax;
- surface area charge; and
- contribution towards the training of Angolan staff.

Furthermore, under the Mining Code all national and foreign entities performing activities of mineral prospection and exploitation in Angola, depending on the developed activity, are subject to the payment of the following taxes:

- revenue tax;
- royalty;
- surface fee; and
- artisanal fee.

19 What restrictions, fees or taxes exist on the export of natural resources?

See questions 17 and 18. Additionally, under the Mining Code, when so required by the interests of the country, the state may request the purchase of the produced minerals at a market price, to allocate them to the local industry. The Petroleum Activities Law also foresees that in case of national emergency, armed conflict or natural disaster, the government may require all or part of the production of any oil concession and determine that the National Concessionaire and its associate companies increase the production to the maximum limit technically feasible.

Legal issues of general application

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

The investments, as already addressed in question 7, entail the approval of a private investment project under the PIA. In relation to loans and remittances by foreign parties or by local companies owned or controlled by foreign parties, foreign-exchange and private investment issues must be considered – see question 7. Further operations and transactions are not, in general, subject to any government approvals. However, the specifics of each operation and transaction shall be assessed on a case-by-case basis in order to evaluate if any relevant authorisations are applicable.

Regarding the applicable fees and charges, see questions 10, 13 and 15.

21 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

The entity before which the project documents shall be filed will vary according to the nature of the project. If the project is included in the PIA's scope, project documents shall be filed before the ministry responsible for its approval. If the project comprises, for instance, the incorporation of a bank, than the project documents shall be filed with the BNA. Regarding legal formalities, the contractual freedom prevails as the general principle under the CC; however, the law imposes notarial intervention for certain specific cases (eg, the execution of agreements for the transfer of real estate require the intervention of a public notary).

All documents related to the project shall be in Portuguese.

The original documents issued by other states shall be subject to legalisation and recognition procedures (normally before the Ministry of Foreign Affairs and the Angolan consulate of the relevant state).

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The Voluntary Arbitration Act establishes that disputes regarding available rights (ie, the ones that the parties may freely waive, extinguish or assign) may be subject to arbitration, upon agreement of the parties, and under the assumption that such dispute is not mandatorily submitted to the judgment of a judicial court (eg, labour disputes or those connected to real estate) or to necessary arbitration. Conversely, disputes regarding non-disposable rights cannot be subject to arbitration.

The applicable law allows the submission of disputes to inter-national arbitration. Although Angola is not a party to the ICSID Convention, the country has, on 6 March 2017, submitted to the Secretary-General of the United Nations the formal instrument of ratification of the New York Convention, which came into force in Angola on 4 June 2017.

The application of the Convention is subject to the reservation of reciprocity: Angola will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State. Furthermore, we note, however, that the Angolan Arbitration Law (which applies to domestic arbitrations and therefore to NY Convention awards) permits the making of a set aside action to the Supreme Court of Angola and an opposition procedure to the enforcement application itself. Both procedures can only be based, in broad terms, on some specific formal grounds plus one which may be of a substantive nature - breach of Angolan public policy.

It is also worth mentioning that the PIA expressly provides that any dispute regarding a private investment project may be referred to

arbitration, even though such arbitration must take place in Angola and be subject to Angolan law.

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

To what concerns project agreements, it is worth noting that the private investment contracts are subject to Angolan law (particularly to the PIA).

Conversely, financial agreements may be governed by the law chosen by the parties, as long as such choice corresponds to a serious interest of one of the parties, and the selected jurisdiction has a connection with the contract at issue.

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

Although there are some matters that must be referred to Angolan courts (such as the disputes regarding real estate property located in Angola), the CPC expressly allows the parties of an international economic contract to submit any disputes regarding such contract to the courts of the respective country or to other jurisdiction.

Environmental, health and safety laws

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

One of the obligations imposed by the PIA on the investors is the compliance with the environmental rules in force in Angola (among which are the Environment Framework Law and the Regulations on the Liability for Environmental Damages). The Ministry of Environment is the entity responsible for the enforcement of the environmental rules. Depending on the nature of the project at issue, its approval by the competent authority might require the elaboration of an environmental impact assessment study. Additionally, investors shall also consider, throughout the course of their businesses in Angola, the regulations regarding health and security in the workplace, which are enforced by the Ministry of Labour (in particular, by the Labour Inspection Department).

The Regulation of Environmental Protection in the course of Petroleum Activities sets forth the rules specifically applicable to this sector and provides that the National Concessionaire and all the oil companies must adopt appropriate measures to prevent the negative effects to pollution and, as far as possible, mitigate its consequences. Said statute is enforced by the Ministry of Petroleum.

Project companies

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Project companies are almost invariably incorporated under the form of private limited liability companies by *quotas*, or public limited



**Catarina Levy Osório
Irina Neves Ferreira**

Masuika Office Plaza
Edifício MKO A, Piso 5, Escritório A
Talatona, Município de Belas
Luanda
Angola

**catarinaosorio@alcadvogados.com
irinaferreira@alcadvogados.com**

Tel: +244 926 877 476
Fax: +244 926 877 481
www.alcadvogados.com

liability companies by shares. Considering the partnership requirement mentioned in the answer to question 10, the formation of joint ventures will be increasingly implemented.

Regarding the sources of financing it is worth noting that until the sharp drop in oil prices, Angola was one of the countries in sub-Saharan Africa where project finance was more prosperous. Under the most common model of project finance implemented by China in Angola, the loan is repaid with the provision of natural resources (most likely oil).

Public-private partnership legislation

- 27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?**

With a view to intensifying the use of the management capacity of the private sector by the state, and consequently developing public services and rationalising the use of public funds, in 2011 a new Law on Public-Private Partnerships was enacted. The Law on Public-Private Partnerships was approved at national level and is not industry-specific. However, it expressly foresees that sector-specific regimes may be set up when the specifics of a certain sector so require.

PPP - limitations

- 28 What, if any, are the practical and legal limitations on PPP transactions?**

The Law on Public-Private Partnerships foresees that the formation of PPPs must be compliant with the financial planning rules set forth in the State Budget Law, and must represent an advantage to the public partner, when compared with alternative means of achieving the same objective (eg, traditional public procurement). Additionally, the possibility of restoring the financial balance of the PPP in response to significant changes in the financial conditions is expressly provided for. At last, any increase to the budgetary costs of the PPP equal to or higher than 200 million kwanza is subject to the prior approval of the Minister of Economy, the Minister of Finances and the relevant sectoral Minister.

PPP - transactions

- 29 What have been the most significant PPP transactions completed to date in your jurisdiction?**

One good example of a significant PPP is the one established between the Angolan government and the company Caiporto for the construction of a deep water port in Cabinda, with an estimated cost of \$600 million.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation

Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans

Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Project Finance
ISSN 1755-974X



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law