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Taking Security in Mozambique

A Comparative Guide for Investors

ABOUT THIS GUIDE

In light of Africa's sustained economic growth over the last decade, the continent has become an increasingly attractive destination for investment.

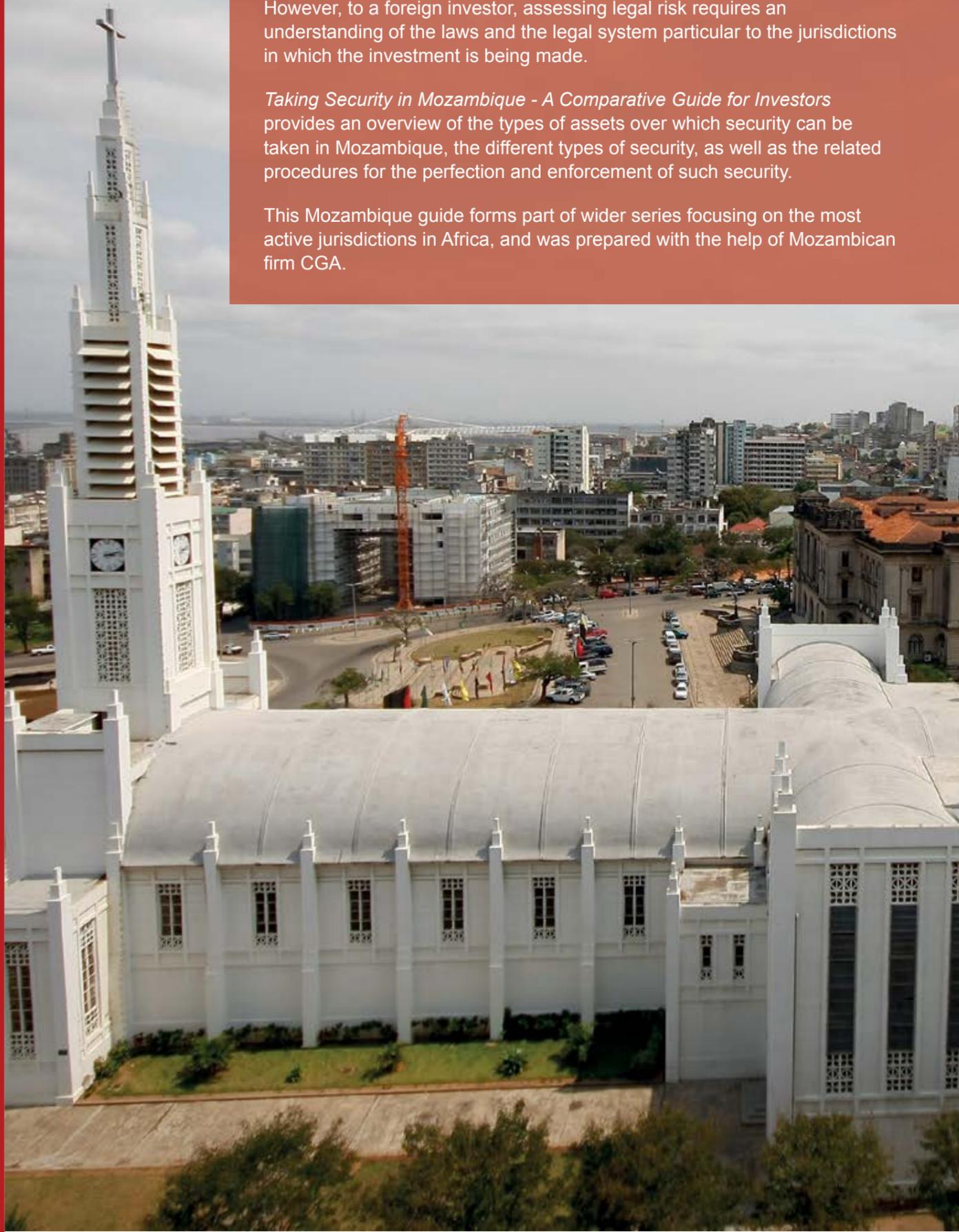
However, to a foreign investor, assessing legal risk requires an understanding of the laws and the legal system particular to the jurisdictions in which the investment is being made.

Taking Security in Mozambique - A Comparative Guide for Investors provides an overview of the types of assets over which security can be taken in Mozambique, the different types of security, as well as the related procedures for the perfection and enforcement of such security.

This Mozambique guide forms part of wider series focusing on the most active jurisdictions in Africa, and was prepared with the help of Mozambican firm CGA.

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REPUBLIC OF MOZAMBIQUE

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Mozambican financings?

Shares

Security can be taken over the shares of a company incorporated in Mozambique by way of a pledge. The Mozambique Commercial Code (the Commercial Code) sets out the requirements for taking security over shares.

There are two types of company under the Commercial Code: private limited (*limitada*) companies whose share capital is represented by “*quotas*,” an immaterial form of equity representation; and public limited (*sociedade anónima*) companies whose share capital is represented by: (i) share certificates (such share certificates may be issued in bearer form or in registered form), or (ii) dematerialised shares held in a depository account operated by a Mozambican commercial bank. The type of company will affect how the security is taken over the shares.

Bank Accounts

Security interests over bank accounts in Mozambique are created by means of a pledge.

Land

The Constitution of Mozambique provides that land is property of the State. Accordingly, it is prohibited for any person to grant any type of security over land. Instead, the State grants to private individuals or companies the right to use such land, through formal authorisations known as “*Direito do Uso e Aproveitamento da Terra*” or “*DUAT*,” which entitle the recipient to have access to and use the designated area of land. The duration of the DUAT is unlimited for land used for residential purposes and lasts for 50 years for land used for commercial purposes.

The holder of a DUAT becomes the owner of any building, premises or other immovable assets erected on the land subject to the DUAT. Accordingly, the holder of a DUAT may create security interests over such real estate (although not the land itself) by means of a mortgage (*hipoteca*). The DUAT itself cannot be assigned or pledged by way of security.

Contractual Rights

Security over rights arising under a contract is usually taken either by way of a written pledge (authorised by the pledgor and signed by both the pledgor and the pledgee) or an assignment of the relevant rights of the assignor in favour of a secured party (with a provision for re-assignment to the assignor after the secured obligations have been discharged in full). Depending on the terms of such contract or agreement, an assignment might require the prior approval of the counterparty to such contract or agreement.

Authorisations and Licences

Rights arising under authorisations and licences can be assigned by way of security to a secured party. However, since authorisations and licences are considered to be personal to the beneficiary or licence holder, an assignment or transfer of the rights of the beneficiary or licence holder to a third-party as security requires the consent of the relevant issuing authority through a direct agreement between that issuing entity, license holder and the creditor. Although not prohibited, this type of security is not commonly granted in Mozambique.

Personal Property and Tangible Assets

Personal property, either tangible or intangible, can be given as security. A pledge is typically used for movable assets (other than those subject to registration, as described below) and intangible ones (e.g., rights), while a mortgage is typically taken for unmovable assets as well as movable assets that are subject to registration.

Notably, due to the different legal forms prescribed for the constitution of security interests over different assets, Mozambican law prohibits the taking of blanket security over all of an entity’s assets. Separate security is taken over each class of assets (tangible, intangible, movable and unmovable) or even on an asset-by-asset basis.

Can security be taken over future assets?

The Mozambican legal system requires that security be created only on existing and specified assets as a condition of its validity. Accordingly, taking valid security over future assets is not possible. However, a promissory mortgage can be granted (typically backed by an irrevocable power of attorney in favour of the lender or security agent) over future assets such that, as and when the identified assets come into existence, the grantor is required to execute a security agreement in the appropriate form. The promissory mortgage itself does not create a security interest in the future asset, but a contractual claim against the grantor.

Are there restrictions on who can legally grant and/ or hold security interest?

Any person with full legal capacity may provide security without restrictions.

Are security trustees or security agencies recognised and, if so, do any steps need to be taken to ensure the enforceability of the security or security agent’s right?

Although the concepts of a “security trust” or “security agency” are not expressly provided for under Mozambican law and there is no record of a foreign security agent enforcing security in Mozambique, local market practice does recognise the concept of a security agent. Relevant parties are free to agree and enter into a private contract in which one or more individuals or entities are identified or nominated as security agents to hold security for lenders, to deal with registration and perfection formalities applying to such security and to enforce such security.

What about third-party security?

Under the Mozambican Commercial Code, article 88, companies are prohibited from offering personal or real guarantees for the obligations of others, unless such guarantees or offers are in the interest of the company, which should be justified in writing by the board of such company. Accordingly, companies should obtain board confirmations confirming that the directors consider any grant of third-party security by a company to be in such company’s interests.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

- **Shares:** A share pledge in relation to “quotas” in a private limited company must be in writing, authorised by the pledgor and signed by the pledgor and the pledgee. Although not mandatory, the common and recommended practice is to have the share pledge notarised.

Pledges with respect to shares in Private Limited Companies also must be registered at the Registry of Legal Entities Registrar (*Conservatoria do Registo das Entidades Legais*).

If share capital in a public limited company is represented by share certificates, a share pledge in relation to such must be in writing, authorised by the pledgor, signed by the pledgor and the pledgee and recorded on the share certificates. In addition, if such share certificates are issued in bearer form, they must also be delivered to the pledgee. However, if share capital in a public limited company is represented by dematerialised shares, a share pledge in relation to such dematerialised shares must be recorded with the depositary bank. Pledges with respect to shares (referred to as *ações nominativas*) in public limited companies also must be registered either: (i) in the official company shares book of the public limited company where such shares are represented by share certificates; or (ii) with the relevant depositary bank where such shares are dematerialised.

- **Bank accounts:** Pledges over bank accounts must be in writing and be notified to the bank holding the relevant account. Typically, the bank is not a party to the pledge agreement, but it should be notified of the pledge agreement. The bank should also be required to acknowledge the pledge and to undertake to comply with a number of operational obligations in favour of the pledgee. Although not mandatory, the parties should have the pledge notarised.
- **Registrable movable assets:** Pledges over certain categories of movable assets (including cars, boats and airplanes) are subject to certain registration requirements. A pledge should be constituted through a written agreement signed between the pledgor and pledgee. Although not mandatory, by common practice the signatures of the parties should be verified by a notary who will certify the identity of the parties as well as their capacity to bind the entity that they represent.
- **Mortgage:** The mortgage must be executed in the form of a notarial public deed and must be registered at the relevant immovable registry office.

What are the fees, costs and expenses associated with creating and perfecting security in Mozambique?

Mortgage: The following fees are applicable to mortgages:

- Stamp duty tax at the rate of 0.3% of the amount of secured debt (which may be capped in the security document)
- Notarial costs, which calculation depends on the number of attached documents; and
- nominal registration costs

Pledge: The following fees are applicable to pledges:

- Stamp duty tax at the rate of 0.3% of the amount of secured debt (which may be capped in the security document)
- If applicable, nominal registration costs

Although stamp duty is payable on each security document, certain exemptions may apply depending on the circumstances of the transaction.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

Outside of bankruptcy or insolvency proceedings, the steps required to enforce Mozambican security depend on the type of security to be enforced, and will depend on the terms of the applicable security documents.

Pledges are typically enforced extra-judicially and in accordance with a procedure agreed by the parties in the relevant pledge agreement.

However, a party seeking to enforce a mortgage will not be entitled to take over, sell or otherwise dispose of the mortgaged asset without first commencing judicial proceedings for the same purpose before a Mozambican court. In order to file a petition for enforcement in Mozambique, a mortgagee must first establish the validity of the claim and the basis of enforcement.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

The enforcement of any category or type of security interest is the exclusive jurisdiction of the courts, and does not require additional consents, although the relevant security documents may prescribe that particular steps must be taken.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of Mozambique?

Generally there are no restrictions on who can enforce a security interest over assets in Mozambique, provided that the person seeking such enforcement is the secured party, its authorised representative, assignee, successor or transferee.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

What is Mozambique's insolvency process?

The current insolvency and bankruptcy regime is the decree-law n° 1/2013. In addition to the company itself, any creditor of that company may apply for the company's liquidation. An insolvency will be formalised once pronounced by the court, registered at the company's registry office (which records the insolvency on the debtor registration) and published by notice in the Official Gazette.

How do winding up or insolvency registers function in Mozambique?

Winding up or insolvency registers at the Companies Registrar Offices can be searched to determine whether bankruptcy or insolvency proceedings are pending or a bankruptcy or winding up order has been made against a company. Note, such insolvency registers cannot be searched electronically or over the telephone.

Are "company rescue" or reorganisation procedures available?

Outside of insolvency and receivership proceedings, Mozambican legislation allows for the restructuring of a company in an insolvency process; provided that an insolvency plan with respect to that company has been approved by the general assembly of creditors and has been subsequently ratified by the Judicial Court.

In addition, a judicial reorganisation of a company may be requested through an instrument named "*Writ of Summons*" which includes a detailed account of the specific debtor's equity and the reasons of its financial and economic crisis. The Writ of Summons and accompanying document may be submitted to court by the debtor or any other interested party.

An extra-judicial reorganisation process is also available in which the debtor may propose and negotiate with its creditors an extra-judicial recovery plan. Such negotiation is conducted pursuant to the rules of conciliation and mediation established in the Arbitration Law (No. 11/99).

Will the commencement of bankruptcy proceedings in respect of a grantor of security affect the liability of a secured party to enforce the security interests granted to it by that company?

If insolvency proceedings are commenced in respect of a company, such company will be summoned by the court to challenge such request and/or request that recovery proceedings be commenced instead. If the company is declared bankrupt, all its assets will be seized by a nominated receiver and, as a general rule, all contracts that were in force at the time of such declaration will be maintained. The company will then be liquidated and creditors be paid in accordance with their legal rank.

Are there any preference periods, claw-back rights or other preferential creditors' rights that creditors should be aware of?

Secured parties have a priority claim, ranking subordinate only to certain credits arising from labour legislation and certain special liabilities relating to work accidents. Under Mozambican law, any transaction carried out (including granting security) during the restructuring of a company would be considered void.

Can debt owed by a company to one creditor be contractually subordinated to debt owed to another creditor? Are contractual subordination provisions agreed between creditors of a company legally recognised in the event of bankruptcy/insolvency of that entity?

Yes. Contractual subordination is ordinarily recognised under Mozambican law and therefore a debt owed by a company to a creditor can be contractually subordinated to a debt owed by that company to other creditors. That subordination agreement would be respected upon the insolvency of the company.

How is the priority between creditors holding a security interest determined upon a company's insolvency?

Creditors will rank in the following order of priority:

- Creditors in respect of liabilities arising from labour legislation and certain special liabilities relating to work accidents
- Secured creditors
- Creditors in respect of liabilities arising from government taxes, irrespective of the nature of such tax liability or when such tax liability is incurred. These liabilities do not include those relating to tax fines and social security credits, both of which will rank below unsecured creditors
- Unsecured creditors

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