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# FINANCIAL LEASING

## FINANCIAL SECTOR PROGRAM IN ANGOLA

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# **FINANCIAL LEASING**

## **FINANCIAL SECTOR PROGRAM IN ANGOLA**

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## PART I: INTRODUCTION

In most countries, financial service companies are subject to varying degrees of supervision. When defining the scope of such supervision and regulation, consideration should be given both to public policy criteria and to the adequacy of resources available for supervision and regulation.

With respect to institutions that extend credit, there are three basic criteria as to whether, from the standpoint of public policy, such institutions should be subject to licensing and to supervision and regulation. These criteria are:

- Whether the type of institution is a significant repository of savings of the public such that the failure of these types of institution could cause a significant shock to financial stability;
- Whether the type of institution is a direct participant in the clearing and settlement of payments such that the failure of a significant participant could disrupt the payments system;
- Whether the type of institution is a source of credit to the economy that has macroeconomic significance.

A bank is the type of institution that clearly satisfies all three criteria in most countries. The basic definition of a bank found in most banking laws is an institution that *both* takes deposits from the public and extends credit.

If the type of institution does not take deposits from the public, extends only modest amounts of credit, and is not a direct participant in the clearing and settlement of payments, like financial leasing and factoring companies, there is much less policy reason to subject such institutions to licensing and supervision and regulation. Thus, for example, in some countries consumer and commercial finance companies, leasing companies and factoring companies are not subject to licensing or to supervision and regulation.

In such countries these credit institutions are subject to market discipline for their funding and for the provision of their services. If their asset quality is poor, they will not receive funding from the market or it will be limited and expensive in the form of bank loans or issuance of commercial paper or bonds. If their services are inefficient or abusive, they will lose customers. In either case particular institutions of this class would tend to become insignificant or exit from the market.

Besides the public policy perspective with respect to licensing, supervision and regulation, another important concern is the practical issue of the resources available to the financial institutions' supervisory agency and whether it can devote sufficient resources to licensing and performing well the supervision and regulation required for *both* institutions of systemic significance like banks and other institutions like factoring or leasing companies.

In Angola, leasing and factoring companies would not fund themselves by deposits, would not be direct participants in the clearing and settlement of payments, and would not be sources of credit of macroeconomic significance. Therefore, an argument could be made on public policy grounds that they should not be subject to licensing or to supervision and regulation. However, the Law on Financial Institutions provides that Banco Nacional de Angola (BNA) will regulate and supervise them without specifying the degree.

In light of the public policy factors above and the limited supervisory resources of BNA that should be devoted predominantly to banks, EMG recommends that the regulations applicable to both financial leasing and factoring companies be limited and the recommended prudential and market conduct regulations have been designed accordingly.



Banks that conduct financial leasing or factoring will be regulated no differently than they are for other bank activities. Financial leasing and factoring operations will be separately accounted for but consolidated with other accounts for purposes of capital adequacy and exposure limits.

The prudential regulations for financial leasing and factoring companies include a minimum capital adequacy ratio, a limit on exposure to one or related parties, a prohibition on transactions with parties related to the companies, and a prohibition on guaranteeing liabilities of third parties. These are basic prudential limitations that seek to prevent important causes of financial institution failure. With respect to provisioning for value impaired assets, this will be in accordance with accounting rules rather than with the extensive rules for banks.

The market conduct regulations for financial leasing and factoring companies seek to establish good business practices in disclosure of the terms and conditions of transactions so that financial leasing and factoring clients will understand their rights and responsibilities in such transactions and will be able to exercise market discipline. The requirement for financial leasing and factoring companies of significant size to have an external audit and to publish financial statements, facilitates market discipline with respect to funding of such companies.

It must be emphasized that it is vitally important for both financial leasing and factoring to have comprehensive proper rules for the underlying leasing and factoring transactions that are subject to the prudential and market conduct regulations. These rules are found in the core provisions of the UNIDROIT models that represent a synthesis of best practices in countries in which financial leasing and factoring have developed successfully. Otherwise there can be no assurance of expected compliance with Article 2(d) of the regulation for financial leasing and Article 2(b) of the regulation for factoring. These address critical legal matters in financial leasing and factoring transactions that should not be left to chance, but rather given a proper foundation, preferably in law, as is best practice. If there is no proper underpinning of financial leasing and factoring transactions and they become problematic, it could discredit for some time financial leasing and factoring as constructive and desirable financial services in Angola.

## **PART II: PRUDENTIAL AND MARKET CONDUCT REGULATIONS**

*Based on the authority of Banco Nacional de Angola (BNA) in Articles 4 and 6 of the Law on Financial Institutions, BNA issues the following Regulations:*

### **Article 1 Prudential Regulations**

- a. Banks that directly conduct financial leasing are subject to applicable banking regulations with respect to, inter alia: (i) minimum capital; (ii) regulatory capital; and (iii) limitations on claims on one party or related parties from leasing transactions as if lease assets on banks' accounts were loan assets.
- b. A leasing company must have minimum paid-in capital equivalent to Kz. fifty million or such other amount as may be required by law or regulation from time to time.
- c. A leasing company must have a minimum regulatory capital (Ratio de Solvabilidade Regulamentar [RSR]) to risk assets ratio of eight percent. Risk assets are assets other than cash and claims on the central government of Angola.
- d. A leasing company's claims on one party must not exceed fifteen percent of its regulatory capital (RSR). The outstanding obligation of the lessee is calculated by summing the present value of both the lease payments and the residual value of the property.



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- e. A financial lease contract term must not exceed the useful life of the asset leased, in accordance with Ministry of Finance schedules.
  - f. Lease payments under a financial lease agreement are calculated taking into account the amortization of the whole or a substantial portion of the cost of the asset. The frequency and manner of payments is determined or agreed to between the contracting parties.
  - g. In addition to its own capital, a leasing company may raise funds through: (i) loans made abroad; (ii) loans from and financing from domestic financial institutions; (iii) official and government-owned financial entities; (iv) public or private placements or obligations; (v) sales of lease contracts as well as credit instruments derived from such contracts.
  - h. A leasing company must not enter into a leasing transaction with a party related to the leasing company.
  - i. A leasing company must not make an equity investment except in its own subsidiary leasing company.
  - j. Leasing company must not guarantee the liabilities of third parties.

## **Article 2      Market Conduct Regulations**

- a. Before entering into a lease contract, the prospective lessor must disclose to the prospective lessee the rate of interest applicable to the contract, [in accordance with Banco Nacional de Angola regulations on interest rate calculations] as if the lease payments were to amortize a loan whose principal amount is the cost to the lessor of the asset to be leased.
- b. Before entering into a lease contract, for a fixed lease payment contract, the prospective lessor must provide to the prospective lessee a table that describes: (i) the amounts of periodic payments; (ii) the aggregate amount of payments each year of the contract; and (iii) the aggregate amount of payments over the life of the contract.
- c. Before entering into a lease contract, for a variable lease payment contract, the prospective lessor must provide to the prospective lessee a table that describes: (i) the minimum and maximum amounts of periodic payments; (ii) the aggregate minimum and maximum amounts of payments each year of the contract; and (iii) the aggregate minimum and maximum amounts of payments over the life of the contract.
- d. A financial lease contract must provide for important legal matters including: (i) rights and duties of the lessor and the lessee; (ii) the effect of loss, damage, or non-conformity of the leased asset; and (iii) the effects of default by a party to the lease contract, including the measure of damages. A financial lease contract must also provide for particular terms of the financial lease transaction described in Annex 1.
- e. Leasing companies must maintain books of account in accordance with applicable accounting principles issued by the Banco Nacional de Angola.
- f. Leasing companies whose liabilities to third parties as of the date of their last annual balance sheet exceed Kz. 100 million must have an annual external audit by auditors authorized by Law no. 3/01 of 23 March and must publish their annual financial statements and auditor's opinion. Leasing companies whose liabilities to third parties as of their last annual balance sheet are below Kz. 100 million must obtain a certification from an auditor approved by the Ministry of Finance.
- g. Lease contracts must include at least the following clauses or address the following issues:



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- (i) A description of the goods included in the lease contract, with sufficient detail to allow their proper identification.
  - (ii) The period of time for which the goods are leased under the lease contract.
  - (iii) The lease payment amount or the formula for the calculation of such payments, as well as any other factors related to any changes or adjustments.
  - (iv) The time period within which payments must be made, which time period shall not exceed one semester (six months).
  - (v) The conditions under which the lessee may exercise the right to renew the lease contract, return the leased goods or acquire ownership of the leased goods.
  - (vi) The conditions under which the lessee may exercise the right or option to purchase the leased goods, including a specified purchase price or a description of the manner in which such purchase price can be calculated.
  - (vii) All expenses or additional charges, including payment for technical assistance, maintenance and any other services related to the operation of the leased goods which are included in the finance lease contract.
  - (viii) Details of any guaranteed residual value at any time during the life of the lease contract, with the understanding that such guaranteed value is not the same as exercising the purchase option.
  - (ix) Details of any readjustment of the value at which a purchase option can be exercised or of the guaranteed residual value.
  - (x) Details of how the leased assets may be exchanged for similar goods which may better meet the needs of the lessee; such exchange must be documented and formalized through an annex to the original lease contract.
  - (xi) A listing of the responsibilities related to:
    - (a) An improper use of the leased goods;
    - (b) Insurance to cover risks related to the leased goods;
    - (c) Damages caused to third parties through the use of the leased goods;
    - (d) Negative or undesirable consequences arising from damages or flaws in the leased goods.
  - (xii) The ability of the lessor to examine the leased goods and to require of the lessee steps and measures to maintain the leased goods in acceptable order.
  - (xiii) Description and definition of the ability of the lessor to transfer to third parties, within Angola, its rights and obligations, as described in the contract, with or without the lessee's consent.



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## PART III REGULATIONS

### General Provisions

#### ARTICLE 1 SCOPE

This regulation applies to any lease of an asset, if the asset is within Angola, the lessee's centre of main interest is within Angola, or the leasing agreement provides that the law of Angola governs the transaction.

#### ARTICLE 2 DEFINITIONS

In this regulation:

"Asset" means certain property used in trade or business, including capital goods, equipment, future assets, and specially manufactured equipment. The term does not include investment securities or immovable property but no asset shall cease to be an asset for the sole reason that the asset has become a fixture to or incorporated in land.

"Financial lease" means a lease, with or without an option to purchase by the lessee, that includes the following characteristics:

- (a) the lessee specifies the asset and may select the supplier;
- (b) the lessor acquires the asset and the supplier has knowledge of that fact; and
- (c) the lease payments under the leasing agreement cover the whole of the lessor's investment in the asset.

"Lease" means a transaction in which a person grants a right to possession and use of an asset to another person for a specific term in return for lease payments. Unless the context indicates otherwise, the term includes a sub-lease.

"Lessee" means a person who acquires the right to possession and use of an asset under a lease. Unless the context indicates otherwise, the term includes a sub-lessee.

"Lessor" means a person who grants the right to possession and use of an asset to a lessee under a lease.

"Person" means any legal, private or public entity or an individual.

"Supplier" means a person from whom a lessor acquires an asset for lease under a financial lease.

"Supply agreement" means an agreement under which a lessor acquires an asset for lease.



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### ARTICLE 3 OTHER APPLICABLE RULES

A leasing agreement subject to this regulation is also subject to any law of Angola applicable to public notice with respect to a leasing agreement or an asset subject to a leasing agreement. Failure to comply with such law has only the effect specified therein.

### ARTICLE 4 FREEDOM OF CONTRACT

Except as provided in Articles 7(1), 16(1) (a), 16(2) and the laws of Angola, the lessor and the lessee may derogate from or vary the effect of this regulation and are free to determine the content of a leasing agreement.

## The Lease Agreement

### ARTICLE 5 ENFORCEABILITY

Except as otherwise provided in this regulation, a lease agreement is effective and enforceable according to its terms between the parties, against purchasers of the asset, and against creditors of the parties, including an insolvency administrator.

### ARTICLE 6 LESSEE UNDER FINANCIAL LEASE AS BENEFICIARY OF SUPPLY AGREEMENT

1. (a) In a financial lease, the duties of the supplier under the supply agreement shall also be owed to the lessee as if the lessee were a party to that agreement and as if the asset were to be supplied directly to the lessee. The supplier shall not be liable to both the lessor and the lessee in respect of the same damage.
  - (b) The extension of the supplier's duties to the lessee under the preceding sub-paragraph does not modify the rights and duties of the parties to the supply agreement, whether arising there from or otherwise, or impose any duty or liability under the supply agreement on the lessee.
  - (c) Where the absence of privity of contract between the lessee and supplier prevents the lessee from enforcing the supplier's duties under the supply agreement, the lessor shall be bound to take commercially reasonable steps to assist the lessee. If the lessor does not take such steps, the lessor is deemed to have assumed such duties.
  - (d) The parties may not derogate from or vary the effect of the provisions of this paragraph.
2. The lessee's rights under this Article shall not be affected by a variation of any term of the supply agreement previously approved by the lessee unless the lessee consented to that variation. If the lessee did not consent to such variation, then the lessor is deemed to have assumed the duties of the supplier to the lessor that were so varied to the extent of the variation.
3. Nothing in this Article shall entitle the lessee to modify, terminate, or rescind the supply agreement without the consent of the lessor.



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## **ARTICLE 7 PRIORITY OF SECURITY INTERESTS**

1. A creditor of the lessee and the holder of any interest in land or personal property to which the asset becomes affixed take subject to the leasing agreement and cannot attach any interest belonging to the lessee.
2. A creditor of the lessor takes subject to the leasing agreement.

## **ARTICLE 8 LIABILITY FOR DEATH, PERSONAL INJURY OR PROPERTY DAMAGE CAUSED TO THIRD PARTIES**

In a financial lease, the lessor shall not, in its capacity of lessor, be liable to the lessee or third parties for death, personal injury or damage to property caused by the asset or the use of the asset.

## **Performance**

### **ARTICLE 9 RISK OF LOSS**

1. In a financial lease, risk of loss passes to the lessee. If the time of passage is not stated, the risk of loss passes to the lessee when the leasing agreement has been entered into.
2. When an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement and the lessee invokes its remedies under Article 12, then the lessee, subject to Article 16, may treat the risk of loss as having remained with the lessor or the supplier from the beginning.

### **ARTICLE 10 DAMAGE TO THE ASSET**

When an asset subject to a leasing agreement is damaged without fault of the lessee or lessor before the asset is delivered to the lessee, the lessee may demand inspection and at the lessee's option either accept the asset with due compensation from the supplier for the loss in value but without further right against the supplier, or seek such other remedies as are provided by law.

### **ARTICLE 11 ACCEPTANCE; NON-CONFORMITY OF ASSET**

1. Acceptance of an asset occurs when the lessee signifies to the lessor or supplier that the asset conforms to the agreement, fails to reject the asset after thirty days from the date of delivery, or uses the asset.
2. Once a lessee has accepted an asset, the lessee is entitled to damages from the supplier if the asset does not conform to the supply agreement.

### **ARTICLE 12 REJECTION**

1. When an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement, the lessee may demand a conforming asset from the supplier and seek such other remedies as are provided by law.



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2. If the lessee rejects an asset in accordance with this Article and the time for performance has not expired, the lessor or supplier has the right to remedy its failure within the agreed time.

#### **ARTICLE 13 TRANSFER**

1. The lessor's rights under the leasing agreement may be transferred without the consent of the lessee. The lessor's duties under the leasing agreement may be transferred without the consent of the lessee except when a transfer would impair the lessee's rights in the asset.
2. The lessee's rights and duties under the leasing agreement may be transferred only with the consent of the lessor, and subject to the rights of third parties.

#### **ARTICLE 14 WARRANTY OF POSSESSION**

1. (a) In a financial lease, the lessor warrants that the lessee's possession will not be disturbed by a person who has a superior title or right or who claims a superior title or right and acts under the authority of a court, where such title, right or claim derives from a negligent or intentional act or omission of the lessor.  
  
(b) In a financial lease, a lessee that furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim of infringement or the like that arises out of compliance with the specifications.

#### **ARTICLE 15 WARRANTY OF ACCEPTABILITY AND FITNESS**

In a financial lease, a warranty that the asset will be at least such as is accepted in the trade under the description in the leasing agreement and is fit for the ordinary purposes for which an asset of that description is used is implied in the supply agreement and is enforceable only against the supplier.

#### **ARTICLE 16 LESSEE'S DUTIES TO MAINTAIN AND RETURN THE ASSET**

1. (a) The lessee shall take proper care of the asset, use the asset reasonably in the manner in which such assets are ordinarily used and keep the asset in the condition in which it was delivered, subject to ordinary wear and tear.  
  
(b) When a leasing agreement sets forth a duty to maintain the asset or the manufacturer or supplier of the asset issues technical instructions for the asset's use, the lessee's compliance with such agreement or instructions shall satisfy the requirements of the preceding sub-paragraph.
2. When the leasing agreement comes to an end or is terminated, the lessee, unless exercising a right to buy the asset or to hold the asset on lease for a further period, shall return the asset to the lessor in the condition specified in the preceding paragraph.



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## Default

### ARTICLE 17 DEFINITION OF DEFAULT

Default for the purposes of this regulation occurs when one party fails to perform a duty arising under the leasing agreement or this Law.

### ARTICLE 18 NOTICE

Except as otherwise provided in the leasing agreement, an aggrieved party shall give a defaulting party notice of default, notice of default in a material respect, notice of enforcement, notice of termination and a reasonable opportunity to cure a default.

### ARTICLE 19 DAMAGES

Upon default, the aggrieved party is entitled to recover such damages as will, exclusively or in combination with other remedies provided by this regulation or the leasing agreement, place the aggrieved party in the position in which it would have been had the agreement been performed in accordance with its terms.

### ARTICLE 20 SPECIFIED DAMAGES

1. When the leasing agreement provides that a defaulting party is to pay to the aggrieved party a specified sum or a sum computed in a specified manner for such default, the aggrieved party is entitled to such sum.

### ARTICLE 21 TERMINATION

1. (a) Subject to sub-paragraph (b), a leasing agreement may be terminated by operation of law, by operation of Article 10, by agreement of the parties or by an aggrieved party upon default in a material respect by the lessee or lessor.  
  
(b) The lessee in a financial lease may not terminate the leasing agreement upon another party's default in a material respect but is entitled to such other remedies as are provided by the agreement of the parties and by law.
2. On termination, all duties under the leasing agreement that are executory on both sides, except for duties intended to take effect upon termination, are discharged but any right based on prior default or performance survives.

### ARTICLE 22 POSSESSION AND DISPOSITION

1. When the leasing agreement comes to an end or is terminated, the lessor has the right to dispose of the asset.



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**ARTICLE 23 ENFORCEMENT; FURTHER RULES**

1. Banco Nacional de Angola may enforce compliance by financial institutions with this regulation.
2. Banco Nacional de Angola is the sole authority that may issue directivas or instructivos in implementation of this regulation.
3. Disputes arising between parties to a lease agreement shall be resolved in accordance with the Code of Civil Procedure, or, if the parties agree, by commercial arbitration.