The new insolvency paradigm in Mozambique

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Introduction

The long awaited overhaul of the bankruptcy and corporate reorganization legal regime in Mozambique will be implemented with the entry into force of Decree-Law no. 1/2013 of July 4 (the "Decree-Law"), on October 2, 2013. The former legal regime was still largely a by-product of the outdated Portuguese legislation of the colonial era, established in the Civil Procedure Code of 1939, amended in 1961.

The latter set of rules governing the bankruptcy of enterprises favoured creditors' rights, especially senior creditors, and the liquidation of the debtor company's assets over a court supervised reorganization. With the implementation of the new regime, new "recovery" procedures have been instated which now allow companies with favourable economic prospects to continue to operate, in lieu of forced liquidations which lack economic grounds, causing destruction of value and loss of human capital.

On the other hand, the law envisages that liquidation of enterprises with little economic prospects is to be made by maximizing the value of the assets and by preferably selling the entire business instead of the assets piecemeal.

These objectives were set out in the notes to a proposal of a new insolvency law presented by prominent figures in the Mozambican legal world on November 2007, albeit influenced by the Brazilian insolvency regime implemented in 2005, which constituted in effect the preliminary draft of the Decree-Law.

Pointing out the low scores attributed to Mozambique in the World Bank Doing Business rankings regarding insolvency procedures and the lack of protection enterprises have when facing financial difficulties, the notes to the proposal set out the eight main objectives of the new insolvency law: (i) preservation of enterprises; (ii) recovery of enterprises deemed capable of being recovered; (iii) liquidation of enterprises not deemed capable of being recovered; (iv) protection of workers; (v) legal security; (vi) active participation from creditors; (vii) maximization of the value of the debtor's assets; and (viii) reduction of financial costs for the companies and for the country as a whole.

Main features of the decree-law

The new insolvency regime established in the Decree-Law encompasses three different procedures: (i) the insolvency procedure; (ii) the "judicial recovery" procedure; and (iii) "extra-judicial recovery" procedure.

Regarding the insolvency procedure, one must distinguish between debtor initiated and creditor initiated insolvencies.

Creditor initiated insolvencies

The Decree-Law provides that the claim of insolvency of a creditor may only proceed if: (i) the debtor, with no justification, does not pay a liquid obligation which is materialized in an enforcement order; (ii) the debtor has enforcement proceedings brought forward against it and does not designate assets to be seized, within the legal deadlines; or (iii) the debtor executes fraudulent transactions or dealings to avoid paying its creditors.

Debtor initiated insolvencies

Debtor initiated insolvencies, on the other hand, require that the debtor claim and prove that its difficult financial situation makes it impossible to carry on its business activities.

The declaration of insolvency by the courts triggers automatic maturity of all the debts of the debtor and involves both an automatic stay on assets (i.e. secured creditors cannot gain possession of a secured asset or "sell" such asset separately in order to be paid), the inability of the debtor to carry out any business activities and to administer and dispose of its assets and the unenforceability of certain transactions related to the debtor carried out immediately prior to the declaration of insolvency. Business of the debtor (technically, the insolvent estate), notably performance of bilateral agreements, is then carried out by the insolvency administrator.

Furthermore, legal transactions or instruments which are contrary to the insolvent estate, meaning that they are performed in order to hurt the rights of creditors, may be annulled.

Liquidation of the insolvent estate is made with the purpose of obtaining the highest possible value for the assets. However, the sale of the enterprise or the various commercial establishments or production units which encompass the enterprise is preferred to selling the assets separately.

Creditors are paid with the proceeds of the sale in the following order: (i) labour credits; (ii) secured credits; (iii) tax credits; (iv) ordinary credits; (v) contractual and tax penalties; and (vi) subordinated credits.

Judicial recovery procedure

As set out in chapter III of the Decree-Law, only debtors may initiate the judicial proceedings by presenting a claim to the court. Acceptance of a request for judicial recovery protects the debtor's assets against creditors while a recovery plan is presented by the debtor to court and approved by the creditors. Furthermore, unless the directors of the debtor have been involved in mismanagement or fraudulent actions against debtors or other crimes against the estate of companies or the estate, the latter shall carry on conducting the business of the company.

The abovementioned recovery plan encompasses, for example, share capital increases, changes in the control of the company, or the sale of assets and may be challenged by creditors within 30 days counting from the announcement of the list of creditors.

Should the claim be accepted by the court and not challenged by any creditor, the plan is approved and the restructured claims of the company (i.e. new rights and obligations set out in the plan, after eventual sales of assets) shall be binding upon debtor and creditors.

If, on the other hand, the plan is challenged, an assembly of creditors shall be convened whereby the plan must be approved by the creditors.

Extra-judicial recovery procedure

Finally the extra-judicial recovery procedure is a special mediation procedure whereby the debtors assets do not become protected from creditors' claims. Should the procedure

be approved, however, and a recovery agreement whereby the debtor's claims are restructured is deposited in a judicial court, such agreement shall in effect constitute an enforcement order, deemed to be specifically enforced. The procedure must be approved by creditors of each class, which represent more than 3/5 of the total value of the credits, with the exception of labour credits and tax credits (which, due to their credits being of public interest, are not affected by such a plan made extra-judicially).

Being essentially a mediation procedure, extra-judicial recovery shall be governed by the rules set out in the Arbitration, Mediation and Conciliation Law (Law no. 11/99, of July 8).

Conclusion

The Decree-Law seems to provide solutions for companies in financial distress which are predictable, clear cut and not overly regulated. However, only time will tell how this regime will fair in practice, i.e., how the courts will apply the new rules and how the interplay between the multitude of intervenient parties in the procedures (courts, insolvency administrator, creditors and debtor) will happen. Moreover, the super seniority of labour credits established in this legal regime restricts the use of recovery plans and may hinder the reorganization of otherwise viable enterprises.

One thing is certain: the implementation of the new insolvency regime is another important step towards the modernization of the Mozambican legal system, bringing it closer to the needs and necessities, inter alia, of investors of the 21st century.

Trading in Africa: what do I need to know about sanctions?

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Financial sanctions remain an important political and diplomatic tool within the EU to achieve its foreign policy and security objectives.

There are currently 12 counties in Africa subject to some form of sanctions restrictions. Indeed, the restrictions on trade are now at their highest level since the end of the Cold War, largely fuelled by the events of the Arab Spring.

The ever-changing scope of the restrictions (in response to political events around the world) coupled with the potential for both civil and criminal liability makes it vitally important international businesses have a proper understanding of sanctions and the steps that must be taken to ensure compliance.

This article provides a brief overview of EU/UK sanctions and their potential significance for international businesses.

What are sanctions?

Sanctions are economic measures imposed by states (e.g. the UK) or groups of states (e.g. the EU) on target states or target persons, entities or products.

Who imposes sanctions within the EU?

Economic sanctions are imposed by either the UN, the EU or individual Member States.

Enforcement and supervision is carried out within each Member State by the relevant competent authority. For example, in the UK, the Foreign and Commonwealth Office and HM Treasury are responsible for administering financial sanctions as well as issuing licences/ authorisations. It is the department for Business, Innovation and Skills that is responsible for trade sanctions such as bans on weapons exports.

Who/what is caught by EU sanctions?

EU sanctions generally apply to:

- Offences committed within the territory of a Member State;
- Any national of a Member State (whether inside our outside the territory of the EU) and/or a legal person, entity or body registered or constituted under the law of a Member State; and
- Any legal person, group or entity doing business within the EU.

This article does not address US sanctions but it should be noted that US sanctions apply (in general terms) to US citizens anywhere in the world, US companies, transactions with a sufficient US nexus and transactions denominated in US dollars.

What do EU sanctions restrict?

The various sanctions regimes differ from jurisdiction to jurisdiction. Key features include:

List of designated persons/entities

Financial sanctions are usually targeted at certain individuals, members of their families and entities affiliated with them – they are known as "designated persons/ entities". For example, the sanctions regime against Egypt is focused on "persons having been identified as responsible for the misappropriation of Egyptian State funds" during the regime of President Mubarak, the sanctions regime against Liberia is focused on assets belonging to Charles Taylor and associated persons, and the sanctions regime against Zimbabwe concerns Mugabe and his associated persons.

Freezing of funds

Funds and economic resources must not be made available directly or indirectly, to or for the benefit of any designated persons.

Sanctions legislation is drafted broadly and "funds and economic resources" includes financial assets and benefits of every kind - for example, right of set off, dividends, letters of credit.