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# Insolvency

Second Edition

Mozambique  
HRA Advogados

[chambers.com](https://www.chambers.com)

2019

## Law and Practice

Contributed by HRA Advogados

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veny team advises clients, mainly banks, on procedures for collecting and recovering credits, and the team contributes to the negotiation and definition of recovery plans adapted to the requirements of a client's business and to the capacity of the debtor. The firm also advises creditors by monitoring executions, as well as seizure and other procedures, aimed at defending and recovering credits in the most diverse situations, and it advises on the protection of clients' interests against eventual or real insolvency.

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## 1. Market Trends and Developments

### 1.1 State of the Restructuring Market

The bankruptcy and corporate reorganisation legal regime in Mozambique is governed by Decree-Law No 1/2013 of 4 July 2013 (the “Insolvency Law”).

Mozambique does not have a tradition of instituting either insolvency procedures or restructuring procedures.

### 1.2 Changes to the Restructuring and Insolvency Market

See 2.1 Overview of Laws and Statutory Regimes.

## 2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

### 2.1 Overview of Laws and Statutory Regimes

The former legal regime was still largely a by-product of the outdated Portuguese legislation of the colonial era, established in the Civil Procedure Code of 1939, amended in 1961.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 creditor’s rights, especially senior creditors, and the liquidation of the debtor company’s assets over a court-supervised reorganisation.

With the implementation of the new regime, new “recovery” procedures have been installed which 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 few economic prospects is best done by maximising the value of the assets and by preferably selling the entire business instead of selling the assets piecemeal. These objectives were set out in the notes to a proposal for a new insolvency law presented by prominent figures in the Mozambican legal world in November 2007, albeit influenced by the Brazilian insolvency regime implemented in 2005, which constituted in effect the preliminary draft of the Insolvency 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 had when facing financial difficulties, the notes to the proposal set out the eight main objectives of the insolvency law as follows:

- preservation of enterprises;

- recovery of enterprises deemed capable of being recovered;
- liquidation of enterprises not deemed capable of being recovered;
- protection of workers;
- legal security;
- active participation from creditors;
- maximisation of the value of the debtor’s assets; and
- reduction of financial costs for the companies and for the country as a whole.

### 2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Regarding the insolvency procedure, it is important to distinguish between debtor-initiated and creditor-initiated insolvencies. In creditor-initiated insolvencies, the Insolvency Law provides that the claim of insolvency of a creditor may only proceed if:

- the debtor, with no justification, does not pay a liquid obligation which is materialised in an enforcement order;
- the debtor has enforcement proceedings brought forward against it and does not designate assets to be seized, within the legal deadlines; or
- the debtor executes fraudulent transactions or dealings to avoid paying its creditors.

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

#### Declaration of Insolvency

The declaration of insolvency by the court triggers automatic maturity of all the debts of the debtor and involves both an automatic stay on assets (ie, 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 of the debtor’s transactions carried out immediately prior to the declaration of insolvency. The business of the debtor (technically, the insolvent estate) and notably, performance of bilateral agreements, is then carried out by the insolvency or judicial administrator.

Furthermore, legal transactions or instruments which are contrary to the insolvent estate, meaning that their implementation will hurt the rights of creditors, may be annulled.

#### Liquidation of the Estate

Liquidation of the insolvent estate is carried out for 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:

- labour credits;
- secured credits;
- tax credits;
- ordinary credits;
- contractual and tax penalties; and
- subordinated credits.

### **Judicial Recovery Procedure**

Regarding the judicial recovery procedure, as set out in chapter III of the Insolvency 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 the court and approved by the creditors. Furthermore, unless the directors of the debtor have been involved in mismanagement or fraudulent actions against the debtor, or other crimes against the estate of companies or the estate, the directors shall carry on conducting the business of the company.

The above-mentioned 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 of 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 (ie, the new rights and obligations set out in the plan, after the 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 to consider the plan and it will only be accepted once it meets the approval of the creditors.

### **Extra-judicial Recovery Procedure**

Finally, the extra-judicial recovery procedure is a special mediation procedure whereby the debtor's assets are not protected from creditors' claims. Should the procedure be approved, however, and a recovery agreement restructuring the debtor's claims 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 three fifths 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). As it is essentially a mediation procedure, extra-judicial recovery is governed by the rules set out in the Arbitration, Mediation and Conciliation Law (Law No 11/99 of 8 July).

### **2.3 Obligation to Commence Formal Insolvency Proceedings**

According to Mozambican law, there are no particular or specific circumstances which oblige a company to commence insolvency proceedings. Nevertheless, a debtor company will be considered insolvent in situations of financial crisis where a restructuring is not possible.

Article 1 of the Insolvency Law provides that insolvency shall only be declared where the debtor is unable to comply with pending due obligations.

### **2.4 Procedural Options**

Insolvency may be filed by the debtor, if they are in an economic and financial crisis and unable to fulfil the requirements to seek judicial recovery. If this is the case, they should state why they are unable to pursue their business activity, and attach the documents listed in Article 102 of the Insolvency Law, namely:

- accounting statements for the last three years;
- a nominal list of creditors;
- a list of assets and rights and an estimate of their value;
- proof of business status;
- the accounting documents required by law; and
- a list of the business's directors for the last five years.

### **2.5 Commencing Involuntary Proceedings**

As referred to in 2.2 **Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, a distinction can be drawn between proceedings initiated by a creditor and proceedings initiated by a debtor.

A request for insolvency may be submitted by:

- the debtor, their surviving spouse, any of their heirs, or the debtor's estate administrator;
- the shareholders of the debtor company, according to the applicable law or its respective statutory regime; and/or
- any creditor of the debtor.

The decision that declares the insolvency will forbid the practice of any acts of disposition by the debtor and will appoint an insolvency administrator who will be responsible for administering the insolvent's assets.

The insolvent debtor is declared incapable of engaging in any economic or business activity and loses the right to manage or dispose of their assets, but they may, however, supervise the administration of the insolvency.

### **2.6 Requirement for Insolvency**

The Insolvency Law provides that the claim of insolvency filed by a creditor only proceeds if:

- the debtor, without justification, does not pay, on maturity, a net enforceable obligation;
- the debtor, ordered to pay any net unpaid amount, does not deposit or assign sufficient assets to the attachment, within the legal term; or
- the debtor engages in fraudulent acts or transactions to avoid paying creditors.

## 2.7 Specific Statutory Restructuring and Insolvency Regimes

The insolvency regime established in the Insolvency Law is not applicable to:

- public or exclusively publicly-owned companies; or
- credit institutions and public or private financial corporations, supplementary pension entities, healthcare plan operating companies, insurance companies, capitalisation companies and other legally equivalent entities, to which special regimes are applicable.

However, the law that regulates the Administrative Liquidation of Credit Institutions and Financial Corporations – Law No 30/2007, of 18 December, determines, under Articles 5 to 66, similar procedures for the insolvency and liquidation of credit institutions and financial corporations as those established by the Insolvency Law.

In the same way, the liquidation procedures for public or exclusively publicly-owned companies, which are governed by Decree no 10/2019, February 26, establish similar procedures for the liquidation of these companies as those established by the Insolvency Law.

## 3. Out-of-court Restructurings and Consensual Workouts

### 3.1 Restructuring Market Participants

As mentioned previously, Mozambican courts are not very familiar with insolvency or restructuring proceedings.

An extra-judicial recovery plan must be executed according to the rules of conciliation and mediation set forth in Law No 11/99, of 8 July (Arbitration Law).

Recourse to this kind of extra-judicial proceeding is not common and there are no rules obliging companies to resort to extra-judicial recovery prior to judicial restructuring or insolvency proceedings.

However, banks, credit funds and other lenders will generally be supportive of borrower companies experiencing financial difficulties pending a detailed assessment of their financial position, through a financing of their activities to cover losses.

### 3.2 Consensual Restructuring and Workout Processes

The Insolvency Law rules on the extra-judicial recovery of companies can be found in chapter VI.

The debtor may negotiate a plan with its creditors for extra-judicial recovery if the debtor:

- is not insolvent, or if it was insolvent, its liabilities have been declared extinct by final judgment;
- has not, within the last two years, obtained approval for a judicial restructuring process; and
- has not been, and is not in the process of being convicted, as director or main shareholder, of some specific criminal offence.

### 3.3 New Money

It is not common for super-priority liens or rights to be accorded to new money investors outside of a statutory or other formal process.

### 3.4 Duties on Creditors

The general applicable laws or legal doctrines in Mozambique impose duties of good faith, a duty of disclosure, rules preventing fraud or discrimination of minorities or unfair prejudice, a duty not to operate or vote in an oppressive manner, and a duty to vote for the purpose of benefiting the class as a whole rather than an individual interest.

### 3.5 Out-of-court Financial Restructuring or Workout

As mentioned previously, this kind of proceeding has not really been used in Mozambique.

However, Article 162 of the Insolvency Law establishes that, provided that the extra-judicial restructuring plan is signed by creditors representing three fifths of the credits of the respective categories, with the exception of labour and tax credits, the rules contained in said plan may be imposed on all other creditors of the same class, exclusively relating to the claims constituted up until the date that the extra-judicial restructuring plan was submitted.

## 4. Secured Creditor Rights and Remedies

### 4.1 Liens/Security

The types of liens/security that may be taken by secured creditors in Mozambique are the following:

- rights in rem, given over immovable or movable assets, as in the case of a mortgage over immovable and pledge over movable shares or accounts; or
- personal liens/guarantees given by the debtor such as promissory notes, bills or bonds.

Considering the type of security in question – namely, if it is security over an immovable property – Mozambican laws and courts may have exclusive rights and jurisdiction.

## 4.2 Rights and Remedies

In general, strictly the courts may enforce securities, namely, in respect of guarantees over immovable property, such as a mortgage. It may however happen, particularly in pledge cases, that the creditor may – with the agreement of the debtor – enforce the security without having recourse to the court.

The Insolvency Law establishes that both the declaration of insolvency and the judicial restructuring will seize and suspend any enforcement proceedings filed against the debtor and the rights of respective creditors have to be claimed in such proceedings.

## 4.3 Typical Timelines

The typical timelines for enforcing a secured claim and lien do not apply to insolvency or restructuring proceedings, where the creditors are obliged to claim their credits and rights in such proceedings. All enforcement proceedings will be suspended.

In normal enforcement cases the timeline may be up to two years.

## 4.4 Foreign Secured Creditors

Mozambican law is applicable to both foreign creditors and national creditors, and no special procedures or impediments apply to foreign creditors.

## 4.5 Special Procedural Protections and Rights

The rights of secured creditors are recognised insofar as their credits will be paid with priority over common creditors by the proceeds of the sale of the asset that has been secured.

## 5. Unsecured Creditor Rights, Remedies and Priorities

### 5.1 Differing Rights and Priorities

The Insolvency Law establishes the following ranking of credits:

1. credits arising out of labour legislation or which result from labour accidents;
2. credits with guarantee in rem;
3. common/ordinary credits (unsecured credits); and
4. subordinated credits.

Unsecured credits are, therefore, ranked third when receiving the proceeds of the sale of the assets apprehended by the judicial or insolvency administrator.

Apart from these credits, all debts and costs accrued in the management of the insolvency estate are considered non-concurrent credits and will therefore be paid with priority to all the credits above.

### 5.2 Unsecured Trade Creditors

Unsecured trade creditors are generally kept whole during a restructuring process, as long as they have claimed their credits in the proceedings and said credits have been recognised in the list of credits prepared and delivered in court by the insolvency administrator.

### 5.3 Rights and Remedies for Unsecured Creditors

The rights and remedies given to unsecured creditors in a restructuring and insolvency context largely depend on their position in the overall credits claimed. Unsecured creditors may, like all other creditors, be present in the assembly of creditors, may vote, may be part of the creditors' committee, and will be paid in third place from the proceeds of the sale of the insolvency estate, see 5.1 Differing Rights and Priorities.

### 5.4 Pre-judgment Attachments

In general terms, Mozambican law rules on pre-judgment attachments when the respective requirements are met.

These attachments or provisional measures, if awarded by the judge, depend on the filing of the main lawsuit in a particular timeframe, failing which, the preventative measure that has been awarded will cease.

However, in enforcement proceedings and other declarative lawsuits pending against the debtor, any provisional measures pending will be suspended with the declaration of insolvency or the acceptance of the request for judicial restructuring, in this last case for a period of 180 days, at the end of which, the creditors may continue their lawsuits and enforcement proceedings, irrespective of any judicial decision.

### 5.5 Timeline for Enforcing an Unsecured Claim

In enforcement proceedings, the timeline can be up to two years.

As for cases within the insolvency and restructuring processes, it should be noted that enforcement of any claims outside the insolvency proceedings or restructuring proceedings will not be allowed, as creditors have to claim their rights and credits in such proceedings.

### 5.6 Bespoke Rights and Remedies for Landlords

Article 114 of the Insolvency Law establishes that bilateral contracts are not resolved by insolvency and may be enforced by the insolvency administrator if compliance reduces or avoids increasing the liability of the insolvency, or if it is necessary for the maintenance and preservation of its assets.



The contractor may appeal to the insolvency administrator up to 90 days after the appointment of said administrator so that, within ten days, the administrator can declare whether or not the contract is fulfilled.

### 5.7 Foreign Creditors

There are no special proceedings or impediments or protections that apply to foreign creditors.

### 5.8 Statutory Waterfall of Claims

As set forth in Article 77 of the Insolvency Law, the ranking of credits is established as follows:

1. non-concurrent credits, such as the judicial costs, remuneration of the insolvency administrator and expenses of the insolvency estate;
2. credits arising out of labour legislation or labour accidents;
3. credits with real guarantee up to the limit of the guaranteed credit;
4. common credits;
5. fines of any nature, including tax fines and penalty clauses; and
6. subordinated credits.

### 5.9 Priority Claims in Restructuring and Insolvency Proceedings

Article 79 of the Insolvency Law establishes the rank of so-called non-concurrent claims, as follows:

1. remuneration of the insolvency administrator and assistants, and credits arising from labour legislation or from labour accidents related to services rendered after the declaration of insolvency;
2. amounts provided by the creditors to the insolvent estate;
3. expenses relating to the apprehension, administration and realisation of the assets, and distribution of the proceeds of the sale, as well as the costs of the insolvency proceedings;
4. judicial costs regarding the actions and enforcement proceedings in which the insolvency estate has not achieved success; and
5. obligations arising from valid judicial acts performed during the judicial restructuring or after the declaration of insolvency, and tax that has arisen since the declaration of insolvency.

The above claims all have priority over secured creditor claims.

## 6. Statutory Restructurings, Rehabilitations and Reorganisations

### 6.1 Statutory Process for a Financial Restructuring/ Reorganisation

As set forth in Article 46 of the Insolvency Law, the main role of a judicial restructuring proceeding is to make it possible to meet the debtor's overdue obligations.

#### Requirements for Restructuring

The restructuring proceeding may be requested by a debtor which, at the time of the request, has regularly conducted business for more than 12 months and, cumulatively, meets the following criteria:

- it is not insolvent, and if it was insolvent, its liabilities have been declared extinct by final judgment;
- it has not obtained, within the last two years, a concession for restructuring proceedings; and
- it has not been convicted, and is not in the process of being convicted, as director or main shareholder, of a crime as established in the Insolvency Law.

The judicial restructuring proceeding may also be requested by the surviving spouse, the debtor's heirs, a trustee or remaining partner.

The application for judicial recovery must be filed with documentation as follows:

- the statement of the causes of the debtor's position in terms of its assets; and
- the accounting statements for the last two years in compliance with applicable law, including:
  - (a) a general inventory and balance sheet of assets and liabilities;
  - (b) income statements;
  - (c) a statement of income for the last fiscal year;
  - (d) a nominal list of creditors;
  - (e) a complete list of workers; and
  - (f) a list of actions and enforcement proceedings to which it is a party.

#### Judge's Role

After the petition for restructuring has been filed in court, together with the documentation set forth in Article 50 of the Insolvency Law (referred to above), if the judge finds that the request and supporting documentation are adequate, the judge will admit the request and, systematically:

- appoint the insolvency administrator;
- order the suspension of all actions and executions, including tax actions, against the debtor;
- determine that the debtor submits their monthly accounts; and

- order that the prosecution and creditors be served either by letter or by notice.

## Recovery Plan

The recovery plan shall be submitted by the debtor to the court within 90 days of the publication of the decision granting the application for judicial recovery and shall contain:

- indication of the means of recovery;
- demonstration of economic viability; and
- the economic and financial report and valuation of the debtor's assets.

All credits existing at the date of the request are subject to judicial recovery, even if not overdue, with certain exceptions.

The debtor's creditors in bankruptcy retain their credit rights and privileges against the co-obligors, guarantors and obligors of return.

Also, the judicial restructuring plan cannot spread the due payment of credits derived from labour legislation or labour accidents over a period of more than one year from the date of filing of the judicial restructuring process.

The creditors have ten days to submit their claims or objections to the already-appointed insolvency administrator. Creditors may also contest the restructuring plan itself within 30 days from the date on which the notice including the plan and the list of creditors is published.

The following, among others, are means of judicial recovery:

- the granting of special terms and conditions for the payment of overdue or due obligations;
- changes in society, such as splits or mergers;
- change of control of the company;
- total or partial replacement of directors;
- granting creditors the right to elect directors separately and to veto matters specified in the plan;
- increase of share capital; and
- transfer or lease of establishment.

## Creditors' Role

Creditors' claims will be observed by the insolvency administrator.

Any creditor may contest the judicial rescue plan within 30 days from the date on which the notice containing the list of creditors was published. If the restructuring plan is contested by any creditor, the judge must call for the general assembly of creditors to resolve the matter, and the meeting can be held up to 60 days from the deadline to submit a contest.

The restructuring plan binds the debtor and all creditors. When judicial restructuring commences, all legal proceedings pending against the debtor company shall be suspended.

When the restructuring plan is submitted for approval, creditors of all classes must approve it. With regard to creditors holding common credit rights and creditors holding rights in rem, the restructuring plan must be approved by creditors that represent more than half of the total value of the credit submitted to the assembly of creditors, and cumulatively, by a simple majority of the creditors present at the creditors' assembly session.

In respect of creditors with rights arising from labour legislation or labour accidents, the restructuring plan must be approved by a simple majority of the creditors present at the assembly of creditors session, irrespective of the value of their claims.

The assembly of creditors may change the restructuring plan submitted for approval if:

- the debtor expressly agrees; and
- the rights of creditors absent from such a session are not diminished.

If the assembly rejects the restructuring plan, the judge will declare the debtor insolvent.

## 6.2 Position of the Company

An insolvency administrator has the role of controlling the management of the company during the period of recovery, even in a restructuring proceeding.

According to Article 22 of the Insolvency Law, the insolvency administrator has the following duties/responsibilities:

- to supervise the activities of the debtor and compliance with the restructuring plan;
- to request a declaration of insolvency from the court in case of non-compliance with said plan;
- to submit to the judge a monthly report on the debtor's activities; and
- to submit a report to the judge on the execution of the restructuring plan on the closing of the restructuring process.

The commencement of a restructuring process will suspend, for an irrevocable period of 180 days, the course of all pending actions and enforcement proceedings against the debtor company.

As long as the restructuring proceedings are pending, the company will conduct business under the direction of the insolvency administrator and, where applicable, the creditors' committee.

### 6.3 Roles of Creditors

Creditors of the debtor in restructuring proceedings maintain all their rights and liens against all liable parties.

According to Article 22 of the Insolvency Code, the insolvency administrator shall:

- provide all the information requested by the interested creditors;
- provide the creditors with extracts from the debtor's books, to serve as grounds for claims and appeals of credits; and
- present all reports on the monthly activities of the debtor, and a final report on the closing of the process.

The general assembly of creditors represents all classes of creditors of the debtor.

There are four main classes of creditors, whose claims are ranked in the following order:

1. credits arising out of labour legislation or labour accidents;
2. credits secured by rights in rem;
3. ordinary credits (unsecured credits); and
4. subordinated credits.

All creditors may also designate a creditors' committee which will be composed of:

- one from the class of creditors resulting from labour legislation or accidents;
- one from the class of creditors resulting from credits secured with rights in rem; and
- one from the class of creditors resulting from unsecured credits.

According to Article 34 of the Insolvency Law, in a restructuring proceeding, it is up to the general assembly of creditors to decide on:

- the approval or rejection of, or changes to, the restructuring plan submitted by the debtor;
- the constitution of the creditors' committee and designation of its members;
- the request of withdrawal of the process by the debtor;
- the appointment of a judicial manager, in case the debtor is removed from the management; and
- any other matter of interest to the creditors.

On the other hand, according to Article 27 of the Insolvency Law, the duties of the creditors' committee are:

- to supervise the activities and inspect the accounts of the insolvency administrator;

- to safeguard the appropriate development of the proceedings and compliance with all applicable rules;
- to inform the judge of any violation of rights or the occurrence of damages to the creditors' rights;
- to examine and issue its view regarding a claim from any interested parties;
- to ask the judge, after hearing the insolvency administrator, to summon the creditors' assembly; and
- to intervene in any other of the acts provided for in the Insolvency Law.

### 6.4 Claims of Dissenting Creditors

A judicial restructuring plan binds all creditors to the following votes/plans, even if not approved by all classes of creditors in the same general assembly of creditors:

- an affirmative vote of creditors which represent more than half of the value of all claims submitted to the assembly, regardless of class;
- an approval of the plan by two classes of creditors or, if there are only two classes of creditors, by at least one of them; and
- in relation to any class of creditors that rejected the plan, an affirmative vote of more than one third of the creditors.

### 6.5 Trading of Claims Against a Company

The Insolvency Law does not rule specifically on the transfer of claims, which means that claims against a company undergoing a proceeding may be traded and the transferee may be recognised by the court and the insolvency administrator, by requesting recognition of their rights.

### 6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

A restructuring procedure may be utilised to reorganise a corporate group on a combined basis for administrative efficiency.

In fact, the following measures, among others, may be set forth in a restructuring plan, as established in Article 49 of the Insolvency Law, permitted under a rescue procedure:

- the division, merger or alteration of the company, the founding of a wholly-owned subsidiary, the transmission of shares, all subject to the rights of the shareholders in accordance with the applicable law;
- change of the company's control;
- the total or partial replacement of the debtor's directors, or a change to its corporate bodies;
- an increase of the share capital;
- the transfer of the commercial establishment, including to a company constituted by the debtor's employees;
- the establishment of shared management with the participation of the creditors;
- the incorporation of a creditors' company;

- the incorporation of a company with a specific purpose to deliver, for the payment of the claims, the debtor's assets; and
- salary reduction, compensation timetables and reduction of the work journey through an agreement or collective agreement.

## **6.7 Restrictions on a Company's Use of or Sale of Its Assets**

According to Article 64 of the Insolvency Law, after the submission of the request to the court for a judicial restructuring process, the debtor may not transfer or encumber any of the assets or rights of its permanent assets, unless there is a manifest need recognised by the judge, after hearing the creditors' committee and the insolvency administrator, excluding those already contemplated in the restructuring plan.

## **6.8 Asset Disposition and Related Procedures**

As established in Article 62 of the Insolvency Law, the debtor and/or its managers are maintained in the operation of the business – namely, the sale of assets, etc – under the supervision of the creditors' committee, if applicable, and under the supervision of the insolvency administrator, provided that the debtor and/or its managers are not suspected of any criminal activity or of acting in bad faith.

If such activity is verified, an insolvency administrator shall be designated with responsibility for conducting the activities of the company.

If the accepted restructuring plan provides for a judicial sale of the business or assets of the debtor, the judge will order such sale, giving preference to the sale of the company as a whole as opposed to the sale of individual assets.

A purchaser acquires good title, free and clear of claims, in a sale executed in accordance with such a restructuring proceeding.

There is nothing in the law forbidding the creditors from bidding on the assets in a restructuring proceeding, as long as this is conducted according to the plan.

Any pre-negotiations will only take place where these have been agreed to in the approved restructuring plan.

## **6.9 Secured Creditor Liens and Security Arrangements**

If this has been approved in the restructuring plan, secured creditor liens and security arrangements may be released pursuant to such a procedure.

## **6.10 Priority New Money**

Priority new money may be made available to the company in accordance with any statutory procedures, and such new

money investments or loans may be secured by assets of the company, as long as this is provided for in the restructuring plan and as long as there is agreement from the creditors' committee, if applicable, and from the insolvency administrator.

## **6.11 Determining the Value of Claims and Creditors**

Determination of the value of claims and those creditors with an economic interest in the company is made by the insolvency administrator, either by referring to the accounting books or other documents in its power and/or information provided by claiming creditors.

The list of creditors and their claims is published and the creditors are given the right to submit a challenge to this list, based on either the value or class in which they have been included.

## **6.12 Restructuring or Reorganisation Agreement**

The principle of fairness is not directly established in the Insolvency Law. After the plan has been approved, it may, however, be contested by any creditor based on imperative rules.

## **6.13 Non-debtor Parties**

The creditors of the debtor in restructuring proceedings retain all rights and liens against the liable parties, guarantors and entities, unless they approve otherwise in the restructuring plan.

## **6.14 Rights of Set-off**

Creditors may only exercise rights of set-off, off-set or netting if these are also included in the approved restructuring plan. If that is not the case, any proceedings towards a set-off are suspended during the first 180 days, which means that creditors will not be able to maintain, enforce or have a decision against the debtor during this time.

## **6.15 Failure to Observe the Terms of Agreements**

During the two-year period following a decision approving judicial recovery, failure to comply with any obligation under the recovery plan will lead to insolvency. After the declaration of insolvency, the creditors will have their rights and guarantees reconstituted under the conditions originally contracted, minus the amounts that have already been delivered and the acts already validly performed within the scope of a judicial recovery.

The Insolvency Law does not establish any specific sanction for non-compliance, by a creditor, to the restructuring plan.

## **6.16 Existing Equity Owners**

Shareholders do not have a right to vote on the approval of the restructuring plan, unless they are also creditors. The

treatment of equity owners is determined by the restructuring plan submitted by the resolution applicant.

## 7. Statutory Insolvency and Liquidation Proceedings

### 7.1 Types of Voluntary/Involuntary Proceedings

See 2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations.

### 7.2 Distressed Disposals

According to Article 139 of the Insolvency Law, the sale of assets or a business is ordered by the court, after hearing from both the creditors' committee and the insolvency administrator, in accordance with the rules of enforcement proceedings provided for in the Civil Procedure Code.

Under the Insolvency Law, the object of the sale is free and clear of claims and does not imply the succession of the bidder in the debtor's obligations, including tax obligations. There are no rules forbidding creditors from bidding on the assets of the insolvent.

### 7.3 Failure to Observe Terms of Agreed/Statutory Plan

In an insolvency proceeding, there is no agreed plan. The assets are sold by the insolvency administrator as ordered by the court.

### 7.4 Priority New Money During the Statutory Process

Priority new money may not be invested or loaned during the statutory process, nor can any advances be secured by liens/security on the assets of the company in an insolvency.

### 7.5 Insolvency Proceedings to Liquidate a Corporate Group

Under Mozambican law, there are no insolvency proceedings that can be utilised to liquidate a corporate group on a combined basis or under related proceedings for administrative efficiency.

### 7.6 Organisation of Creditors or Committees

See 6.3 Roles of Creditors.

### 7.7 Use or Sale of Company Assets During Insolvency Proceedings

According to Article 136 of the Insolvency Law, the disposal of the assets of the insolvent is always carried out with a view to obtaining the maximum value possible. Disposal of the assets occurs in the following order of preference:

1. disposal of the company, with the sale of its stores in a block;

2. disposal of the company by selling its branches or production units in isolation;
3. block sale of the assets comprising each of the debtor's establishments; or
4. disposal of the assets individually considered.

The sale is subject to court permission, after hearing the creditors' committee and the insolvency administrator.

## 8. International/Cross-border Issues and Processes

### 8.1 Recognition or Relief in Connection with Overseas Proceedings

Mozambique has rules on the recognition of a foreign judgment. Any request for recognition of such must be submitted to the Mozambican Supreme Court.

The Supreme Court may not judge the merits of the case; but the request will need to meet the following requirements for the Supreme Court to recognise the judgment:

- there is no doubt as to the authenticity of the verdict or the correctness of the decision;
- the judgment was executed according to the laws of the country in which it was issued;
- the decision was issued by the competent court in accordance with the conflict rules of Mozambican law;
- the exception of double jeopardy may not be invoked, or the case having been judged based on a case attached to a Mozambican court, may not be invoked, except if the foreign court determined the jurisdiction;
- the accused was duly summoned, except if it is a case where 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 is not contrary to Mozambican principles of public order; and
- it does not offend the provisions of Mozambican law in cases where the decision was issued against a Mozambican national, if the matter should have been decided in accordance with Mozambican conflict rules.

### 8.2 Co-ordination in Cross-border Cases

In cross-border cases, there appears to be no record of courts in Mozambique entering into protocols or other arrangements with foreign courts to co-ordinate proceedings.

### 8.3 Rules, Standards and Guidelines

Considering the fact that insolvency proceedings are not familiar in Mozambique, there is actually no tradition of dealing with cross-border insolvency. Therefore, there are no particular rules, standards or guidelines to determine which jurisdiction's decisions, rulings and laws would be accorded

priority or paramountcy in the context of insolvency. However, Portuguese principles of the conflict of laws will have value in Mozambican courts.

## 8.4 Foreign Creditors

Foreign and local creditors receive the same treatment under Mozambican law.

## 9. Trustees/Receivers/Statutory Officers

### 9.1 Types of Statutory Officers

In Mozambique, only one type of officer is appointed in recovery or insolvency proceedings, and this is the insolvency or judicial administrator.

The insolvency administrator is in charge of the management or liquidation of the bankrupt estate under the insolvency procedure, being competent to carry out all acts attributed to them by this statute and by the law.

The nomination of a insolvency administrator is made by the judge in the declaration of insolvency or in the admission of a restructuring process.

The judge may remove the insolvency administrator at any time and replace them with another one if – once the creditors' committee, the debtor and the insolvency administrator have been heard – there exists fair ground.

The insolvency administrator may be liable for any damages caused to the debtor and to the creditors for negligent non-compliance with the obligations and duties that the administrator has to comply with.

### 9.2 Statutory Roles, Rights and Responsibilities of Officers

See 9.1 Types of Statutory Officers.

### 9.3 Selection of Officers

See 9.1 Types of Statutory Officers and 10. Advisers and Their Roles.

## 10. Advisers and Their Roles

### 10.1 Typical Advisers Employed

The insolvency administrator may have recourse to assistants in the exercise of their functions, namely lawyers, accountants and consultants.

Such service providers will be paid out of the insolvency estate and the proceeds of the sale, with priority over the remaining creditors.

In judicial and non-judicial restructuring proceedings, it is up to the company to contract such service providers.

In judicial restructuring proceedings any contracting must also be supervised by the insolvency administrator.

### 10.2 Compensation of Advisers

Such professionals are employed whenever the insolvency administrator needs technical support, either in the valuation or liquidation of the assets.

### 10.3 Authorisation and Judicial Approval

It is up to the insolvency administrator to appoint any such assistants they might need to support them in the exercise of their functions, depending on prior judicial authorisation.

### 10.4 Duties and Responsibilities

The Insolvency Law does not establish what type of professionals or expertise enterprises might be contracted to assist the insolvency administrator. This largely depends on the complexity of the functions and the particular needs of the proceeding. Considering that such agreements involve contracts for the provision of services, rules on liability shall be applicable.

## 11. Mediations/Arbitrations

### 11.1 Utilisation of Mediation/Arbitration

Insolvency proceedings for the liquidation of a company's assets must be dealt with by the judicial courts.

However, extra-judicial restructuring may be subject to arbitration, in which case, the Mozambican Law on Conciliation, Mediation and Arbitration (Law No 11/99 of 8 July) should be applied.

### 11.2 Mandatory Arbitration or Mediation

There are no rules in Mozambique that order mandatory arbitration or mediation in either a judicial, supervised insolvency or restructuring proceeding.

### 11.3 Pre-insolvency Agreements to Arbitrate

Arbitration of pre-insolvency agreements does not come up in Mozambique, since insolvency proceedings must be dealt with exclusively by the courts.

### 11.4 Statutes Governing Arbitration/Mediation

Law No 11/99 of 8 July rules on conciliation, mediation and arbitration.

### 11.5 Appointment of Arbitrators

There is a broad recognition, in Articles 4 and 5 of Law 11/99, of the freedom of parties to commit arbitrators to decide their disputes, provided that they concern matters which are considered available and not to be submitted exclusively to

a court of law. Such law therefore plays a major role in economic development in the country.

As for arbitrators, they may be appointed by the parties or a third party as an arbitral institution and there is nothing to prevent these arbitrators from being judges (Article 19), provided that they exercise the function of arbitrators outside their official condition. As for the effectiveness of the judgments of arbitration proceedings, they must be identical to those of a court of law (Article 43).

Two of the institutions based in Mozambique stand out: COMAL (Centre for Labour Mediation and Arbitration) and CACM (Centre for Arbitration, Conciliation and Mediation). The first is public and has representation in all the provinces and the second is private, created by the CTA (Confederation of Economic Associations), based in the capital Maputo.

CACM plays an important role in promoting alternative means of conflict resolution, arbitrator training and support at different stages of the procedure, to ensure greater organisation and credibility in Mozambican arbitration. In addition, CACM has its own rules and procedures, which are inspired by those of the International Court of Arbitration of the International Chamber of Commerce (ICC).

## 12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

### 12.1 Duties of Directors

As mentioned previously, in an insolvency proceeding, the management of the assets of the company is handled by the insolvency administrator and the debtor loses their right to administer their asset.

On the other hand, under a judicial or extra-judicial restructuring proceeding, directors may continue to manage the company, subject to the non-opposition of the creditors.

As set forth in the Mozambican Commercial Code, directors may be found liable towards:

- the company, for damages caused by acts or omissions in breach of legal or statutory duties, unless they can prove that they acted without fault; and
- the creditors of the company if, by failing to comply with a legal or statutory provision, principally or mainly designed to protect the creditors, the net assets of the company become insufficient for the satisfaction of the creditors' claims.

The liability of directors, officers or managers, as well as of shareholders in limited liability companies, is ascertained in the insolvency proceedings.

The judge may, on their own initiative or at the request of interested parties, order the ring-fencing of the private property of the accused, in a quantity compatible with the damage caused, until judgment of the accountability action.

This action expires in two years counted from the date of the final and unappealable sentence of closure due to insolvency.

Directors can be disqualified from running the management of a company or business, and/or be considered incapable of managing any company.

Moreover, as set forth in Article 167(1) of the Insolvency Law, a director who, "for their own benefit or that of third parties, through forgery, inaccurate accounting, simulation, hiding of accounting documents, artificial creation or aggravation of losses or profit reduction, or any other artifice practised before, during or after a declaration of insolvency, a concession of judicial restructuring or the deposit of the extra-judicial recovery plan, harms the creditors, shall be sentenced under the crime of theft."

Considering the nature of the crime committed by the director in question, criminal sanctions may be applied.

### 12.2 Direct Fiduciary Breach Claims

See 12.1 Duties of Directors.

### 12.3 Chief Restructuring Officers

Even in a restructuring proceeding, an insolvency administrator has the role of controlling the management of the company during the period of recovery.

According to Article 22 of the Insolvency Law, the following duties/responsibilities fall upon the insolvency administrator:

- to supervise the activities of the debtor and their compliance with the restructuring plan;
- to request a declaration of insolvency from the court in the case of non-compliance with said plan;
- to submit a monthly report to the judge on the debtor's activities; and
- to submit a report to the judge on the execution of the restructuring plan, at the closing of the restructuring process.

### 12.4 Shadow Directorship

There is no concept of shadow directorship in Mozambican law.

However, in restructuring proceedings, creditors may contribute to the administration of the company, either by electing the managers or by exercising a veto power in certain issues as specified by the restructuring plan.

## 12.5 Owner/Shareholder Liability

The personal liability of the owners/shareholders of a limited liability company is determined by the insolvency court itself, regardless of the realisation of the assets or proof of insufficiency to cover the liability.

The action for liability shall lapse within two years of the final judgment closing the insolvency. The judge may, at their own discretion or at the request of any interested parties, order the ring-fencing of private property of the accused, in an amount commensurate with the damage caused, until the trial dealing with the liability is over.

## 13. Transfers/Transactions That May Be Set Aside

### 13.1 Historical Transactions

According to Articles 125–128 of the Insolvency Law, the following transactions, among others, may be annulled, either by the court or by request of the creditors:

- payments by the company of debts which are not in arrears;
- payments of debts due and payable within their legal term, in a manner not provided for in the contract;
- actions performed, free of charge, within a period of two years prior to the declaration of insolvency;
- repudiation of an inheritance or legacy within a period of two years prior to the declaration of insolvency;
- the sale or transfer of the business 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 of immovable property, made after the declaration of insolvency.

### 13.2 Look-Back Period

According to Article 125 of the Insolvency Law, the look-back period (prior to the onset of the insolvency process) covering transactions that can be challenged or set aside is two years.

### 13.3 Claims to Set Aside or Annul Transactions

Any act performed by the company prior to the commencement of the insolvency that is determined to have caused damage to creditors, is revocable.

Any revocation must be required by the insolvency administrator, a creditor, or a public department, within three years after the declaration of insolvency.

However, some of the acts above, if approved in restructuring proceedings, will not be considered null.

## 14. Importance of Valuations in the Restructuring and Insolvency Process

### 14.1 Role of Valuations

With regard to processes of valuation, Mozambique lacks any tradition of either insolvency or restructuring proceedings, considering that the Insolvency Law is only dated 2013. Therefore, valuations of assets do not play a well-established role in the Mozambican market.

### 14.2 Initiating a Valuation

Valuation may be initiated either by the debtor company or by the creditors, depending on who initiates the insolvency proceedings.

### 14.3 Jurisprudence

Considering how recently the Insolvency Law was approved and the limited number of cases brought to court, there appears to be no relevant jurisprudence on this matter.

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