

THE MINING LAW
REVIEW

NINTH EDITION

Editor
Erik Richer La Flèche

THE LAWREVIEWS

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REVIEW

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Erik Richer La Flèche

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PREFACE

I am pleased to have participated in the preparation of the ninth 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 19 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 three 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.

At the time of writing, the covid-19 pandemic is continuing. It has greatly reduced economic activity throughout the world and the road to recovery will be long and uncertain.

Governments are trying their best to mitigate the effects of the pandemic, but consumer demand is down and certain sectors of the economy (e.g., transportation, hospitality) have been flattened. We are very far from the Goldilocks scenario of 2019 with steady world growth.

The impact of the pandemic on mining has been uneven. Taken as a whole, mining has done better than many sectors but it is undeniable that the pandemic has materially affected the demand for most minerals. This having been said, cuts in production because of the pandemic have helped maintain the price of some minerals (e.g., iron ore).

The story for gold and other precious metals continues to be a favourable one. Extraordinary increases in the monetary supply of the US, the uncertainty brought about by the pandemic and US–China trade frictions have contributed to the surge in gold, silver and other precious metals.

It is unclear what the next 12 months will bring and we can only hope that new vaccines and therapeutics will be developed and distributed in the not-too-distant future.

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

Stikeman Elliott LLP

Montreal

September 2020

Part I

MINING

MOZAMBIQUE

João Afonso Fialho, Ângela Viana and Helna Vitoldás¹

I OVERVIEW

For the past few years, foreign investment has been steadily driving Mozambique's economy through the turmoil of the economic crisis. Apart from the hidden debt crisis, the impact of tropical cyclones Idai and Kenneth, and military instability in Cabo Delgado, the recent covid-19 pandemic has grown into an unprecedented social and economic global crisis, with Mozambique being no exception.

The declaration of a state of emergency along with the necessary administrative measures to stop the spread of the covid-19 pandemic (including, among others, suspension of the issuance of licences and authorisations as well as closure of non-essential economic activities) have significantly cut down on consumption and have led to the country's economy currency depreciation and budget deficit. Many mineral resources and infrastructure projects have been immediately postponed or cancelled operations to limit the spread of the virus among workers and local communities.

The mining industry still assures Mozambique's place as one of Africa's leading players in mineral resources projects and plays a meaningful role in fighting poverty and promoting inclusive growth and social development. The coal industry, seen as Mozambique's main export, is well established and thriving in the Province of Tete and is expected to set Mozambique up as one of the world's largest coal producers in the coming years.

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 (according to the data published by the National Institute of Statistics, in 2018 the real GDP growth stood at 3.4 per cent and in 2019, at 2.2 per cent – the lowest growth over the past two decades – and projected to remain so in 2020) and create jobs (at a time when the unemployment rate approaches 25 per cent).

After successfully completing the Nacala Corridor Railway project, which is already in operation connecting Moatize's Coal Mine in Tete Province to the Port of Nacala, the exploration of liquefied natural gas from the Rovuma basin is now one of the government's main 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 the infrastructure

¹ João Afonso Fialho is a partner and Ângela Viana is a senior associate at Vieira de Almeida and Helna Vitoldás is an associate at Guilherme Daniel & Associados.

development deficit. Currently, the major mining investments and projects in the mining sector are mainly directed towards graphite, precious and semi-precious stones, heavy sands and coal.

II LEGAL FRAMEWORK

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). 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 of 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, amended by Decree 34/2019, of 2 May 2019;
- c* the Law on the Taxation and Fiscal Benefits of Mining Operations (Law 28/2014, of 23 September 2014, amended by Law 15/2017, of 28 December 2017) sets out the tax regime, including tax rates and exemptions, applicable to the mining sector;
- d* the Regulations on the Taxation and Fiscal Benefits of Mining Operations (Decree 28/2015, of 28 December 2015) set out the rules for the assessment of mining production tax and surface tax;
- e* the 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, amended by Decree 34/2019, of 2 May 2019;
- f* the 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* the Rules on Environmental Management of Mining Activities (Ministerial Order 189/2006, of 14 December 2006) set out the rules for and standards aiming to minimise the environmental damage and negative socio-economic impacts resulting from Level I mining activities;
- h* the 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 (amended by Decree 25/2015, of 20 November 2015 and Decree 34/2019, of 2 May 2019);
- i* the Regulations on Marketing of Diamonds, Precious Metals and Gems (Decree 25/2015, of 20 November 2015) set forth the rules for the marketing, import, export and transit of rough diamonds, precious metals and gems, amended by Decree 34/2019, of 2 May 2019;
- j* the Regulations on Mineral Resources and Energy Inspection Activity (Decree 34/2019, of 2 May 2019) set out the rules, principles and procedures governing the Mineral Resources and Energy inspection activity;
- k* the Regulations on the Hiring of Expatriates for the Petroleum and Mining Sectors (Decree 63/2011, of 7 December 2014) contain the applicable rules for hiring expatriate personnel in these sectors;

- l* the Regulations regarding Labour on Mining Activities (Decree 13/2015, of 3 July 2015) set out the rules applicable to employment relationships in mining and petroleum activities; and
- m* the VAT Refund Regulations (Decree 78/2017, of 28 December 2017) provide for a special value added tax regime for mining companies in the production stage.
- n* The main regulatory bodies are the Ministry of Mineral Resources and Energy (MIREME), which is responsible for the award of mining rights, the National Institute of Mines (INAMI), which oversees mining activities, the National Directorate of Geology and Mines, which is responsible for the administrative procedures within the industry, and the Inspectorate-General of Mineral Resources and Energy, which monitors mining activities and carries out inspections.

At an international level, Mozambique has entered into bilateral cooperation treaties with Angola (2009) and with Portugal (2014). Mozambique is also an aspiring candidate 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. Mineral 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 by MIREME on a first come, first served basis. However, MIREME may 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. Whenever justified by public interest, the award of handling and processing licences may also be subject to public tender.

There are seven main types of mineral titles:

- a* prospecting and exploration licence;
- b* mining concession;
- c* mining certificate, for small-scale mining operations;
- d* mining pass, for artisanal mining operations;
- e* mineral beneficiation licence;
- f* mineral processing licence; and
- g* marketing licence.

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, including mineral water (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 198 hectares for construction minerals and 19,998 hectares for other mineral resources. 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 MIREME. 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 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.

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 beneficiation 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 or companies. Reference must also be made to the Law on Public Private Partnerships, Large-Scale Projects and Enterprise Concessions (Law 15/2011, of 10 August 2011) which reserves a minimum participating interest (between 5 per cent and 20 per cent) to the state or Mozambican nationals or entities for large-scale or significant mining projects.

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 acceded under the Resolution 22/98, of 2 June

and having deposited its instrument of accession with the Secretary-General of the United Nations on 10 June 1998. Upon the accession, 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 an environmental licence and 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, because in Mozambique all land is property of 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 keeping in mind that obtaining a DUAT may be a quite challenging and time-consuming process. Procedures regarding the hearing of local communities under the DUAT acquisition process are set out in the Regulations on Consultation of Local Communities (Ministerial Order 158/2011, of 15 June 2011).

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

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 environmental impact assessment (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.

Holders of mining titles are required to prepare and submit – ahead of commencement of mineral operations – security, health and safety plans to MIREME 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.

The government expressed commitment towards the global strategy for decreasing greenhouse gases. In addition to the green policies to support green programmes and projects aimed at contributing to the control and reduction of greenhouse gas emissions (Decree 23/2018 of 3 May), the government has also established the National Sustainable Development Fund, created by Decree 6/2016 of 24 February, to support and finance programmes that have sustainable priorities, such as: environmental management, adaptation and mitigation of climate change; sustainable management of forests; conservation of biodiversity; and land management and land use planning.

ii Environmental compliance

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.

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.

Level II

For example, 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.

Level III

For example, mining concessions. The holder of a mining title is required to first obtain an environmental licence, issued by the Ministry of Land and Environment. To obtain an environmental licence, one must produce an 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 the Ministry of Land and Environment and MIREME. An environmental licence is valid for the period of the corresponding concession but is subject to review every five years and its issuance is 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 the Ministry of Land and Environment each year.

iii 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.

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 intended 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 governed by 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 (Decree 63/2011, of 7 December 2011).

An employment contract is subject to either authorisation by the Ministry of Labour or a quota regime. 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.

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 and the Regulations on Marketing of Diamonds, Precious Metals and Gems, the sale, import and export of minerals by entities that do not hold a mining title is subject to prior licensing by MIREME and may only be awarded to Mozambican nationals or companies.

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.

The following operations qualify as foreign direct investment:

- a* 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;
- b* equipment and relevant accessories, materials and other imported goods;
- c* in the case of national direct investment, infrastructure, facilities and the granting of rights relating to land use, concessions, licences and other rights of an economic, commercial or technological nature;
- d* assignment, in specific cases and under the terms agreed and sanctioned by the competent entities, of the rights to use patented technology and trademarks, under the terms to be regulated; and
- e* amount spent on geological studies or other activities within the obligations provided under the Mining Law.

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, that is, 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.

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.

iii Other fees

According to the Mining Law, in cases where a mining right 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.

Without prejudice to the liability of holder of mining rights for the damage caused to the environment as a result of mining operations, the provision of a financial bond for Level II and III activities are 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.

VII OUTLOOK AND TRENDS

The last two years have been marked by great increase in demand for Mozambican mineral products considering, on the one hand, the interest announced by several Australian mining companies in intensifying efforts in exploiting Mozambique's large graphite deposits, and on the other, by the expansion of ruby mining operations carried out in what is believed to be the largest ruby deposit in the world, both located in the Cabo Delgado province.

The mining sector was expected to grow by 2020; however, with the outbreak of the covid-19 pandemic, major mining companies of all sizes have been slowing down or halting their operations while workers are forced to stay at home. Recently published data by the Confederation of Economic Associations of Mozambique have shown that the fall in demand

in the mining sector resulting from the impact of the covid-19 pandemic contributed to a reduction in turnover of approximately 64 per cent and a global drop in revenues of more than US\$248 million.

One outcome that seems to emerge from this unprecedented crisis is that as most business start to resume, new and permanent health and safety protocols will have to be put in place (e.g., redesign of workplaces or adoption of measures that shall extend to the local community to prevent any future disease contamination). In addition to the recently approved legislation, the new e-government initiatives and online mining cadastre systems to be operated by INAMI are believed to bring a huge boost to the mining sector in Mozambique, as many statutory processes such as submission of applications and reports, payments, and licence renewals, among others, will be made online, resulting in fewer bureaucratic procedures and growth for the mining sector, which is one of the key economic drivers for Mozambique.

As per the National Development Strategy (2015-2035), Mozambique still faces major challenges related to the local processing and transformation of some mineral resources and efforts shall be made to allow the processing and export of transformed or beneficiated products.

The government recently announced an investment of approximately US\$100 million in strategic projects and infrastructure until 2023, which may be delayed by the recent global economic upturns and downturns. The government's efforts to attract foreign investment and economic development shall continue going hand in hand with Mozambique's mining potential, because it will allow the promotion of new development areas and attraction of new players to the industry.

ABOUT THE AUTHORS

JOÃO AFONSO FIALHO

Vieira de Almeida

João Afonso Fialho joined Vieira de Almeida in 2015 and is the head of the firm's oil and gas and mining practices. 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).

ÂNGELA VIANA

Vieira de Almeida

Ângela joined Vieira de Almeida in 2015. She is a senior associate of the oil and gas and mining practice areas where she has been involved in several global transactions with a particular focus on energy, mining, investment, corporate and commercial law. She has been particularly active in providing assistance to several mining projects in Angola, Mozambique, Portugal and Timor-Leste, notably in the negotiation or renegotiation of mining investment contracts, structuring or restructuring of joint ventures, farm-ins and farm-outs, assisting some of the world leaders of the mining sector.

Ângela is a member of the Portuguese Bar Association and the Angolan Bar Association.

HELNA VITOLDÁS

Guilherme Daniel & Associados

Helna Vitoldás joined Guilherme Daniel & Associados in 2018. She is an associate and has been working in various sectors, but particularly involved in corporate matters in the oil and gas sector. Helna is admitted to the Mozambican Bar Association.

VIEIRA DE ALMEIDA

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
jaf@vda.pt
axv@vda.pt
jcv@vda.pt
www.vda.pt

GUILHERME DANIEL & ASSOCIADOS

Torres Rani, Av. Tenente Osvaldo Tazama/Marginal
Torre 1, Piso 02, Fracção 05
Maputo
Moçambique
Tel: +258 21 498 770
hav@guilhermedaniel.com
www.guilhermedaniel.com

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