

The new security interests regime applicable in the Democratic Republic of Congo after its accession to OHADA¹

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By finally adhering to the OHADA Treaty and to the uniform acts promulgated thereunder (the “Uniform Acts”), the Democratic Republic of Congo (the “DRC”) has finally adopted a set of business laws which should create a more investor friendly environment in a country which is currently ranked 178 (out of 183) by the World Bank in its Doing Business Index.

Among the various Uniform Acts which became applicable in the DRC on 12 September 2012², the Uniform Act on Security (the “AUS”) helps to modernize the security law framework and facilitate the financing of projects in the DRC by allowing the lenders to benefit from a complete security package without impacting the operations of the projects, which was not possible under the former security interests law (*Loi n°73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et mobilier et régime des sûretés telle que modifiée et complétée par la Loi n°80-008 du 18 juillet 1980*) (the “Former Security Law”).

The rules governing security interests are of a paramount importance for the development of a country since they can strengthen the confidence of foreign investors and economic operators. The option granted to Member States to create a centralized commercial registry (RCCM) where all security interests would be registered is also a very important progress as it allows a creditor to verify independently the existence of eventual pledges granted by its debtor.

The process of adapting the DRC security law to attract foreign investments started in one of the sectors where foreign investments are crucial: the mining sector.

The DRC adopted in 2002 a new and investor friendly mining code containing a special legal framework for the mortgage of mining exploitation titles and their enforcement (the “Mining Code”).

Indeed, in order to circumvent the restrictions of the Former Security Law relating to the enforcement of a mortgage³, the

Mining Code introduced the self-appropriation of the pledged asset by the creditor in the event of default of the debtor⁴.

The process of modernization is now fully completed with the adherence to the OHADA Treaty and the application of the AUS which brings greater legal certainty, clarity and comprehensiveness as the creation, perfection and enforcement of security interests are now incorporated into a single corpus of law.

For instance, as far as the self-appropriation of the pledged asset is concerned, despite some limits related to the type of assets and the quality of the debtor, the AUS generalizes and frames such exception since self-appropriation of pledged assets is authorized as long as the value of the relevant asset is assessed by an expert appointed by the parties at the date of appropriation. In addition, any value of the pledged asset in excess of the secured debt shall be returned to the pledgor⁵.

Above all, one of the main features of the Former Security Law which required for the pledge of movable assets that the borrower released the possession of the pledged asset into the hands of the lender or a third party is no longer applicable under the AUS.

The dispossession of the pledged assets made difficult the constitution of standard security packages an international lender would expect to see in a project financing such as pledge on shares, onshore bank accounts, equipment and receivables.

SHARE PLEDGE

The Former Security Law was not adapted to the fact that shares are dematerialized and are not represented solely by share certificates that could be held in custody by the pledgee or a third party to meet the dispossession obligation imposed by the Former Security Law.

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There was no legal obligation to report the existence of the pledge into the company's shareholder register. It was up to the parties to insert such obligations in their share pledge agreement.

This has now been corrected by the introduction of the AUS which takes into consideration the fact that shares are dematerialized.

PLEDGE OVER BANK ACCOUNT BALANCES

In the absence of specific rules governing the pledging of bank account balances under the Former Security Law, it was common practice for both parties to give permanent and irrevocable bank instruction signed by both parties to a bank in order to achieve the objectives of a pledge.

Such solution had several legal weaknesses including the lack of publicity and the fact that under a civil code system an unlimited term agreement can be terminated at any time by either party.

The AUS provides creditors with a more protected regime applicable to pledge over bank account balances.

EQUIPMENT PLEDGE

Under the Former Security Law, it was difficult for a debtor to pledge its equipment without hindering its operational capacity since such pledge required the mandatory dispossession of the pledged equipment.

To circumvent such difficulty, lenders and borrowers were using the pledge over the going concern (*fonds de commerce*) which, under the law, was a security interests only available to financial institutions but in practice could be used by other economic operators with an express authorization of the Central Bank of Congo.

In addition to the fact that the security was subject to the prior authorization of a third party, it lacked legal basis and therefore was a fragile security.

The AUS provides a comprehensive legislative framework allowing creditors to have a choice between a pledge over the going concern or equipment.

PLEDGE OVER RECEIVABLES

The Former Security Law lacked of clarity and suitability with regard to pledges over receivables. The AUS improves the former legal regime by creating a specific regime applicable to pledge over receivables which sets the modalities of creation, administration and enforcement of such security⁶.

Further, the AUS modernizes the security interests regime with the creation of a new type of security interests over receivables: the assignment of receivables as collateral ("*cession de créance à titre de garantie*") which will provide more flexibility to the parties when the relevant assignees are financial institutions⁷.

MINING EXPLOITATION PERMITS MORTGAGE

In accordance with the Mining Code, mining exploitation permits fall within the definition of real property rights (*droits réels immobiliers*). As such, security interests granted over the DRC exploitation permits, further to the entry into force of the AUS in DRC, are now covered by the AUS provisions related to the creation and enforcement of mortgages including the self-appropriation of the pledged asset mentioned hereabove.

1 [Organisation pour l'Harmonisation en Afrique du Droit des Affaires \(the pan-African organisation for the harmonisation of business law in Africa\).](#)

2 These Uniforms Acts relate to:
 - General Commercial Law,
 - Commercial Companies and Economic Interest Group,
 - Security Interests,
 - Simplified Recovery Procedures and Enforcement Measures,
 - Insolvency proceedings,
 - Arbitration law,
 - Accounting rules, and
 - Contracts for carriage of goods by road.

3 According to Article 262 of the Former Security Law any provision authorizing a creditor to enforce a mortgage by self-appropriation of the pledged asset in the event of a default of payment was null.

4 Article 172 of the Mining Code.

5 Article 199 of the AUS.

6 Articles 125 to 135 of the AUS.

7 Please note that receivables may only be assigned as collateral to financial institutions.