

Regional Developments

ANGOLA

CLIMATE CHANGE: FIDUCIARY DUTIES AND DIRECTORS' LIABILITY IN THE OIL AND GAS SECTOR

📖 Angola; Breach of fiduciary duty; Climate change; Corporate social responsibility; Criminal liability; Directors' liabilities; Mitigation of climate change; Oil and gas industry

Abstract

One of the hot topics being discussed across different jurisdictions is whether the failure to address climate-related matters and/or to implement climate adaptation and/or mitigation measures may be deemed breach of fiduciary duties and/or trigger any liability. This topic is particularly relevant for carbon-intensive industries and/or companies directly contributing to the worldwide increase of carbon emissions, such as oil and gas companies, which are being more and more targeted with climate-related claims and subject to public scrutiny. Under Angolan law, it is safe to conclude that directors are deemed to have breached fiduciary duties of diligence and care, in case of failure to assess, address and manage climate risks. As a result thereof, civil and criminal liability may apply.

Slowly, but steadily, moving forward

Angola approved the adhesion to the United Nations Climate Change Convention (UNFCCC) in 1998,¹ and ratified same in May 2000 and the Kyoto Protocol in 2007.² By being a party to these instruments, Angola undertook to implement measures and programs aimed at stabilizing greenhouse gases' (GHG) emissions. The National Strategy for the Implementation of the United Nations Framework Convention on Climate Change and the Kyoto Protocol was approved in 2008,³ and in 2011, the domestic National Adaptation Programme of Action was submitted to the UNFCCC Secretariat. In 2020, Angola adhered⁴ to the Paris Agreement, and approved the Doha Amendment.⁵ The first version of Angola's intended Nationally Determined Contributions was submitted in 2015,⁶ and an updated version was submitted in May 2021⁷ whereby Angola planned to reduce, unconditionally, GHG emissions up to 14% by 2025 as compared to the base year (i.e. 2015)—equivalent to an estimated mitigation level of 15.4 million tonnes of carbon dioxide equivalent (tCO₂e)—with a further 10%—equivalent to an estimated mitigation level of 11.1 million tCO₂e—conditional on support. Finally, the Angolan National Strategy on Climate Change,⁸ details the path for the country to adapt to climate change and transition to a low carbon economy.

During the past decades, different statutes aimed at promoting and governing environmental protection and the rational and sustainable use of natural resources have been enacted. To date, no climate law has been passed. Notwithstanding, several statutes, policies and strategies do either expressly refer to climate change, climate action, adaptation and/or resilience, or otherwise expressly aim at addressing climate-related matters.

¹ Resolution No.13/98, of 28 August 1998.

² Resolution No.14/07, of 23 March 2007.

³ Resolution No.52/08, of 5 June 2008.

⁴ Resolution No.37/20, of 12 October 2020 and Adherence Letter No.8/20, of 20 October 2020.

⁵ Resolution No.29/20, of 14 July 2020.

⁶ See Draft, "Intended Nationally Determined Contribution (INDC) of the Republic of Angola" (November 2015), available at <https://unfccc.int/sites/default/files/NDC/2022-06/INDC%20Angola%20deposito.pdf>.

⁷ See Republic of Angola, "Nationally Determined Contribution of Angola" (May 2021), available at <https://unfccc.int/sites/default/files/NDC/2022-06/INDC%20Angola.pdf>.

⁸ Presidential Decree No.216/22, of 23 August 2022.

Further, over the years, the Angolan State introduced in its Investment Contracts more demanding obligations, notably by requiring environmental impact studies (whenever the specific project entails higher environmental risks). More recently, some climate-related concerns are referenced in some Investment Contracts and certain reporting obligations—whereby the foreign investor is obliged to report any potential situations harmful to the environment—may also be found therein.

Reference must also be made to the Sustainable Investment Facilitation Agreement (SIFA),⁹ executed on 17 November of 2023, between Angola and the EU, which came into force on 1 September 2024. Amongst others, the SIFA upholds climate commitments, and the parties thereto undertake to comply with the UNFCCC and the Paris Agreement and take measures to facilitate investments aimed at ensuring the sustainable use of natural resources, the protection of the environment and the conservation of biodiversity. The SIFA also includes specific provisions on corporate social responsibility and responsible business, stressing the key role of investors in identifying, mitigating and/or eliminating, notably, adverse environmental and/or climate impacts.

While the SIFA expressly acknowledges the right of either party thereto to define their policies and/or priorities in what concerns sustainable development and/or adopt legal instruments for such purpose, one can only expect that Angolan legislators pass legislation aimed at aligning the domestic legal framework with the commitments set forth in the SIFA. Amongst others, specific legal instruments aimed at implementing disclosure of non-financial information and/or sustainability reporting obligations may be in the pipeline.

However, there seems to be signs evidencing that the authorities, petroleum companies and other stakeholders, are working together to ensure the transition to a low-carbon economy.

While trying to keep up with the global trends and the domestic statutes of a programmatic nature (such as the National Development Plan 2023–2027),¹⁰ Angola created a working group responsible for preparing the Plan for Decarbonizing the Oil and Gas Activities, coordinated by the Minister of Mineral Resources, Petroleum and Gas.¹¹ The tasks of the working group were to be concluded by 15 February 2025. Hence, one may expect additional developments on this front shortly.

Even though the Petroleum Activities Law¹² and related statutes do not specifically address climate-change initiatives and/or reduction of GHG emissions, the National Agency for Petroleum, Gas and Biofuels (*Agência Nacional do Petróleo, Gás e Biocombustíveis*, ANPG), in its capacity of the National Concessionaire for the Petroleum Sector, has recently made public its perspective on decarbonisation.¹³ ANPG's views entail: (i) defining and implementing a strategy to decarbonise oil and gas operations in Angola; (ii) creating synergies between the oil and gas companies operating in Angola; (iii) identifying and defining common objectives for sustainability and oil and gas operators and the National Concessionaire; (iv) ensuring low levels of GHG emissions during operations; and (v) developing the Biofuels Sector.

On a contractual level, the current model production sharing agreement foresees that in addition to contribute to social projects, petroleum companies are required to contribute for environmental preservation projects as from the first crude oil lifting from the contract area.

⁹ See European Commission, "EU's first Sustainable Investment Facilitation Agreement enters into force with Angola", available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4462.

¹⁰ Presidential Decree No.225/23, of 30 November 2023.

¹¹ Order No.10626/24, of 19 August 2024.

¹² Law No.10/04, of 12 November 2004, as amended.

¹³ See "Iniciativas para Redução de Emissões de Gases de Efeito Estufa", available at <https://www.aler-renovaveis.org/contents/atividadeseventsspeakersdocuments/33-ao-anpg-1-seminario-de-enargia-e-clima-da-cplp.pdf>.

Another interesting aspect on this regard is the fact that there are recent situations in which the Angolan Executive approved tax incentives for petroleum companies developing emission reduction projects which are expressly deemed deductible for tax purposes.¹⁴ These incentives aim at promoting the reduction of GHG emissions and meet carbon reduction targets, by incentivising companies to adopt cleaner technologies. Whether these incentives apply to carbon offsetting projects is yet to be clarified though.

All the above considered, it seems reasonable to conclude that, even though a comprehensive regime governing climate-related matters is still not in place in Angola, the country is not oblivious to the matter and references to, notably, climate adaptation, mitigation and resilience, emissions reduction and/or offsetting and transitioning to a low carbon economy are becoming common in domestic legal and/or contractual instruments. Angola still has a long road ahead, but it seems safe to say that the country is slowly, but steadily, moving forward in what concerns implementing climate-related legislation.

Climate risks and corporate governance

Climate change related risks—whether physical, economic, financial, litigation and liability or reputation risks—are shaping business strategies in what concerns, notably, the implementation of adaptation and mitigation actions across the overall spectrum of operations and the shifting to green technologies. Addressing climate risks is increasingly deemed a key corporate governance issue, and one of the hot topics being discussed across different jurisdictions is whether the failure to address climate-related matters and/or to implement climate adaptation and/or mitigation measures may be deemed breach of fiduciary duties and/or trigger any liability.

This topic is particularly relevant for carbon-intensive industries and/or companies directly contributing to the worldwide increase of carbon emissions, such as oil and gas companies, which are being more and more targeted with climate-related claims and subject to public scrutiny.

On this topic, one must stress that, at present, neither the petroleum legal framework, nor the model production sharing agreement in place impose specific duties on the directors of oil and gas companies, other than carrying out activities in accordance with international best practices (which, among others, includes the carrying out of the operations ensuring environmental and local communities' protection purportedly in accordance with sustainable environmental practices).

Hence, as to address directors' duties and liability related matters, one must rely on the general rules set forth in the Angolan Companies Law.¹⁵

Directors' duties

The general and fiduciary duties which directors of Angolan companies are required to abide by are set out in arts 69 and 70 of the Angolan Companies Law and may be summarised as follows.

Duties of diligence, care, loyalty and promotion of company's interests

Even though arts 69 and 70 of the Companies Law only expressly refer to the duty of "diligence" and "reporting and filling accounts", it is typically understood that, in line with the general principle of good faith provided for in the Angolan Civil Code,¹⁶ directors must further act with care and loyalty,

¹⁴ Legislative Presidential Decree No.4/24, of 22 May 2024 and Legislative Presidential Decree No.5/24, of 22 May 2024.

¹⁵ Law No.1/04, of 13 February 2004, as amended.

¹⁶ Decree Law No.47344, of 25 November 1966.

and in the best interest of the company. As a result thereof, it is generally accepted that directors are required to, amongst others: (i) demonstrate the required availability, technical competence and knowledge of the company's activity to perform their duties and apply the diligence of a judicious and orderly manager; (ii) act in the company's interest, considering the interests of the shareholders and weighing the interests of other stakeholders deemed relevant for company's sustainability, notably employees and creditors; (iii) exercise their functions as fiduciary administrators for all shareholders, whose rights shall be equally treated, irrespective of their respective stake in the share capital; and (iv) ensure the protection of the interests of shareholders, employees and other company stakeholders, within the powers conferred upon it by law and the articles of association, in order to fulfil the company's object and function.

Considering the foregoing (and without prejudice to specific regulations and guidelines applicable to certain regulated sectors) it seems appropriate to conclude that, under Angolan law, directors are deemed to have breached fiduciary duties of diligence and care, in case of failure to assess, address and manage climate risks.

Duties of disclosure

Under domestic laws, directors of Angolan companies are merely required to disclose financial information, notably by preparing and submitting the management report, the annual accounts and ancillary accounting documents for the relevant financial year. While the law neither requires the disclosure of non-financial information nor provides for sustainability reporting requirements and/or mechanisms, these obligations may still apply as a result of undertakings under international instruments. This is the case of domestic companies and/or companies operating in Angola which are subject to disclosure requirements set forth in certain foreign laws, notably, EU Corporate Sustainability Reporting Directive. Disclosure obligations may also result from the investment contracts entered into with the Angolan State, but these must be assessed on a case-by-case basis.

Directors' liability

As a general rule, directors of Angolan companies are deemed liable for any damages caused to either the company or its creditors, as a result of any actions or omissions of the same, in breach of any legal and statutory duties applicable, except where there is sufficient evidence that the directors have acted without fault. Conversely, directors shall not be deemed liable for acts or omissions taken based on or supported by collegial resolutions passed in meetings where the relevant director has not been present and/or, where present, the relevant director has voted against. In this latter scenario, the relevant director shall have five days as of the approval of the relevant resolutions to issue a vote statement stating his/her vote against the resolution adopted. Where no such vote statement is made, directors are joint and severally liable for the damages caused. The rules on directors' liability fully apply to liability of other managers and/or people with management responsibilities, as well as to accountants and/or members of the supervisory body.

Criminal liability may also apply in a scenario where certain actions omissions qualify as a criminal offense, notably under the Criminal Code.¹⁷ Further, legal entities—including companies—can also be deemed liable for any criminal offenses when same are committed by directors/managers acting in their name and on their behalf, and/or by anyone acting under the authority of directors/managers as a result of willful breach of their fiduciary duties and without prejudice to their own individual criminal liability.

¹⁷ Law No.38/20, of 11 November 2020, as amended.

Conversely, legal entities shall not be deemed criminally liable in case those causing the offense have acted against the orders or express instructions of the relevant entity.

As to mitigate potential liabilities, companies shall avoid actions (or omissions) that may qualify as harmful to the environment and/or the climate and generate liability as a result thereof.

Assessing climate risks and implementing risk management policies, alongside with integrating climate-related factors in the decision-making process and implement climate policies with strong governance and accountability systems at board level is key. Developing and adopting climate and environmental due diligence proceedings and including climate clauses in the various contractual frameworks in place is also recommendable.

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