

Mining 2019

Contributing editors
Michael J Bourassa and Alison Lacy



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between April and June 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2005

Fifteenth edition

ISBN 978-1-83862-125-4

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Mining

2019

Contributing editors**Michael J Bourassa and Alison Lacy**

Fasken

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Mining*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael J Bourassa and Alison Lacy of Fasken, for their continued assistance with this volume.



London

May 2019

Reproduced with permission from Law Business Research Ltd

This article was first published in April 2019

For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	5	Ghana	104
Michael J Bourassa Fasken		Michael Edem Akafia, Kimathi Kuenyehia Sr and Sefakor Kuenyehia Kimathi & Partners, Corporate Attorneys	
Project development: how to get started	9	Greenland	114
Alison Lacy Fasken		Peter Schriver Nuna Law Firm	
Mining in Japan	12	India	122
Hiroyasu Konno and Yoshiaki Otsuki Nishimura & Asahi		Neeraj Menon and Karthy Nair Trilegal	
Latin America overview	14	Mexico	131
Florencia Heredia Allende & Brea		Enrique Rodríguez del Bosque RB Mexico-Law	
Angola	19	Mozambique	141
João Afonso Fialho and Ângela Viana VdA Legal Partners		João Afonso Fialho and Ângela Viana VdA Legal Partners Guilherme Daniel Guilherme Daniel & Associados	
Argentina	29	Myanmar	151
Florencia Heredia and Agostina L Martinez Allende & Brea		Khin Cho Kyi Myanmar Legal Services Ltd	
Brazil	41	Peru	159
Cláudio Guerreiro, Luiz André Nunes de Oliveira, Carlos Maurício Ribeiro and Rodrigo Leite Moreira Vieira Rezende Advogados		Fernando Pickmann Dentons	
Canada	52	Philippines	168
Michael J Bourassa and Alison Lacy Fasken		Patricia A O Bunye Cruz Marcelo & Tenefrancia	
Chile	65	South Africa	180
Rodrigo Muñoz U Núñez, Muñoz & Cía Ltda		Peter Leon and Patrick Leyden Herbert Smith Freehills South Africa LLP	
Democratic Republic of the Congo	73	Sweden	190
Olivier Bustin and Matthieu Le Roux Vieira de Almeida		Peter Dyer and Pia Pehrson Foyen Advokatfirma	
Ecuador	81	Thailand	200
Cesar Zumarraga and Juan Fernando Larrea Tobar ZVS		Ratana Poonsombudlert, Nuanporn Wechsuwanarux and Sawanee Gulthawatvichai Chandler MHM Limited	
Finland	91	United Kingdom	211
Pekka Holopainen and Panu Skogström Kalliolaw Attorneys Ltd		Richard Blunt, Susie Davies and Ruchika Patel Baker McKenzie	

United States **220**

John D Fognani and Christopher J Reagen
Haynes and Boone, LLP

Uzbekistan **230**

Bakhodir Jabborov
GRATA International Law Firm

Zambia **239**

Charles Mkokweza, Namakuzu Shandavu and Mutinta Annel Zulu
Corpus Legal Practitioners

Mozambique

João Afonso Fialho and Ângela Viana VdA Legal Partners

Guilherme Daniel Guilherme Daniel & Associados

MINING INDUSTRY

Standing

1 | What is the nature and importance of the mining industry in your country?

The mining industry arguably represents one of Mozambique's most important sectors and stands at the forefront of the country's development efforts. Mining is one of the principal drivers of the nation's economy and its contribution to the gross domestic product continues to increase. Over the past few years, Mozambique has developed a mineral export promotion programme, which is primarily aimed at augmenting its depleted foreign exchange reserves. Consequently, major industry players from Australia, Brazil, India, Russia and South Africa have acquired interests in various mining areas across the country, highlighting the significance of the mining sector.

A number of high-profile mining projects are currently under way, which are not only boosting the industry itself, but also the wider economy through considerable infrastructure development to facilitate exporting the mining output. The most visible expression of this anchor effect is the upgrade of the Nacala Corridor Railway – a project that has enhanced Mozambique's competitiveness in the region by connecting the country's inland area to the port of Nacala, East Africa's deepest natural harbour. In this context, investment opportunities for the provision of coal mining equipment and railway logistics and equipment are expected in the near future.

Target minerals

2 | What are the target minerals?

Mozambique's geological make up is varied. Being one of the largest producers of tantalite and beryllium, the country boasts strategic reserves of both these minerals. Mozambique also hosts one of the world's largest aluminium smelters, with an installed capacity to produce 560,000 tonnes of aluminium ingot a year.

Copper, iron ore and lead, as well as high-grade bauxite, are explored in the central part of the country. Large-scale heavy mineral sands and titanium projects are being developed in the same region. The Mozambican province of Tete is known as one of the world's largest coal reserves, although its level of production has decreased in recent years. Apatite, ornamental rocks (such as marble and granite) and bentonite also abound. Minerals used in battery technology, such as graphite and vanadium, have been catching investors' attention because of their importance energy storage properties, and so has graphene, a derivative of graphite that, in recent years, has been studied as a possible source of renewable energy.

Regions

3 | Which regions are most active?

Mozambique's most important mineral reserves are located in its central provinces of Tete, Manica and Niassa.

LEGAL AND REGULATORY STRUCTURE

Basis of legal system

4 | Is the legal system civil or common law-based?

Mozambique's legal system is civil law-based.

Regulation

5 | How is the mining industry regulated?

Mozambique's mining industry is primarily regulated at the national level by nationwide laws (enacted by parliament) and by implementing regulations (approved by the government). Mining agreements are often entered into by and between the government and holders of mining rights. There are no objective criteria defining when a mining contract should be executed, but they are used for large-scale mining projects. A mining contract can provide for amendments and variations to or exemptions from the existing legislative requirements, taxes, custom duties and employment quotas regulating the country's mining industry.

6 | What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Mining activities in Mozambique are governed by the Mining Law (Law No. 20/2014, of 18 August 2014) and by Mining Regulations (Decree 31/2015, of 31 December 2015). The existing legal framework aims to regulate the mining titles awarded for the exploitation of the country's mineral resources, the formalities instructing their concession and respective time frames, as well as the rights granted to investors who wish to engage in mining activities.

Other key statutes include:

- Health and Safety Regulations for Mineral Activity;
- Regulations on Mining Work;
- Environmental Regulations for Mineral Activity;
- Basic Rules for the Environmental Management of Mining Activity; and
- the Law on Taxation of Mineral Operations and its Regulations.

The industry's main regulatory bodies are the Ministry of Mineral Resources and Energy, which is essentially responsible for awarding mining rights, and the National Institute of Mines, which oversees mining activities.

Classification system

- 7 | What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Mozambique's mining legislation does not stipulate a specific classification system for the reporting of mineral resources and reserves.

MINING RIGHTS AND TITLE

State control over mining rights

- 8 | To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Mozambique's Constitution establishes the fundamental principle that all mineral resources found in the soil, subsoil or water are the sole property of the state. This same principle is reproduced in the Mining Law. Holders of surface rights may, under no circumstances, be vested with title to minerals found in the subsoil, except if special mining rights are obtained from the state. Private prospecting, and the exploration and mining of mineral resources, is only permitted under mining licences awarded by the government (Ministry of Mineral Resources and Energy).

Publicly available information and data

- 9 | What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Several sets of mining data, including geological and geochemical data, are available for consultation at the National Directorate for Geology and Mines by private entities considering investments in the mining sector. A detailed registry of mining areas and existing mining licences is also available. Nevertheless, mining data derived from prospecting and exploration activities may only be disclosed 90 days after the termination date of the respective mining title.

Mozambique has the Mining Registry Site, which is part of the Ministry of Mineral Resources and Energy. This online tool was created to ensure compliance with the standards set by the Extractive Industries Transparency Initiative and is essentially aimed at improving transparency in the mining sector. In addition, it has proved useful in promoting and boosting investment given that it provides potential investors with immediate and clear information on the areas open to mineral activities. It also provides a reference list of the various prospecting and exploration licences and mining concessions awarded. The Portal is regularly updated and can be viewed at <http://portals.fiexicadastre.com/Mozambique/en/>.

Acquisition of rights by private parties

- 10 | What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Seven types of mineral rights or licences are available:

- prospecting and exploration licences;
- mining concessions;
- mining certificates;
- mining passes;
- mineral handling licences;
- mineral processing licences; and
- marketing licences.

Only one type of mineral right can exist over an area of land at any one time. The acquisition, modification, transfer and termination of mineral licences are subject to registration.

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

Prospecting and exploration licences

Prospecting and exploration licences are initially granted for two years in the case of construction minerals (renewable for an additional two-year period) and five years for all other minerals (renewable for an additional three-year period), for areas of up to 198 and 19,998 hectares respectively. These licences allow their holders to access the licensed area and to carry out all activities ancillary to prospecting and exploration, such as the construction of temporary structures and the removal or sale of samples and specimens.

Holders of prospecting and exploration licences must submit an annual report by 28 February of each year, summarising the activities undertaken during the previous year, as well as a work programme and budget for the forthcoming year, until 30 March.

Mining concessions

Mining concessions are granted for up to 25 years, allowing the holder to extract minerals from the concession area and to carry out all activities ancillary to extraction, such as the construction of structures and the marketing of minerals. Applications for mining concessions must be addressed to the Minister of Mineral Resources and Energy and filed with the National Institute of Mines. Furthermore, these applications are always subject to prior opinion issued by the government of the relevant province.

Mining concessions are granted on an exclusive basis and may be extended once, for the same 25-year period. Before commencing extraction activities, the holder of the mining concession must obtain an environmental licence and a land-concession form (DUAT), as well as prepare a resettlement and compensation plan for the communities affected by the mining activities. These activities must then be launched within two years, and production within four years, of the awarding of the mining concession.

The mining production plan must include, among other elements:

- details of the ore deposit;
- design of the mine site;
- the operations schedule;
- the necessary infrastructure;
- expected dates for the start of development and commercial production; and
- environmental and health and safety plans.

Mineral processing licences

In Mozambique's Mining Law, mineral processing is defined as the mineral operations carried out to obtain mining ore, spanning the entire extractive industry chain. Mineral processing licences are granted for a period of 25 years and may be extended once for an equivalent period. Applications for this licence must be addressed to the Minister of Mineral Resources and Energy and filed with the National Institute of Mines.

Mineral handling licences

The Mining Law defines mineral handling as mineral operations carried out to recover useful ore components in order to then transform these into useful or profitable minerals using physical processes, excluding industrial transformation. Mineral handling licences are granted for a period of 25 years and may be extended once for an equivalent period. Applications for this licence must be addressed to the Minister of Mineral Resources and Energy and filed with the National Institute of Mines.

Marketing licences

When the entity selling or exporting minerals is not the same as that which produced or mined these minerals, a marketing licence is required. See question 33.

Renewal and transfer of mineral licences

11 | What is the regime for the renewal and transfer of mineral licences?

Prospecting and exploration licences are valid for up to two years in the case of construction minerals (renewable for an additional two-year period) and five years for all other minerals (renewable for an additional three-year period). In order to be granted an extension, an extension fee must be paid and the following documents must be submitted to the Ministry of Mineral Resources and Energy, at least 60 days prior to the termination date of the licence:

- a tax clearance certificate confirming that all mining taxes have been paid;
- a report detailing the activities carried out during the initial phase (including the investments made); and
- a work programme covering the extension period (with mention of the respective projected investment).

Provided that the above requirements have been met and that the licence holder has complied with all its obligations under the existing prospecting and exploration licence, the Ministry of Mineral Resources and Energy may, subject to the opinion of the National Institute of Mines, approve extension of the licence for the time period requested (ie, the Minister is not legally granted discretion to refuse the awarding of extensions for other reasons). In accordance with the Mining Law and the Mining Regulations, the transfer of prospecting and exploration licences from one company to another, as well as the direct or indirect transfer of the licence holder's shares, may be requested only two years after the start of the respective mineral activities and is subject to prior approval by the Ministry of Mineral Resources and Energy. The Ministry's approval is, in turn, conditional on compliance with certain requirements, such as the payment of a transfer fee and clear demonstration of the assignee's technical and financial capacity.

Duration of mining rights

12 | What is the typical duration of mining rights?

The duration of mining rights depends on the mining right in question (see questions 10 and 11).

Pursuant to Mozambique's Mining Law, a mining right can be revoked when its holder fails to remediate, within 60 days of the government's prior notification, the following situations:

- failure to pay specific taxes;
- failure to comply with any provision or regulation set out in the mining contract that foresees the revocation of the mining right;
- bankruptcy, agreement or composition with the creditors (except if a guarantee has been registered over the mining facilities);
- transformation or dissolution of the mining company without the government's prior approval; or
- indebtedness to the state.

The Mining Regulations also allow for the immediate revocation of mining rights in the following situations:

- failure to pay the surface or production tax, for more than 90 days past the due date;
- failure to carry out mining activities or to file the respective annual works report within 24 months following the issuance of the prospecting and exploration licence; or
- failure to start the mining production within 48 months following the granting of the mining concession, or 24 months following the issuance of the mining certificate, as applicable.

Additionally, the Mining Law establishes other grounds for the revocation of each specific mining right.

Acquisition by domestic parties versus acquisition by foreign parties

13 | Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The mining rights that may be acquired by Mozambican nationals are distinct from those that may be acquired by foreign parties:

- mining passes (for more basic, artisanal mining activities) and marketing licences may only be granted to Mozambican nationals or to Mozambican companies wholly owned by Mozambican individuals;
- mining certificates (for small-scale mining operations) may only be granted to Mozambican nationals or to Mozambican companies majority-owned by Mozambican individuals; and
- mineral processing and handling licences, prospecting and exploration licences, and mining concessions may only be granted to companies incorporated under the laws of Mozambique; however, these companies can be foreign-held, subject to the mandatory participation of Mozambican nationals, as detailed ahead.

Protection of mining rights

14 | How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mozambique has an independent judicial system and observes the fundamental principles of rule of law and due process. The protection and enforcement of mining rights can be effected through the local courts, although these courts often lack the necessary expertise of technical mining issues. Litigation in Mozambican courts has the additional problem of being expensive and time-consuming.

International arbitration represents a viable alternative to the local courts. Mozambique is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), having deposited its instrument of accession with the United Nations Secretary-General on 10 June 1998. As is permitted by the New York

Convention, when Mozambique acceded to it, it declared that it would only apply the Convention to the recognition and enforcement of awards made in the territory of another contracting state, based on reciprocity. As such, only arbitral awards made in contracting states benefit from the more favourable recognition and enforcement regime set out in the New York Convention. Awards made in non-contracting states will be subject to a (more burdensome) judicial review and confirmation process before they can be enforced.

Surface rights

15 | What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Under Mozambican law, all land belongs to the state. Investors in mining activities cannot, therefore, buy or own land being used for the implementation of a mining project. They may, however, be granted the right to use and exploit that land (through the means of a DUAT). A DUAT provides its holder with legal certainty that it will be authorised to use a certain area of land for the purposes for which the DUAT was granted, such as mining. DUAT holders may also be owners of any buildings, facilities or other immovable assets built on the land covered by their DUAT.

When mining rights are granted in relation to an area of land subject to an existing DUAT, the holder of the granted rights must pay compensation to the respective DUAT holder. In cases where a DUAT is awarded over a populated area and the population must be resettled, a relocation plan must be drawn up and due compensation paid to those affected.

Participation of government and state agencies

16 | Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The state's right to participate in mining projects is not provided for in Mozambique's mining legislation, but rather in Law No. 15/2011, of 10 August 2011 (the Law on Public-Private Partnerships, Large-Scale Enterprises and Business Concessions, also commonly known as the Mega-Projects Law) and Decree 16/2012, of 4 July 2012 (the Regulations on Public-Private Partnerships, Large-Scale Enterprises and Business Concessions, also commonly known as the Mega-Projects Regulations).

Pursuant to the Mega-Projects Law, contracts must permit the participation of public or private Mozambican corporate persons in the share capital of the project in question or in the capital of the consortium, according to terms to be negotiated and agreed upon by the parties. The Mega-Projects Regulations goes a step further, setting out that as consideration for the granting of exploitation rights over natural resources, the state reserves the right to negotiate a gratuitous participation of no less than 5 per cent of the share capital, during any of the project's phases.

With regard to the listing of project companies, and in accordance with the Mega-Projects Law, contracts must provide for a participation in the project or consortium's share capital which is to be reserved, through the Stock Exchange and on commercial market terms, for the economic inclusion of Mozambican nationals, regardless of whether foreign investment is involved. The participation rate should range between 5 and 20 per cent of said capital. Participation may be guaranteed by the state or by another public entity designated by the state, meaning that at an initial stage the relevant participation is transferred to the state or to other such entity. Alternatively, participation may be guaranteed by the project vehicle, which unconditionally undertakes to then dispose of it at a later date.

Government expropriation of licences

17 | Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

Mozambique's Mining Law establishes, as a general principle, that expropriation can only take place for justified public interest reasons and that the expropriated party will always be entitled to receive fair compensation.

Protected areas

18 | Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Mozambique's Land Law (Law No. 19/97, of 1 October 1997) establishes the existence of fully protected areas and partially protected areas. Fully protected areas are reserved for nature conservation and state military activities, whereas partially protected areas include:

- sea and river beds;
- the continental shelf;
- an area of 100 metres from the coastline or river banks, or both;
- an area of 250 metres bordering dams and man-made lakes, as well as railways and an area of 50 metres adjacent to it;
- highways and an area of 50 metres adjacent to it;
- a two-kilometre wide band along the country's borders;
- airports and an area of 100 metres adjacent to it; and
- military facilities and an area of 100 metres adjacent to it.

No rights may be awarded over fully or partially protected areas, but special licences can be obtained for specific and limited activities.

DUTIES, ROYALTIES AND TAXES

Duties, royalties and taxes payable by private parties

19 | What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Mozambique's Law on the Taxation of Mineral Operations (Law No. 28/2014, of 23 September 2014, as amended by Law No. 15/2017, of 28 December) and the relevant Regulations (approved by Decree 28/15, of 28 December 2015) introduced significant changes to the tax regime applicable to the mining industry. The special regimes governing production tax, corporate income tax and fiscal benefits for the mining sector, previously dispersed across several legal instruments, are now consolidated in this single instrument.

VAT and customs duties apply throughout the entire lifecycle of mining projects, but duties, royalties and taxes vary in accordance with the operational phase of the project. In this respect, Decree 78/2017, of 28 December, which approves the new VAT Refund Regulations, provides for a special regularisation regime applicable to the oil and mining sector. Under this regime, oil and mining companies – at the production stage – are allowed to settle their invoices without VAT provided that among other requirements their exports exceed 75 per cent of the annual turnover of the preceding year. A regularisation document will need to be issued in order to allow suppliers to correct the VAT initially charged.

Surface tax

Holders of prospecting and exploration licences, mining concessions and mining certificates are required to pay surface tax calculated in accordance with the fixed amount per hectare of land contained in the mining title.

Amount annually payable in meticaís per hectare

Mining title	Rate
Prospecting and exploration licences	
Year 3	43.75 MT/ha
Years 4 and 5	91 MT/ha
Year 6	105 MT/ha
Years 7 and 8	210 MT/ha
Mining concession	
Years 1 to 5	30 MT/ha
From year 6 onwards	60 MT/ha
Mining certificate	
Years 1 to 5	30 MT/ha
From year 6 onwards	50MT/ha

Production tax (royalty)

Individuals or companies developing mining activities must pay a production tax (royalty) calculated based on the value of the mineral extracted, as follows:

- diamonds – 8 per cent;
- precious metals, precious and semi-precious stones and heavy sand – 6 per cent;
- sands and stone – 1.5 per cent; and
- base minerals, coal, ornamental rocks and other mineral products – 3 per cent.

This value is informed by the sale price of the previous consignment of the respective mineral or, if the mineral has never been sold, its market value. Production tax is to be paid at the end of the month during which the mineral was extracted. A 50 per cent reduction is foreseen in the law for mining products used in the development of local industry.

Windfall profits tax

Mining concessions or mining certificates with a pre-corporate income tax net return in excess of 18 per cent are subject to a windfall profits tax levied on the accumulated net cash flow. The statutory rate of the windfall profits tax is set at 20 per cent.

Corporate income tax

Corporate income tax – a profit-based tax – is payable at a rate of 32 per cent.

Tax advantages and incentives

20 | What tax advantages and incentives are available to private parties carrying on mining activities?

Mining projects are exempt (for a period of five years after the start of mining activities) from:

- customs duties payable on imported equipment (for both the prospecting and exploration, and mining or production phases) classified under Class K in the Customs Schedule;
- customs duties payable on imported equipment not expressly classified under Class K in the Customs Schedule, but which is considered equivalent to it (a comprehensive list of which can be found annexed to the Law on the Taxation of Mineral Operations); and
- mining companies – at the production stage – are allowed to settle their invoices without VAT provided that among other requirements their exports exceed 75 per cent of the annual turnover of the preceding year.

Tax stabilisation

21 | Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

A fiscal stabilisation regime may be negotiated between the government and the holders of mineral rights, as established in article 58 of the Law on the Taxation of Mineral Operations. This stabilisation period has a maximum duration of 10 years, which may be extended until the term of the concession in return for a 2 per cent annual increase in the production tax rate.

Carried interest

22 | Is the government entitled to a carried interest, or a free carried interest in mining projects?

The Mega-Projects Regulations establish that the Mozambican state reserves the right to negotiate a free participation of no less than 5 per cent during any phase of a mining project, as consideration for its awarding of exploitation rights over natural resources.

Transfer taxes and capital gains

23 | Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of mineral rights or licences is subject to a 32 per cent capital gains tax.

According to the Law on the Taxation of Mineral Operations, capital gains are due whenever the underlying transaction concerns mining assets or rights located in Mozambican territory, regardless of where the transaction actually takes place (ie, even if it is concluded at the (offshore) parent company level). In addition, Law No. 15/2017, which amended Mozambique's Law on the Taxation of Mineral Operations, provides that the gains or losses resulting from the tax on transfers (either onerous or free of charge) of stakes in the mining sector are not deductible.

Distinction between domestic parties and foreign parties

24 | Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

No.

BUSINESS STRUCTURES**Principal business structures**

25 | What are the principal business structures used by private parties carrying on mining activities?

There is generally little difference between a branch and a subsidiary in Mozambique. The main differentiating factor is the tax efficiency associated to the repatriation of profits. Dividends distributed by a local company to its shareholders are subject to withholding tax, whereas the repatriation of profits by the local branch of a foreign company is not.

Other key differences include:

- a subsidiary is a separate legal entity, whereas a branch is not legally autonomous from the foreign company that set it up; namely, its head office;
- the liability of a company's shareholders is limited to the amount of its share capital, whereas a foreign company is fully responsible for any liabilities arising from its branch's activities;
- at least one other shareholder (or two more, depending on the type of company) is required to incorporate a Mozambican company;

in the case of a foreign entity branch, the appointment of a local representative is the sole requirement;

- given that a branch and its head office represent the same legal entity, the respective company's corporate matters are governed by only one jurisdiction; typically, the country where the company has its registered offices, which determines the company's personal law;
- conversely, corporate documents issued by the foreign company at the head office level (minutes of shareholders' meetings, board resolutions, powers of attorney, etc) will always be subject to a more cumbersome and expensive process, usually involving translation and several stages of legalisation; and
- branch registration costs are broadly similar to those of incorporating a local company, although the latter are slightly higher.

Local entity requirement

26 | Is there a requirement that a local entity be a party to the transaction?

Yes. In accordance with the Mega-Projects Law, contracts must provide for a participation in the project or consortium's share capital, to be reserved, through the Stock Exchange and on commercial market terms, for the economic inclusion of Mozambican nationals, regardless of whether foreign investment is involved. The participation rate should range between 5 and 20 per cent of the capital.

Bilateral investment and tax treaties

27 | Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Mozambique has entered into double taxation treaties with Botswana, India, Italy, Portugal, the Special Administrative Region of Macao (China), Mauritius, South Africa, the United Arab Emirates and Vietnam.

Mozambique has established bilateral investment treaties with Algeria, Angola, Belgium, Brazil, China, Cuba, Denmark, Egypt, Finland, France, Germany, India, Indonesia, Italy, Japan, Luxembourg, Mauritius, the Netherlands, Portugal, South Africa, Spain, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom, the United States, Vietnam and Zimbabwe.

FINANCING

Principal sources of financing

28 | What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Mozambique's banking sector and capital markets remain underdeveloped and lack the necessary liquidity to finance medium or large-scale mining projects. As such, financing for mining activities is mainly secured through corporate loans provided by foreign banks or through shareholders' loans. A common alternative financing option involves listing the licence holder's parent company (typically in the London Alternative Investment Market), thus passing the flotation proceeds down to the Mozambican company actually implementing the mining activities.

Direct financing from government or major pension funds

29 | Does the government, its agencies or major pension funds provide direct financing to mining projects?

Mining activities are typically financed by private parties, rather than by the government, its agencies and pension funds.

Security regime

30 | Please describe the regime for taking security over mining interests.

Physical assets used in mining activities may be mortgaged, pledged or otherwise used as collateral to secure loans for the financing of mining operations – always subject, however, to the prior approval of the Ministry of Mineral Resources and Energy. As regards immovable assets, any security rights attached to it – a mortgage – must be documented in the form of a notary deed and duly registered with the property registry.

In addition, pursuant to Law No. 19/2018, of 28 December 2018 (which establishes the legal framework for securities over movables and creates the Central Registry for Security over Movables), holders of mining rights may create security interests over mineral resources already extracted or to be extracted, the latter being limited to the purpose of funding the relevant exploration or extraction. The terms of the security must be agreed upon in written form.

The admissibility of a direct security over mining interests is highly debatable. From a legal standpoint, the creation and enforcement of security rights over mining interests is always subject to authorisation by the Ministry of Mineral Resources and Energy. This means that the beneficiary of a security does not have an immediate right to execute the collateral in case of default of the underlying loan or financing arrangement – the intervention of the Ministry of Mineral Resources and Energy will always be required, it having full discretionary powers to approve or refuse the enforcement of the collateral.

RESTRICTIONS

Importation restrictions

31 | What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Mozambique's mining legislation does not establish specific restrictions on the importation of services and equipment. However, customs duties exemptions on the importation of equipment will only be granted if no equipment of comparable quality is produced in Mozambique.

Standard conditions and agreements

32 | Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

No standard conditions and agreements are used, although nothing prevents the parties from instituting these should they wish to do so.

Mineral restrictions

33 | What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Entities extracting minerals under a mining licence may freely dispose of the output of their production. Nevertheless, a marketing licence is required when the entity selling or exporting the minerals is not the

same entity that produced or mined them. This marketing licence is awarded by the National Institute of Mines.

Import of funds restrictions

34 | What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Mozambique's Mining Law establishes that the state warrants mining licence holders' right to export and repatriate profits derived from mining activities – including the proceeds from the export or sale of minerals, but always subject to compliance with the applicable foreign exchange regulations and procedures. Both the import of funds and the repatriation of proceeds derived from the export or sale of minerals qualify as foreign exchange operations under the Foreign Exchange Law and the Foreign Exchange Regulations. Foreign exchange operations must undergo a licensing process, which consists of registration or approval by the Central Bank of Mozambique, by the country's foreign exchange authority, or by both.

Finally, there is an additional obligation to convert at least 50 per cent of the export proceeds into local currency.

ENVIRONMENT

Principal applicable environmental laws

35 | What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Environmental mining issues are largely regulated by Mozambique's Environmental Law (Law No. 20/97, of 1 October 1997), its Environmental Regulations for Mining Activity, and the Basic Rules on Environmental Management for Mining Activity.

The Ministry for Land, Environment and Rural Development acts as the country's environmental regulator.

Environmental review and permitting process

36 | What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Holders of mining rights must observe several environment-related obligations. For the purposes of defining the environmental requirements applicable to each case, mining operations are classified into three levels according to the scope, scale and sophistication of the equipment to be used.

If the activities foreseen are deemed to fall under Level I activities, the mining project will merely be subject to the Basic Rules on Environmental Management for Mining Activity, which are aimed at mitigating any environmental damages or socio-economic impacts possibly arising from mining activities by ensuring that these respect simple methods intended to prevent air, soil and water pollution, as well as damage to flora and fauna, and to protect human health.

If the activities foreseen are deemed to fall under either Level II or Level III activities, the specific regime set out in the Environmental Regulations for Mining Activity will apply. Mining operations falling under Level II activities, including those carried out in quarries or which involve the extraction and mining of other mineral resources for construction, exploration and mining activities involving mechanised equipment, as well as pilot-projects, must mandatorily submit an environmental management plan (EM plan) and an emergency and risk situation control programme.

The EM plan should comprise a report on the initial conditions of the mining area, a monitoring programme, a rehabilitation programme or a mine decommissioning and closure programme, or all of the above. Once approved by the relevant authority, the EM plan is considered a statement of environmental liability with which the company is required to comply.

Mining operations falling under Level III activities – typically mining concessions – are subject to even stricter environmental requirements. More specifically, holders of a mining concession must obtain an environmental licence from the Ministry for Land, Environment and Rural Development before commencing operations. An environmental impact assessment (EIA) is mandatory to obtain this licence. The resulting EIA report, which details the assessment findings, shall also include an environmental management programme (EM programme), as well as an emergency and risk situation control programme. The EM programme, which should contain an environmental monitoring programme and a mine decommissioning and closure programme, is required to cover a five-year period.

The procedure to obtain an environmental licence involves a public consultation process with the local communities, during which the licence holder must ensure that these communities are given the opportunity to participate in the decision-making process. Before the environmental licence can be issued, the EIA report must be approved by the Ministry for Land, Environment and Rural Development following a technical review conducted by the same in cooperation with the Ministry of Mineral Resources and Energy. The environmental licence is valid for the term of the corresponding mining title, but is subject to review every five years and may be issued subject to recommendations and certain conditions. Moreover, the Environmental Regulations for Mining Activity encourage stakeholders to enter into a memorandum of understanding for a five-year period, in order to establish the parties' agreement on the methods and procedures to be applied in the management of environmental, biophysical, social, economic and cultural matters, both during the project and on decommissioning. Furthermore, an environmental management report outlining the results of the environmental monitoring, from a social, economic, cultural and biophysical standpoint, must be submitted each year to the Ministry for Land, Environment and Rural Development.

The Mining Law also contains a provision, although somewhat generic, on environmental matters. Mining activities are similarly classified into three different levels (called A, B and C), in accordance with criteria akin to that provided for in the Environmental Regulations for Mining Activity. The Law further states that Level A activities are subject to an EIA, Level B activities to a simplified EIA, and Level C activities to an EM programme.

Closure and remediation process

37 | What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

The provision of a financial bond for Level II and III activities is required under the Environmental Regulations for Mining Activity. This financial bond may be provided annually, in the form of an insurance policy, bank guarantee or bank deposit. It is intended to cover any decommissioning costs of the operations in question.

Restrictions on building tailings or waste dams

38 | What are the restrictions for building tailings or waste dams?

Pursuant to the Environmental Regulations for Mining Activity, both holders of mining rights and operators must take appropriate measures for the disposal and treatment of mining waste products in order to

prevent contamination of the location where this waste is deposited. It is forbidden to deposit hazardous waste on the soil and subsoil.

In addition, mining areas, including facilities used for or related to mining activities carried out under mining rights, are subject to inspection by the Ministry of Mineral Resources and Energy, although the law does not establish a specific number of inspections. The Technical Safety and Health Regulations for Geological and Mining Activities (approved by Decree 61/2006, of 26 December 2006) also contain detailed health and safety provisions with respect to mining activities.

HEALTH AND SAFETY, AND LABOUR ISSUES

Principal health and safety, and labour laws

39 | What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Health, safety and labour issues are principally regulated by the Regulations on Mining Work, approved by Decree 13/2015, of 3 July 2015, and by the Technical Safety and Health Regulations for Geological and Mining Activities, approved by Decree 61/2006, of 26 December 2006. The Labour Law (Law No. 23/2007, of 1 August) also applies, but on an ancillary basis. The Ministry of Labour is the main regulator.

Management and recycling of mining waste

40 | What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

As mentioned in question 38, pursuant to the Environmental Regulations for Mining Activity, holders of mining rights and operators must take appropriate measures for the disposal and treatment of mining waste products in order to ensure that the location where waste is deposited is not contaminated. The deposit of hazardous waste on the soil and subsoil is forbidden.

Use of domestic and foreign employees

41 | What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

No restrictions apply to the use of domestic employees in mining activities, except those related to minimum employment age, maximum work hours, mandatory rest days and similar matters.

Both labour and immigration issues must be taken into account when dealing with foreign nationals working in Mozambique. As a general rule, foreign employees are only entitled to work in Mozambique under an employment contract governed by Mozambican law and entered into with a Mozambican employer – either a Mozambican company, or the Mozambican branch of a foreign company. This employment contract is subject to the authorisation of the Ministry of Labour – usually quite a cumbersome process – or simply to a notification procedure.

An employer may have a specific number of expatriate employees, depending on the total number of employees at its service. Under this quota regime, a company with more than 100 employees may have 5 per cent of expatriate workers, a company with more than 10 and fewer than 100 employees may have 8 per cent expatriate workers, and companies with up to 10 employees can only employ one expatriate. Expatriates hired under this quota regime are only subject to a notification procedure before the authorities. Employers are required to notify the authorities when they hire an expatriate under the expatriate quota, within 15 days of his or her admission, through the submission of a

model application approved for this purpose, together with additional documentation.

Expatriates may be hired in numbers exceeding the relevant expatriate quota, but this exception is subject to special authorisation issued by the Ministry of Labour. In such cases, employers must submit an application stating their denomination, head office and business sector, as well as identifying the expatriate in question, his or her job function and the grounds on which they are requesting this special authorisation.

Further important features of the labour regime can be summarised as follows: when a mining contract explicitly provides for the possibility of hiring expatriates in numbers exceeding the quotas established in the general regime, mining companies and their subcontractors are merely required to notify the labour authorities of the admittance of these additional expatriates.

SOCIAL AND COMMUNITY ISSUES

Community engagement and CSR

42 | What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Ministry of Mineral Resources and Energy recently approved the Guide on the Implementation of the Corporate Social Responsibility Policy for the Extractive Mineral Resources Industry (Ministerial Order 8/2017, of 16 January 2017). This statute primarily aims to establish social responsibility initiatives to help promote the social, economic and environmental welfare of communities affected by mining projects.

Nationally, the main regulator is the Ministry of Mineral Resources and Energy, and locally, it is the provincial government and the District Administration.

Rights of aboriginal, indigenous or disadvantaged peoples

43 | How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

No specific legislation regulates this matter in Mozambique. It should, however, be noted that if mining activities are to be carried out in a populated area, and the local population subsequently needs to be resettled, a relocation plan must be prepared and due compensation must be paid to those evicted.

International law

44 | What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Mozambique has not entered into any international treaties, conventions or protocols specifically related to CSR issues.

ANTI-BRIBERY AND CORRUPT PRACTICES

Local legislation

45 | Describe any local legislation governing anti-bribery and corrupt practices.

The Mozambican Penal Code (approved by Law No. 35/2014, of 31 December), as amended by the Anti-Corruption Law (approved by Law No. 6/2004, of 17 June 2004), criminalises both passive and active bribery and corruption practices. The applicable periods of imprisonment and fine amounts will depend on the type of offence committed and on the agent.

Pursuant to the Anti-Corruption Law and the Regulations on Public Works Contracts and the Supply of Goods and Services to the State (approved by Decree 15/2010, of 15 May 2010, as amended), all contracts to which government bodies are a party (as is the case of mining concession contracts) must include an anti-corruption clause.

Foreign legislation

- 46 | Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Yes, particularly companies owned by foreign individuals or companies. It is common practice for these companies or individuals to apply the anti-bribery and anti-corruption legal regime in force in their own country of origin at their companies operating under the laws of Mozambique.

Disclosure of payments by resource companies

- 47 | Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Mozambique has been a party to the Extractive Industries Transparency Initiative since 2012. The recommendations set forth in the EITI Reports on Mozambique concern, among others, the lack of a centralised government revenue collection monitoring system required to ensure the accuracy and transparency of records of payments made by mining companies to government entities. Within this context, the Mozambican EITI Coordinating Committee has set, as one of its main goals for 2016–18, the improvement of government entities' and mining companies' accountability mechanisms in a bid to comply with the standards established by EITI. However, no progress has been made thus far on the enactment of new regulations governing these issues.

FOREIGN INVESTMENT

Foreign ownership restrictions

- 48 | Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

In the mining industry, foreign ownership is restricted by the Mega-Projects Law, according to which a percentage ranging from 5–20 per cent of a mining project's capital must be reserved for local participants.

INTERNATIONAL TREATIES

Applicable international treaties

- 49 | What international treaties apply to the mining industry or an investment in the mining industry?

Mozambique has entered into several double taxation treaties and bilateral investments treaties, which establish certain benefits also applicable to the mining industry. A complete list of these legal instruments can be found in question 27.

A more targeted bilateral cooperation treaty for the mining sector was entered into by and between Mozambique and Angola in 2007. A similar cooperation treaty was then entered into by and between Mozambique and Portugal in March 2014.

As already mentioned, Mozambique is also a party to the Extractive Industries Transparency Initiative.



Guilherme Daniel

gdd@guilhermedaniel.com

Torres Rani, Torre 1 Piso 02, Fracção 05
Maputo
Mozambique
Tel: +258 21 498770
mozambique@vdalegalpartners.com
www.guilhermedaniel.com



João Afonso Fialho

jaf@vda.pt

Ângela Viana

axv@vda.pt

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
www.vda.pt

UPDATE AND TRENDS

Recent developments

- 50 | What were the biggest mining news events over the past year in your jurisdiction and what were the implications? What are the current trends and developments in your jurisdiction's mining industry?

The year 2018 was marked by increased demand for minerals used in battery technology. This trend was felt in Mozambique when mining companies – mostly Australian – announced their interest to intensify exploiting Mozambique's large graphite deposits, which count for between 20–40 per cent of the world's reserves, most of which are concentrated in the Cabo Delgado province. Graphite commercial production was declared at some mines (eg, Balama).

The boost in graphite mining is expected to continue throughout 2019, keeping up with the global demand for the commodity, and is likely to help the economy regain the confidence of international investors and donors that, hitherto, was profoundly shaken by the country's hidden debt case. Despite this current trend, new mining legislation is not anticipated in 2019.

This year is expected to be pivotal for Mozambique's economy because the Rovuma LNG and Mozambique LNG projects are likely to reach their final investment decision, helping improve the country's financial credibility.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Islamic Finance & Markets	Real Estate M&A
Advertising & Marketing	Domains & Domain Names	Joint Ventures	Renewable Energy
Agribusiness	Dominance	Labour & Employment	Restructuring & Insolvency
Air Transport	e-Commerce	Legal Privilege & Professional Secrecy	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Licensing	Risk & Compliance Management
Anti-Money Laundering	Energy Disputes	Life Sciences	Securities Finance
Appeals	Enforcement of Foreign Judgments	Litigation Funding	Securities Litigation
Arbitration	Environment & Climate Regulation	Loans & Secured Financing	Shareholder Activism & Engagement
Art Law	Equity Derivatives	M&A Litigation	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mediation	Shipbuilding
Automotive	Financial Services Compliance	Merger Control	Shipping
Aviation Finance & Leasing	Financial Services Litigation	Mining	Sovereign Immunity
Aviation Liability	Fintech	Oil Regulation	Sports Law
Banking Regulation	Foreign Investment Review	Patents	State Aid
Cartel Regulation	Franchise	Pensions & Retirement Plans	Structured Finance & Securitisation
Class Actions	Fund Management	Pharmaceutical Antitrust	Tax Controversy
Cloud Computing	Gaming	Ports & Terminals	Tax on Inbound Investment
Commercial Contracts	Gas Regulation	Private Antitrust Litigation	Technology M&A
Competition Compliance	Government Investigations	Private Banking & Wealth Management	Telecoms & Media
Complex Commercial Litigation	Government Relations	Private Client	Trade & Customs
Construction	Healthcare Enforcement & Litigation	Private Equity	Trademarks
Copyright	High-Yield Debt	Private M&A	Transfer Pricing
Corporate Governance	Initial Public Offerings	Product Liability	Vertical Agreements
Corporate Immigration	Insurance & Reinsurance	Product Recall	
Corporate Reorganisations	Insurance Litigation	Project Finance	
Cybersecurity	Intellectual Property & Antitrust	Public M&A	
Data Protection & Privacy	Investment Treaty Arbitration	Public Procurement	
Debt Capital Markets		Public-Private Partnerships	
Defence & Security		Rail Transport	
Procurement		Real Estate	
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)