

THE MINING LAW
REVIEW

SEVENTH EDITION

Editor
Erik Richer La Flèche

THE LAWREVIEWS

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REVIEW

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This article was first published in October 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-92228-59-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ANDERSON & ANDERSON

EAST AFRICAN LAW CHAMBERS

FALCON & HUME INC

GENI & KEBE

HERBERT SMITH FREEHILLS

HOLLAND & HART LLP

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VIEIRA DE ALMEIDA

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PREFACE

I am pleased to have participated in the preparation of the seventh edition of *The Mining Law Review*. The *Review* is designed to be a practical, business-focused ‘year in review’ analysis of recent changes, developments and their effects, and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 18 chapters, each dealing with mining in a particular jurisdiction. These countries were selected because of the importance of mining to their economies and to ensure a broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of the book has five chapters that focus on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

Much of the mining sector continues to emerge from a lengthy down-cycle. The world economy continues to expand, albeit at a deliberate pace. Demand for minerals is generally sustained and exploration in many parts of the world – in Canada in particular – has rebounded.

But new risks beyond the control of miners are gathering on the horizon. The threat of trade wars, economic nationalism and increased sanctions risks derailing the mining industry just as it is reaping the fruits of its hard work.

As you consult this book, you will find more on topics apposite to jurisdictions of specific interest to you, and I hope you will find the book useful and responsive.

Erik Richer La Flèche

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Montreal

September 2018

Part I

MINING LAW

MOZAMBIQUE

*João Afonso Fialho and Diogo Prado Alfaiate*¹

I OVERVIEW

For the past few years, foreign investment has been steadily driving Mozambique's economy through the turmoil of the economic crisis. In 2016, the hidden debt crisis meant that the country's economy faced currency depreciation and budget deficit; however, mineral resources and infrastructure projects put Mozambique back on the map of economic development.

The mining industry assures Mozambique's place as one of Africa's leading players in mineral resources projects. The coal industry is well established and thriving in the Province of Tete and it is expected that coal production will reach a figure of 100 million tons by 2020, which will establish the country as one of the world's largest coal producers. Currently, coal is almost single-handedly responsible for a projected growth in gross domestic product (GDP) of 5 per cent in 2018.

Infrastructure development is still the main challenge faced by private investors, particularly in the mining sector. Nevertheless, the government has been promoting several projects at national level to boost GDP growth and create jobs (at a time when the unemployment rate approaches 25 per cent). Projects such as the Nacala Corridor Railway or the exploration of liquefied natural gas from the Rovuma basin are two of the government investment priorities.

The mining legal framework has also been updated in recent years, mirroring the trends of the industry and putting the economy in a good position to respond to infrastructure development deficit. Current economic upsurge and further government regulation on promising sectors are already producing encouraging results.

II LEGAL FRAMEWORK

The mining industry is regulated by the following main statutes:

- a* The Mining Law (Law 20/2014 of 18 August 2014) sets out the legal framework for exploration for mineral resources, the necessary administrative procedures for the concession of licences and respective duration, and the investors' regimes applicable for each mining title.
- b* The Mining Regulations (Decree 31/2015 of 31 December 2015) set out the specific provisions for each licence, such as the necessary administrative steps licence holders need to follow, the validity and renewal periods, assignment and cancellation.

¹ João Afonso Fialho is a partner and Diogo Prado Alfaiate is an associate at Vieira de Almeida.

- c* Law on the Taxation and Fiscal Benefits of Mining Operations (Law 28/2014 of 23 September 2014) sets out the tax regime, including tax rates and exemptions, applicable to the mining sector.
- d* Mining Tax Regulations (Decree 28/2015 of 28 December 2015) sets out the rules for the assessment of mining production tax and surface tax.
- e* Regulations on Health and Safety on Mining Activities (Decree 61/2006 of 26 December 2006) set out the rules and procedures for the safety of employees during mining operations.
- f* Environmental Regulations for Mining Activities (Decree 26/2004 of 20 August 2004) set out the rules for preventing and diminishing the environmental impact of mining activities.
- g* Rules on Environmental Management of Mining Activities (Ministerial Order 189/2006 of 14 December 2006) set out the rules for environmental licensing of Level I activities.
- h* Regulations on Marketing of Mineral Products (Decree 20/2011 of 1 June 2011) set out the regulations on marketing and the licensing procedures for the trading of mining products.
- i* Rules and Procedures on the Registration of Report Technicians on Prospecting and Exploration Activities of a Mining Project (Ministerial Order 92/2007 of 11 July 2007) set out the procedures for obtaining the necessary clearance card issued by the National Directorate of Mines to sign off the necessary reports under the Mining Regulations.
- j* Regulation on the Hiring of Expatriates for the Petroleum and Mining Sectors (Decree 63/2011 of 7 December) contains the applicable rules for hiring expatriate personnel in these sectors.
- k* VAT Refund Regulations (Decree 78/2017 of 28 December 2017) provides for a special value added tax regime for mining companies in the production stage.

The main regulatory bodies are the Ministry of Mineral Resources (MIREM) and the National Directorate of Mines. MIREM is responsible for the award of mining rights and the National Directorate of Mines is responsible for the administrative procedures within the industry.

At an international level, Mozambique has entered into bilateral cooperation treaties with Angola (2009) and with Portugal (2014). Mozambique is also a party to the Kimberley Process Certification Scheme and a member of the Extractive Industries Transparency Initiative.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

According to the Constitution of the Republic of Mozambique, all mineral resources in the soil, subsoil and water are the sole property of the state. Private prospecting, exploration and mining activities are subject to administrative authorisation by the government. This fundamental principle is replicated in the Mining Law.

ii Surface and mining rights

Mining rights are awarded to the interested party by MIREM on a first come, first served basis. However, awards are subject to public tender whenever there is more than one application for the same mineral rights. MIREM may also subject the award of mineral rights

to a public tender (1) if the area is believed to have mineral potential following a geological study, (2) when the area has already been subject to prior mining operations, and (3) when the area is reserved for mineral activities.

There are seven main types of mineral titles:

- a* prospecting and exploration licences;
- b* mining concessions;
- c* mining certificates;
- d* mining passes;
- e* mineral handling licences;
- f* mineral processing licences; and
- g* marketing licences.

The most important and commonly awarded rights for medium and large-scale operations are prospecting and exploration licences (for the exploration phase) and mining concessions (for the mining and production phase).

A prospecting and exploration licence grants the holder access to licensed areas and authorises all prospecting and exploration activities, including selling samples and specimens. This type of licence is valid for two years if it relates to construction minerals (renewable for an additional two-year period) and for five years for all other minerals (renewable for an additional three-year period). Following the renewal period, the holder of the licence must apply for a new licence or request a conversion to another type of licence (typically a mining concession).

A prospecting and exploration licence can cover an area up to 25,000 hectares and can be extended upon request to MIREM. Holders of a prospecting and exploration licence must submit annual reports on (1) the previous year's activities and expenditure, and (2) a programme of work and budget details for the following year.

A mining concession allows the holder to extract minerals from the licensed area and authorises all extracting activities, including selling the minerals. A concession is valid for 25 years (renewable for a further 25 years). The licence covers the operations area and can be extended upon request to MIREM. An application for a mining concession must include an economic feasibility study and a mining production plan, as well as details of the applicant's expertise and the financial resources to operate the extraction. The mining production plan must include details of the ore deposit, mine site design, operations schedule, expected commencement dates of development and commercial production, and environmental, health and safety plans.

In a large-scale mining projects, the licence holder usually enters into a mining contract with the government, which sets out tax exemptions and modifications to the applicable administrative and labour regimes.

All prospecting and operation licences and mining concessions are awarded exclusively to their holders.

A mineral processing licence entitles the holder to carry out mining operations to obtain mining ore and is granted for a period of 25 years, which may be extended once for a further 25 years.

A mineral handling licence entitles the holder to carry out mining operations to recover useful ore components in order to transform them into useful or profitable minerals using physical processes, and is granted for a period of 25 years, which may be extended once for a further 25 years.

Finally, a marketing licence is required when the entity that sells or exports minerals is not the same as that which produced the minerals.

Any individual or company is eligible to hold a mining title. However, foreign applicants must keep in mind that (1) mining certificates and mining passes may only be awarded to Mozambican individuals, (2) mining concessions may only be awarded to Mozambican companies (but these companies can be 100 per cent held by foreign entities, subject to the mandatory participation of Mozambican nationals), and (3) marketing licences that are not under a mining concession may only be granted to Mozambican nationals. Also, for mining contracts, the Law on Public Private Partnerships, Large-Scale Projects and Enterprise Concessions (Law 15/2011 of 10 August 2011) sets out that a percentage of participating interest (between 5 per cent and 20 per cent) must be reserved to the state or to Mozambican nationals or entities.

As regards the protection of mineral rights, it must be stressed that Mozambique has an independent judicial system and observes the principles of the rule of law and due process. Mineral right protection and enforcement can be made through the local courts, although specific knowledge of technical mining issues is not always present. Litigation in Mozambican courts tends to be an expensive and time-consuming exercise.

One possible alternative to local judicial courts is international arbitration. Mozambique is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), having deposited its instrument of accession with the Secretary-General of the United Nations on 10 June 1998. As permitted by the New York Convention, when it acceded thereto Mozambique declared that it would apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state on the basis of reciprocity. Therefore, only arbitral awards made in contracting states benefit from the more favourable recognition and enforcement regime provided for in the New York Convention. Awards made in non-contracting states will have to undergo a (more burdensome) judicial process of review and confirmation before they can be enforced.

iii Additional permits and licences

For the mining phase, holders of mining concessions must also obtain (1) an environmental licence, and (2) a licence to use and exploit the land (DUAT). Both licences must be obtained within three years of the date of the mining concession being granted and before commencing extraction operations. Development must start within two years and production within three years of obtaining the environmental licence or the DUAT (whichever occurs later).

The award of a DUAT is required before any activity requiring the use of land, since in Mozambique all land belongs to the state and is granted (1) by the provincial government, if the mining concession does not exceed 1,000 hectares, (2) by the Minister of Agriculture, if the mining concession exceeds 1,000 hectares but does not exceed 10,000 hectares, and (3) by the Council of Ministers, if the mining concession exceeds 10,000 hectares. It is worth keep in mind that obtaining a DUAT may be a quite challenging and time-consuming process.

iv Closure and remediation of mining projects

The Mining Regulations and the Environmental Regulations for Mineral Activities set out that holders of mining titles are responsible for restoring the site where mining operations were carried out.

Holders of mineral titles may be further required to provide an annual financial bond in the form of an insurance policy, bank guarantee or bank deposit, to meet decommissioning costs of the operations.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

Holders of mining titles are required to prepare and submit – ahead of commencement of mineral operations – security, health and safety plans to MIREM and to the Ministry of Labour on matters relating to risk assessment, potential sources of fire or explosion, the use and maintenance of equipment, working conditions, and measures to prevent risks, accidents and occupational diseases.

For the purposes of environmental compliance, mineral obligations are classified in three levels, which are defined based on the scope, scale and sophistication of the equipment to be used in the operations.

- a* Level I: the Basic Rules on Environmental Management for Mining Activities directed to moderate environmental damage and socio-economic impact arising from mineral activities shall apply. In this case, the holder of the mineral rights shall ensure that the activities are carried out using simple methods to prevent air, soil and water pollution, flora and fauna damage and risks to human health.
- b* Level II (e.g., operations in quarries or extraction for construction, or exploration and mining activities involving mechanised equipment): the holder of the mineral rights must submit an environmental management plan and an emergency and risk situation control programme. The environmental management plan must include a report on the conditions of the area, a monitoring programme, a rehabilitation programme (usually including backfilling and levelling measures) and a mine decommissioning and closure programme. The environmental management plan is also a statement of liability by the holder.
- c* Level III (e.g., mining concessions): the holder of a mining title is required to first obtain an environmental licence, issued by the Ministry of Coordination of Environmental Affairs (MICOA). To obtain an environmental licence, it is necessary to produce an environmental impact assessment (EIA). The EIA must also contain an environmental management programme and an emergency and risk situation control programme. The environmental management programme must cover a five-year period and contain a monitoring programme and mine decommissioning and closure programme (usually including backfilling and levelling measures).

The environmental licencing procedure involves a public consultation process involving the local communities, which must participate in the decision-making process. The EIA must be approved by MICOA and MIREM. An environmental licence is valid for the period of the corresponding concession, but is subject to review every five years and may be issued subject to certain conditions. In addition, the Environmental Regulations for Mining Activities encourage stakeholders to enter into a memorandum of understanding for a five-year period on the methods and procedures for the management of environmental, social, economic, biophysical and cultural matters during operation and decommissioning. Finally, an environmental management report, containing the results of environmental monitoring, must be submitted to MICOA each year.

Pursuant to the Mining Law, mining operations are classified in three levels for environmental assessment purposes: Levels A, B and C. Activities falling under Level A are subject to an EIA. Activities under Level B are subject to a simplified EIA and, activities under Level C are subject to an environmental management plan. These procedures must, necessarily, be read with the remaining provisions one may find under the Environmental Regulations for Mining Activity and with the Basic Rules on Environmental Management for Mining Activity.

ii Third-party rights

The title-holder must prepare a resettlement plan, under the Resettlement Regulations (Decree 31/2012 of 8 August 2012), applicable to local communities affected by the mining activities. These communities are entitled to compensation or to be resettled in a new area, so resettlement must restore the cultural, social and economic conditions of the affected communities. Procedures regarding the hearing of local communities are set out in the Regulations on Consultation of Local Communities (Ministerial Order 158/2011 of 15 June 2011).

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

Customs regime

Holders of mining rights are usually granted customs exemptions on imports of machinery, equipment and other goods to be used in mining operations. If imported goods are not destined for use in mineral operations, the general customs regime applies. To calculate the customs duties and other charges due at the time of importing equipment, machinery and other goods, values stated in foreign currency must be converted into the local currency (metical). Customs duties are based on the Customs Classification of Goods under the Customs Tariff Schedule, according to which classification is made in line with the General Rules on Interpretation of the Harmonised System of Designation and Codification of Goods. The customs value on imports of goods is set out in the General Agreement on Tariffs and Trade. In 2002, Mozambique adopted the World Trade Organization's Customs Valuation Agreement. Regardless of which method of evaluation is being used to assess the customs value, the following elements are taken into account: the cost of transportation of goods as far as the customs station, manoeuvring costs and insurance of goods (cost, insurance and freight value).

Expatriate personnel

Employment of foreign personnel is subject to special (labour and migration) rules. Foreign employees are only entitled to work in Mozambique under an employment contract of Mozambican law, entered into with a Mozambican employer (a national company or the national branch of a foreign company). The labour regime is mostly set out in the Regulations on the Hiring of Expatriates for the Petroleum and Mining Sectors.

An employment contract is subject to either authorisation by the Ministry of Labour or a quota regime (based on a notification procedure). Under the quota regime, the hiring of foreigners is subject merely to a notification to the authorities: a company with more than 100 employees may have 5 per cent foreigners, and a company with more than 10

but fewer than 100 employees may have 8 per cent foreigners. Companies with fewer than 10 employees may only hire one foreigner. Hiring more foreigners than the number allowed by the quota regime is subject to authorisation by the Ministry of Labour. The employer must submit an application identifying the employee or employees, explaining the job function in question and stating the grounds on which the authorisation is requested.

Mining contracts entered into between the government and the holder of mining rights may authorise the hiring of more foreigners than established by the quotas in the general regime. These hirings are subject to a notification to the labour authorities with the prior approval of the National Directorate of Mines.

ii Sale, import and export of extracted or processed minerals

The Customs Clearance Regulations (Decree 9/2017 of 6 April 2017) state that mineral products are subject to a special export customs regime. Holders of prospecting and exploration licences are only allowed to export mineral samples for the purposes of analysis and testing. Holders of mining concessions, mining certificates or mining permits may market and process the minerals they produce in the area of the respective mining title.

According to the Regulations on Marketing of Mineral Products, the sale, import and export of minerals by entities that do not hold a mining title is subject to prior licensing by MIREM and may only be awarded to Mozambican nationals.

iii Foreign investment

Foreign investors benefit from several guarantees provided for in the Mining Law, namely the safety and legal protection of the goods and rights within authorised mining activities. Limitation of public expropriation and mandatory compensation in cases of expropriation or confiscation are also provided for.

Holders of mining rights are required to register mining titles with the Mozambican Central Bank and provide evidence of the amount of foreign direct investment for the purposes of securing guarantees and other incentives.

The following operations qualify as foreign direct investment: (1) freely convertible currency or cash in the case of direct national investment, (2) equipment and relevant accessories, materials and other imported goods, and (3) value paid (in freely convertible currency) for the acquisition of shares in a company holding mining rights and established in Mozambique, or the acquisition of a mining title in the case of partial or total assignment.

VI CHARGES

Value added tax and customs duties apply throughout the life span of mining projects. However, royalties and other taxes may vary according to the phase of the operation.

i Royalties

Mining concession holders are required to pay royalties (production tax) on the value of the minerals extracted. The rate varies depending on the type of mineral: diamonds (8 per cent), precious metals, precious stones, semi-precious stones and heavy sand (6 per cent), base metals, coal, ornamental rocks and other minerals (3 per cent), sand and stone (1.5 per cent). The royalty value is calculated based on the market value of the mineral (if a previous consignment of the mineral was sold, then the value will be calculated based on that price).

ii Taxes

Prospecting and exploration licence holders and mining concession holders are required to pay surface tax and corporate income tax. Surface tax is a fixed amount per square kilometre of land and levied annually, payable on the month prior to the date of award of the licence.

Corporate income tax is due at 32 per cent on any profits generated (assessed under the ring-fencing principle, i.e., on a mineral right or licence basis). Although profits are unlikely to be generated during prospecting and exploration activities, those licence holders are subject to the rules applicable to the carrying forward of accumulated losses set out in the Corporate Income Tax Law (Law 34/2007 of 31 December 2007) and Corporate Income Tax Regulations (Decree 9/2008 of 16 April 2008). The definition of the tax treatment of deductible costs for income tax purposes, including a list of deductible and non-deductible costs, is expressly set out in the Law on the Taxation and Fiscal Benefits of Mining Operations (Law 28/2014 of 23 September 2014).

Mining ventures with a net return before taxes of at least 18 per cent may also be subject to the assessment of windfall profits tax.

Also worth noting is that capital gains arising from transfers between non-resident entities of equity interests, or any other rights or participating interests involving mining assets or rights located in Mozambique, may be taxable in Mozambique regardless of where the transaction takes place.

VII OUTLOOK AND TRENDS

The approval of new mining regulations and tax regulations relating to the mining sector in recent years means that the legislator is paying attention to the mining industry in order to maximise its development. It also means that the country is keeping an eye on the sector's taxation, keeping state gains at high levels while allowing foreign private investment to thrive.

Recently approved amendments, to name a few, to the Commercial Code (Decree Law 1/2018, of 4 May 2018), Foreign Exchange Regulations (Notice 20/GMB/2017 of 27 December 2017), Transfer Pricing Regulations (Decree 70/2017 of 6 December 2017) and VAT Code also mean that doing business in Mozambique is now faster, with far fewer bureaucratic procedures blocking investment activities and up-to-date regulation supporting investment contracts between the state and private investors.

The government recently announced an investment of approximately US\$100 million until 2023 in strategic projects and infrastructure. The mining sector continues to sustain its pole position in the country's economic development, unscathed by global economic upturns and downturns and putting the country's vast mineral reserves to good use. The government's efforts to attract foreign investment and economic development go hand in hand with Mozambique's mining potential, promoting new development areas and attracting new players to the industry.

ABOUT THE AUTHORS

JOÃO AFONSO FIALHO

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João Afonso Fialho joined Vieira de Almeida in 2015 and is the head of the firm's oil and gas and mining practice group. In the past 20 years, João has been involved in all sorts of oil and gas and mining projects and transactions in various jurisdictions, such as Timor-Leste, Angola, Portugal, Mozambique, Congo, Democratic Republic of the Congo, Guinea Bissau and São Tomé and Príncipe. His practice is mainly focused on the energy (oil and gas upstream and downstream and power projects) and mining industries.

João has assisted in the negotiation, structuring and implementation of several mining projects in Angola, Mozambique, Timor-Leste, Congo and the Democratic Republic of the Congo.

A frequent guest speaker in international mining and oil and gas upstream and downstream events, João has a detailed and comprehensive understanding of all typical projects and transactions of both industries.

He is a member of the Portuguese Bar Association, the Timorese Bar Association, the Association of International Petroleum Negotiators, and the board of the World Initiative of Mining Lawyers (2014–2018) and is chairman of the Portuguese Law Firms Association (2014–2018).

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Diogo Prado Alfaiate joined Vieira de Almeida in 2016. He is an associate in the oil and gas practice where he has been involved in several transactions in Portugal and abroad, namely in the oil and gas, waste management and energy sectors.

He has advised several clients on regulation procedures and public procurement in these sectors.

Diogo Alfaiate speaks Portuguese, English and French. He is admitted to the Portuguese Bar Association.

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ISBN 978-1-912228-59-1