

LEGAL ALERT

ANGOLA

A STEP FORWARD FOR FINANCINGS IN ANGOLA

SECURITIES OVER MOVEABLE ASSETS AND SELF-HELP REMEDIES

Further to our *Legal Alert* published on 4 February 2021, we are now pleased to update the position and confirm that on 22 April 2021 Law no. 11/21, which provides the legal framework applicable to the use of moveable assets (including credit rights and IP rights), credit securities and financial assets (such as securities) as a guarantee for the fulfilment of obligations (the “Law”), was published.

As referred to in our previous *Legal Alert*, several aspects of the framework strengthens the position of secured creditors, in particular, lenders, which are subject to the statute, thus confirming the effort that has been undertaken by the Angolan Executive to attract foreign investment; the financing of private projects and contribute to the sustainability of the Angolan market.

Scope of application

The Law is applicable to all securities over moveable assets, which are defined as security over moveable assets which may be tangible or intangible, including the pledge, the mortgage, the assignment of credits as security, the fiduciary sale as security, the sale with reservation of ownership and any other agreements which are aimed at creating security over moveable assets.

It is now possible to create security over “all the moveable assets of the guarantor”, a totality of assets or assets belonging to a generic category, with in the latter cases, a generic description of the assets given as security being permitted.

Differently, in what refers to secured obligations, they may be future, or conditional, determinable (and in this case the maximum secured amount shall be established) or determined.

Creation of security

Security may be created through an agreement, court decision or by law. In the first case, the agreement must include the minimum requirements established by the Law (among others, identification of the parties, timeline for payments, description of the secured obligations and secured assets).

In case of security over bank accounts or financial assets, the parties may enter into a control agreement that envisages to grant publicity to the security. This agreement is entered into by the guarantor with a third party in favour of the secured creditor. The third party may be the issuer of the financial asset over which security is created or the financial institution in which the relevant bank account or other financial asset is deposited.

Security does not cover just the main obligation but also interest and default interest, fees due to the secured party under the agreement, costs arising from keeping and maintaining the asset and ancillary obligations, as well as enforcement costs.

Security may be created over different types of assets (including future assets), the general criterion being that the assets must be capable of being disposed of for a consideration at the time of creation of the security. Specifically if the security has as its object a future asset (something which is a real novelty in Angolan security law), the security will only become effective on the date the guarantor acquires rights over the asset or the power to dispose of it, however, the priority of the security is retrospective from the date it was perfected, *i.e.*, was publicly registered.

We note that one of the key novelties of this new framework is the express possibility of creating security over mineral or oil resources which have not yet been extracted, even if only to finance their respective exploration or extraction. The encumbrance of such assets is permitted only to the “holder of the rights”, a wording which could be clearer, and which may give rise to ambiguous interpretations regarding who are in fact these entities. However, it is a significant move forward

towards reserve-backed lending. Previously direct security over reserve ownership to raise finance for Oil & Gas projects was not permitted as the ownership of oil reserves was the property of the State until it reached the well head and production was shared. The primary focus of security to finance Oil & Gas Projects has to date generally been by way of share pledge, control over accounts and cash flows.

Another important novelty relates to the ability to create security over inventories, defined in the Law as ‘set of tangible assets available in stock for sale, lease, manufacture or use in the normal course of activity of the guarantor’. Being, by nature, a variable reality, inventories were thus far deemed undeterminable and, as such, the creation of security over these assets violated Article 666.1 of the civil Code, approved by Decree-Law no. 47 344, of 22 November 1967, according to which the assets over which security is created must be certain. A debtor granting security over inventory, can now dispose of the assets included as inventory if in its normal course of business. This is an important step towards the common law concept of a floating charge, allowing the debtor to grant security over tangible assets but with the freedom of disposing of those assets in the course of business. In the event of a default there is a form crystallization and the security is exercised over the inventory existing at that time of enforcement.

Publicity and registration

Although the security is contractually enforceable as against the parties to it, to be enforceable against third parties the Law requires certain formalities be satisfied after its constitution. Thus, depending on the secured asset or assets, the requirements are as follows:

- The general rule is that security over moveable assets is binding on a third party: *(i)* on the date in which it is available for consultation on the website of the entity responsible for its registration; *(ii)* through the delivery of the asset or document supporting the creditor’s powers over the asset; *(iii)* with the entry into a control agreement;
- Notwithstanding this, in the case of assets subject to registration to be binding as against the world at large, registration is mandatory: as is the case of mortgages created over vehicles, aircrafts, ships and vessels and of acquisition security (see further below).

The Law provides that publicity through registration occurs on the ‘registration on the website of the entity responsible for the Registration of Security over Moveable Assets’. The new statute further establishes that this entity - Registration Office for Securities over Moveable Assets (“ROSMA”) – is to be created through a specific normative act: Presidential Decree no. 114/21, of 29 April (the “Decree”).

The Decree provides that ROSMA is an electronic platform in which all the data on the registration of security over moveable assets is to be centralized. This data is made available for registered users for a fee, which is also due for other actions such as registering or amending the registration of security. Again, this is a welcome novelty as creditors can in theory now undertake searches of the assets belonging to debtors and determine what security is held over the same.

This statute further provides that the registration of security over assets subject to registration themselves is not effected directly with ROSMA, but rather with the registry office in which such assets are or should be registered.

In effect a bridging regime applies until the ROSMA is fully operational, which includes granting powers to register security over moveable assets to existing entities, according to the type of secured asset, specifically:

- Assets subject to ownership registration: at the respective registry;
- Equipment, machinery and similar: vehicle registry;
- Aircrafts, the National Institute of Civil Aviation (*Instituto Nacional da Aviação Civil*), and seagoing vessels, the Angolan Maritime and Port Institute (*Instituto Marítimo e Portuário de Angola*);
- In the case of credit securities / securities admitted to negotiation on a regulated market or publicly offered: Securities Central (*Central de Valores Mobiliários*), with the Angolan Stock Exchange (*Bolsa de Dívida e Derivados de Angola*);
- For financial leases and financial assignments, the Angolan National Bank (*Banco Nacional de Angola*);
- In other cases: the Commercial Registry Office.

Once ROSMA is operational, the entities referred to above shall of their own motion communicate the security created, pursuant to terms to be defined.

Concerning the timeframe of this type of security, it is expected that their registration will remain valid throughout the life of the agreement which created the security. In the absence of an agreed contractual term, the registration expires after five years although it may be renewed.

Priority and enforcement

The Law sets out the rules according to which the priority as between security in the same category is determined. We note, in this regard, that secured creditors of the same obligation may modify, by written agreement, the priority of the security held by each.

Another aspect which strengthens the position of secured creditors is the priority granted to acquisition security (defined by the Law as ‘security granted to a creditor ... which finances the acquisition, by the guarantor, of the tangible moveable asset over which security is created’), which results in the preferential payment to creditors of this type of security.

Both judicial and out of court enforcement of security were previously already permitted in Angola, although the latter was difficult to achieve in practice. The new Law now introduces common law style self-help remedies favourable to lenders such that a mortgagee/guarantor may, in an event of default, take possession of the asset, if previously agreed between the parties. Notwithstanding that there are certain limitations to exercising this power, namely concerning the valuation of the asset and the use of the proceeds of its sale, we note that this change gives lenders the right to take action to swiftly enforce the security.

In particular, the Law regulates the cases of direct sales of the encumbered assets without the need to resort to the courts (something which was already allowed in previous legislation), which must necessarily be included in the agreement, namely providing that:

- The creditor may determine the method, means, time, location and other aspects concerning the sale/lease/other type of asset disposal, which apply to the valuation the terms foreseen for out of court enforcement;
- For this purpose, the creditor must notify (i) the guarantor, the debtor and its guarantor, if any; (ii) other creditors with public securities over the same asset;

- This notification must be provided at least 15 days prior to the sale/lease of the asset and include ‘a description of the asset, of the amount required to comply with the secured obligation ..., an estimate of the enforcement costs, the time, location and means of disposal of the assets’.

Final note

Notwithstanding the positive advantages for lenders arising under this new framework, we expect it to raise some practical obstacles. Angola is a civil law jurisdiction and the introduction of concepts modelled on common law, such as floating charges and self-help remedies, will take some time to implement and enforce both from a commercial mindset perspective as well as by the implementing entities, such as the registries and courts. Difficulties may also be encountered in the reconciliation between different statutes (such as the Civil Code) and the logistical effort of operating ROSMA and the transition to it of the data registered by existing entities, which may result initially in delays. In addition, the limited experience in operating an exclusively electronic platform and the use of sophisticated instruments such as electronic signatures may initially be another practical constraint.

Although the Law only enters into force on 19 October 2021 (180 days after its publication), projects currently under development should take the new framework into account, in order to ensure that they comply with the new requirements and so that when the framework is fully operational there securities are already complaint and can be registered.

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