

# International **Comparative** Legal Guides



## Project Finance **2020**

A practical cross-border insight into project finance

**Ninth Edition**

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## Project Finance **2020**

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**John Dewar**

**Milbank LLP**

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# Mozambique

VdA

Guilherme Daniel & Associados



Teresa Empis Falcão



Guilherme Daniel

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Mozambique has not seen significant improvements in its macroeconomic conditions since last year. Although some positive messages have been conveyed by the IMF following the evaluation visits to the country, uncertainty remains regarding the resumption of assistance by the IMF, which maintains the country's public investment capacity and attractiveness to private investment, especially FDI, at very low levels. The Bank of Mozambique expects an increase in the medium-term inflation for February 2020 and an acceleration of the annual inflation from 3.58% in November 2019 to 3.48% in February 2020.

To the causes pointed out by the Bank of Mozambique, the outbreak of COVID-19 is now added, which will have, albeit in unassessed proportions, significant economic impacts for the country.

From the point of view of political and governmental stability, despite some contestation, the election results confirming a significant victory of the Frelimo party were validated and proclaimed by the electoral bodies and followed by the formal takeover of office by the new government and all other elected bodies both nationally and locally, including those elected by the other parties. In the centre region, some military instability persists and the northern region, especially Cabo Delgado, has been the scene of violent attacks on populations and defence and security forces allegedly perpetrated by Islamic radicals.

In terms of projects, despite the increase of interest by investors in the energy (power generation) sector, the LNG projects in the Rovuma Basin will continue to play the most significant role in Mozambique's economy due to the size of the investments, around USD 60 billion all combined.

In January 2020, ExxonMobil and its partners (Coral South) launched into the sea the floating platform that will collect and process natural gas to be extracted in the Area 4 block of the Rovuma basin. The Coral South Floating Liquefied Natural Gas (FLNG) floating platform is one of the largest in the world, and will be the first to carry out liquefaction in deep waters, at a depth of about 2,000 metres.

In August 2019, Anadarko was taken over by Occidental Petroleum Corp. (OXY). A month later, in September, OXY sold Anadarko's African assets to Total for USD 8.8 billion. This transaction includes Anadarko's 26.5% stake in Mozambique's LNG project for USD 3.9 billion, making Total the main sponsor and the operator of the Mozambique LNG project.

Still regarding the gas projects in the Rovuma Basin, in May 2019, the Mozambican Government approved the Development Plan for the Rovuma LNG project operated by Mozambique Rovuma Ventura (MRV) a consortium between ExxonMobil, ENI and China National Petroleum Corporation (described in more detail below). The final investment decision (FID) is expected to be announced in the first semester of 2020.

In the power sector, representatives from the Government of Mozambique, Electricidade de Moçambique (EDM) and its project partners (Globelec and EleQtra) and Sasol, signed agreements that made available the necessary grants, loans and guarantees required for the transmission line and substation components of the Temane Regional Electricity Project with a group of development financing institutions, including the World Bank, the Government of Norway (through the Norwegian Trust Fund managed by the World Bank), Islamic Development Bank, African Development Bank and the OPEC Fund for International Development (OFID). This project involves the construction of a 400kV high voltage transmission line, connecting Vilanculos to Maputo, along with three new substations at Vilanculos, Chibuto and Matalane and upgrades to the Maputo substation. The transmission line will then connect to the new 420 MW gas-fired power plant to be constructed at Temane, for which a separate financing process is currently underway. Gas will be supplied by Sasol and ENH from the PSA gas field and electricity will be sold to EDM under a long-term agreement.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The most significant project financings in Mozambique in recent years are the Coral South Floating LNG Project (the Coral Project), the Moatize-Macuse Railway and Port Project (the Moatize Railway and Port Project), the Mozambique Area 1 LNG Project and the Metoro Solar Power Plant Project (the Metoro Project).

The Coral Project is the first project to reach the FID in the development of the gas resources discovered in the Rovuma basin. The USD 4.675 billion financing of the Coral South Floating Liquefied Natural Gas (FLNG) project in offshore Mozambique, to be developed by Italian oil and gas firm Eni and its partners, closed in May 2017. In this co-venture partnership, ExxonMobil owns a 35.7% interest in Mozambique Rovuma Venture S.p.A., which holds a 70% interest in Area 4, and is co-owned by Eni (35.7%) and CNPC (28.6%). The remaining interests in Area 4 are held by Empresa Nacional de Hidrocarbonetos E.P. (10%), Kogas (10%) and Galp Energia (10%). The FLNG unit will have a capacity of around 3.4 MTPA and will be the first FLNG in

Africa. The construction of the FLNG facilities will be financed under a project finance structure covering around 60% of its entire cost. The financing agreement has been subscribed by 15 major international banks and guaranteed by five export credit agencies.

The Moatize Railway and Port Project was awarded to Thai Moçambique Logística, a joint venture between Thailand-based Italian-Thai Development Company with a 60% share, the local State-owned ports and railways company Portos e Caminhos de Ferro de Moçambique (better known as CFM) with a 20% share and a local private-sector consortium Corredor do Desenvolvimento Integrado do Zambeze (Zambeze Integrated Development Corridor, generally known by the acronym CODIZA) with a 20% share. The project, which would originally connect Moatize and Macuse and would run for 500 kilometres, was amended in November 2017 to extend the railway for a further 120 kilometres west of Moatize to Chitima. The Macuse port will be designed to accommodate ships of up to 80,000 tonnes, and annual exports are expected to start at 25 MTPA, eventually increasing to 100 MTPA.

The projected cost of the project is around USD 2.7 billion (USD 810 million for the port and the remainder for the railway).

The Mozambique LNG Project announced the FID in June 2019. The now Total-led Area 1 Mozambique LNG Project (Total with 26.5%, Mitsui E&P Mozambique Area 1 with 20%, NH Rovuma Área Um, 15% and ONGC Videsh with 10%) will be the country's first onshore LNG development, consisting at the first stage of two LNG trains with total nameplate capacity of 12.88 million tonnes per annum. The project has successfully secured sales of 90% of its production to buyers in Asia and Europe. The Mozambique LNG Project was designated as "First Mover" by the Government of Mozambique, meaning that the Total-led Area 1 will be responsible for construction of the support shared facilities between Area 1 and Area 4 (led by MRV) projects. In November 2019, it was announced that the project would get a USD 400 million loan from the African Development Bank with financial close expected for the first semester of 2020.

The Metoro Project is led by the French renewable energy company Neoen in partnership with Electricidade de Moçambique (EDM). The financial closing for the 41 MWp photovoltaic (PV) project in Mozambique was announced in December 2019 and construction has already started in Cabo Delgado. Commissioning is planned for the end of 2020.

The investment is estimated at USD 56 million, of which USD 40 million were provided by French development agency AFD and its financial arm Proparco.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is indeed possible to give security over movable assets and rights (movables) by means of a general security agreement.

The legal framework of security over movables changed considerably with the enactment of Law no. 19/2018, of 28 December 2018 (the Movables Security Law). The Movables Security Law applies to pledges, mortgages over vehicles subject to registration, assignments of credits by way of security, financial leases, conditional bills of sale/equitable charges, retention of title clauses, and to other legal transactions tantamount to

creating security over movables located in Mozambique by a Mozambican security provider.

Under the Movables Security Law, any type of movables, parts or ideal fractions of a movable or all movables owned by a security provider, either specific or generic, present or future (in this later case, security only becomes effective when the security provider acquires rights over the relevant movable or becomes entitled to dispose of it), tangible or intangible, may be given in security, provided that they can be disposed of for consideration at the time of the creation of security.

The security interests must be created by means of a written agreement between the security provider and the secured creditor. No public deed is required. Security interests may also be created verbally, when publicity is completed upon transfer of possession. The security interests become effective immediately upon being created. As for the effectiveness of security against third parties, the new framework sets forth three publication methods: (i) by filing the security with the Central Registry for personal property and rights subject to registration of title; (ii) through bailment or a document fully transferring possession of the movable to the creditor or a third party; or (iii) through a control agreement, if the security is created over a bank account, a securities and brokered financial assets account, to be defined in a separate regulation, which to date has not been published.

Specific perfection requirements may apply depending on the type of movable at stake.

The Movables Security Law also creates the Central Registry Office, which is tasked with recording the information in connection with the security over movables and centralising the information in connection with certain property and rights subject to registration. The Central Registry Office has not yet started to operate.

Note that, as ruled by Decree-Law no. 29.833, of 17 August 1939, in the case of mercantile pledge (*penhor mercantil*) granted as security of banking credit facilities, the physical possession of the pledged goods is not required for the pledge to be fully valid and effective.

Real estate assets are subject to mortgages which need to be granted by public deed before a notary and must be registered with the competent real estate registration office.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Under the laws of Mozambique, land cannot be privately owned and, accordingly, cannot be mortgaged. Land and its associated resources are property of the State.

However, the Land Law (Law no. 19/97 of 1 October) grants the right to use and exploit the land, known as "*Direito de Uso e Aproveitamento da Terra*" (DUAT). Although the land itself cannot be owned, all assets built on the land in association with the DUAT and its improvements can be owned and consequently mortgaged (in case of immovable assets). Any machinery and equipment (movable assets) may be pledged separately.

Even though the Mozambican Civil Code does not expressly provide for the possibility of creation of factory mortgages, reference to those mortgages is made in the Land Register Code (*Código do Registo Predial*) and there are precedents of factory mortgages having been successfully created and registered in Mozambique, covering project facilities and all machinery, equipment and other movable property located therein.

**2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?**

According to the Movable Security Law, security can be taken over current and future receivables by means of a written agreement between the security provider and the secured creditor, and those documents, which give possession of the receivables, must be delivered to the secured creditor to ensure effectiveness of the security against third parties. Security over receivables shall be registered with the Central Registry Office.

The third-party debtor shall continue to carry out the relevant payments to the security provider until notice to the contrary. It is common for the secured creditor to authorise the security provider to continue to collect the receivables in the absence of a default.

**2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

Security can be taken over cash deposited in bank accounts by means of a written agreement between the security provider and the secured creditor. The execution of a control agreement will be required for it to be effective against third parties. The requirements of such control agreement will be defined in a separate regulation, which to date has not been published.

Generally, the secured creditors will grant a mandate to the security provider for him to operate the relevant bank account in the absence of a default.

Security over cash deposited in bank accounts shall be registered with the Central Registry Office. The bank records should also record the security interest and the mandate in favour of the security provider.

**2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?**

In a limited liability company by shares (*sociedade anónima*), the creation of security is made by written agreement between the parties and, because shares are represented by physical certificates, it requires the endorsement of the share certificates by the security provider, the registration of the pledge in the company's share register book and the deposit of the share certificates with the financial intermediary used by the company to register itself and its shares. If the shares are bearer shares, the creation and perfection of security is made by delivery of the shares to the secured creditor. Security must be registered at the Central Securities Depository (*Central de Valores Mobiliários*) operating at the Stock Exchange and at the Central Registry Office.

In a limited liability company by quotas (*sociedade por quotas*), where the shareholding is not materialised in share certificates, security is created by means of a written agreement between the parties and prior consent of the company in which quotas are being given in security is required. Security must be registered at the Legal Entities Register Office and at the Central Registry Office.

**2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?**

The costs of public notary and registration fees, when applicable, vary according to the secured amount and number of pages of the deed or private document.

Stamp duty on security is charged at 0.3% of the total amount secured, unless those security interests are ancillary and created simultaneously with a loan, and the loan has already been subject to a similar taxation (no duplication of tax applies).

The stamp duty rate on loans varies, as follows: 0.3% for loans with a maturity of less than a year; 0.4% for loans with a maturity of more than a year; and 0.5% for loans with a maturity equivalent to or more than five years.

**2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

Filing, notification and registration procedures before the competent authorities normally do not take more than 20 days, but this may vary from registration office to registration office.

Expenses/registration fees vary in accordance with the maximum secured amount by the security interest and the amounts involved may be significant. The registration of the cancellation of an existing security also requires the payment of registration fees.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

Generally, the creation of security over assets which are in the private domain does not require any regulatory or similar consent. Conversely, the creation of security over assets in the public domain is prohibited.

It should be noted that restrictions may be imposed regarding the creation of security over concessions or regulated assets, notably through specific regulations or the relevant concession agreements.

### 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

The concept of a "trust" is not recognised in Mozambique. It is, however, common to have security granted to a security agent on behalf of the lenders; in which case, even if the relevant agreements expressly spell out that the security agent holds security for the benefit of a given lending syndicate, the security agent shall appear as the sole beneficiary of the security entitlements and shall be the sole entity with the authority to file enforcement procedures in respect thereof (unless all lenders are disclosed as holders thereof). Hence, in the context of the enforcement procedures, the security agent may be required to prove before a court that it holds title to the secured obligations.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

The only way to have all the lenders recognised as beneficiaries of a given security interest is to name them as holders of the

secured obligations and corresponding security. However, this makes it necessary to amend the relevant agreement (or execute a new notarial deed) each time the lenders assign, buy or sell part of the loans, which may not be a practical solution. For this reason, attempts have been made to set up alternatives and to put in place less burdensome solutions, as is the case where the security agent is made the registered beneficiary of the security and either benefits from a joint and several creditor status or a parallel debt or is made contractually bound to assign the secured obligations to all the lenders prior to enforcement of the security.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

The enforcement of a mortgage by the creditor can only be achieved through a judicial proceeding.

As for security over movables, the sale can be completed judicially or, if previously agreed by the parties, through a private sale. The new Movables Security Law also allows for appropriation or foreclosure of movables by the secured creditors.

It is common practice to grant an irrevocable power of attorney to the creditor pursuant to which the creditor is authorised to sell the secured asset on behalf of the security provider and be paid from the proceeds of the referred sale.

Court procedures usually take several months or, in certain cases, more than a year. That period may be further extended if the complexity of the legal arguments at stake leads to court appeals.

Please refer to section 5 below for restrictions concerning insolvency/bankruptcy and restructuring proceedings.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

All transactions with and/or between Mozambican and non-Mozambican persons or legal entities are subject to either registration or prior authorisation with the Bank of Mozambique or both, depending on the transaction at stake. In case of foreclosure, the re-exportation of the invested capital is subject to authorisation by the Bank of Mozambique.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

The Insolvency Law (Decree-Law no. 1/2013, of 4 July) in Mozambique establishes a suspension regarding all ongoing claims against the debtor, following the opening of an insolvency proceeding. This means that all proceedings that were ongoing are suspended when the insolvency/judicial recovery is declared. In the case of judicial recovery, the law establishes a 180-day “stay period”, after which the right of creditors to start

or continue their actions and executions, regardless of the court decision, is reinstated.

It is possible to file new claims against the debtor after the insolvency is declared and those must be notified to the judge in the insolvency proceedings by either the judge in the new proceedings or by the debtor himself. However, those new proceedings can never be other insolvency proceedings, because the law prohibits the filing of new insolvency proceedings against the same debtor.

**5.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g. tax debts, employees’ claims) with respect to the security?**

The declaration of insolvency results in all debts being accelerated and all assets being collected and sold to pay creditors. The creditors are paid with the proceeds of the sale in the following order: (i) labour credits; (ii) secured credits; (iii) tax credits; (iv) ordinary credits; (v) contractual and tax penalties; and (vi) subordinated credits.

When different security interests are granted over the same asset, the first (older or higher ranking) creditor shall be paid first, except in the case of the right of retention which entitles creditors to hold certain assets in their possession until their credit is paid. Credits with a right of retention have preference over common credits secured by pledges and mortgages regardless of whether the pledges and mortgages were created first.

**5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

The general insolvency regime is applicable to both natural and legal persons, except for public companies and entities, complementary pension fund entities, societies operating on healthcare plans, insurance companies, credit institutions, as well as financial corporations and other companies similar to the previous, which are subject to specific insolvency rules and proceedings placed in their respective regimes.

**5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?**

As referred to in the answer to question 5.2 above, a creditor may retain possession of the assets pertaining to a certain entity if it is in the possession of such assets and if the claim arises from expenses or damages caused by such assets.

**5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?**

The Insolvency Law (Decree-Law no. 1/2013, of 4 July) provides not only the steps for the judicial recovery process, but also for the extrajudicial recovery process.

The judicial recovery can be initiated by the debtor, the debtor’s surviving spouse, debtor’s heirs, the executor or the remaining partner, by filing a petition with the court. If accepted by the court, the debtor must submit a recovery plan to the court showing evidence of the viability of the business, a detailed description of the recovery process and the proposed



recovery measures. If the plan is accepted by the court and not challenged by any creditor, the process follows its normal course, and the restructured claims of the company (i.e. new rights and obligations set out in the plan, after sale of assets, if applicable) shall be binding on the debtor and creditors. If the plan is challenged, a general meeting of the creditors must be convened and the approval depends, cumulatively, on the vote of the creditors present at the meeting that holds more than half of the total claims and on the vote of the simple majority of the members present.

The extrajudicial recovery can only be initiated by the debtor. This is a special mediation procedure in which the recovery plan is negotiated with the creditors, according to the rules of conciliation and mediation provided in Law no. 11/99, of 8 July – the Arbitration, Conciliation and Mediation Regime. If the plan is approved by creditors representing  $\frac{2}{3}$  or more of the total amount of credits, a recovery agreement is deposited in a judicial court and such agreement shall, in effect, constitute an enforcement order, subject to specific performance and grounds for declaring insolvency should the credits not be paid.

**5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.**

Directors may remain in office, supervised by the insolvency administrator, whilst the insolvency proceedings are pending. They may, however, be dismissed where they have contributed to the worsening of the economic situation of the company.

## 6 Foreign Investment and Ownership Restrictions

**6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?**

The Mozambican Commercial Code does not require companies to reserve a percentage of their shareholdings to local partners. However, for compliance purposes with the rules on local content in certain sectors, such as oil, gas and mining regarding hiring nationals, only companies with most of the share capital held by Mozambican persons or legal entities (i.e. 51% or more of share capital) are considered Mozambican companies.

**6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?**

Even though Mozambique is a party to several bilateral investment treaties with other nations (South Africa, Germany, Algeria, Belgium, China, Cuba, Denmark, Egypt, USA, Finland, France, Italy, Mauritius, the Netherlands, Portugal, Sweden, the United Kingdom, Vietnam, India, Switzerland, Spain and Zimbabwe), none of those treaties provide protection from foreign ownership restrictions imposed under sector-specific legislation.

**6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?**

Nationalisation is governed by Decree-Law no. 5/76, of 5 February 1976, which determines the reversion to the State of all income from buildings as well as those that were abandoned.

With the implementation of this law, the Mozambican State began to provide housing to citizens for very low prices, as symbolic amounts. Even though this piece of legislation has not been revoked, it has only been applied immediately after national independence as it does not conform to the current reality in Mozambique.

The Constitution of Mozambique provides that any property right may be expropriated in case of public necessity, utility and interest, and compensation shall be payable to the property owner.

Also, the Land Law establishes that DUAT may be revoked on grounds of public interest, upon payment of a compensation to the DUAT holder. In those cases, all assets and improvements that exist on the land revert in favour of the State.

## 7 Government Approvals/Restrictions

**7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?**

The governmental agencies or departments with authority over projects depend mainly on the relevant sector of activity of a project. In general terms, the respective Ministries (energy, infrastructure, transport, health, etc., and, when applicable, environment) are responsible for the launch, licensing and major regulation of the projects, either directly or through their governmental departments. In this context, the most relevant authorities with authority over projects are: the National Institute of Mining (INAMI); the National Institute of Petroleum (INP); the Ministry of Land Environment and Rural Development (MITADER); the Agency for the Promotion of Investments and Exports (APIEX); and the Bank of Mozambique.

**7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?**

Obligations set out in financing or project documents of private nature are only enforceable before the courts after being authenticated or certified by a notary or by any other competent authority. Financing contracts entered into with foreign entities are subject to prior authorisation of the Bank of Mozambique.

An exception is made to finance contracts for amounts equivalent or less than USD 5 million and which satisfy the following conditions: (i) the interest rate is less than the base lending rate for the relevant currency; (ii) the sum of the relevant rate and margin is not more than the rate used in Mozambique; and (iii) the repayment period is at least three years or more. Those financings are treated as pre-authorised and subject only to registration.

Shareholder and intercompany loans made by non-residents to their resident subsidiaries or affiliates will also be treated as pre-authorised and subject only to registration if: (i) they are interest-free, the repayment period is, at the latest, three years and no fees and other charges apply; or (ii) the interest rate is lower than the base lending rate for the relevant currency, the repayment period is at least three years and the loan amount is a maximum of USD 5 million. Note that, in those cases, registration relates to each disbursement amount received by the entity in Mozambique within the pre-authorised finance contract and to each repayment of principal made thereunder. Payments of interest and fees or charges under or in connection with finance contracts qualify as current transactions and are not subject to registration.



Financing or project documents executed by public entities may be subject to approval by the Administrative Court to become effective.

Special rules apply in case of the exploration and production concession contracts in the Rovuma basin under Decree-Law no. 2/2014, of 2 December 2014.

**7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?**

In general terms, the performance of economic activities in Mozambique is subject to licensing. Also, the granting of the right of use of an asset in the public domain is admissible through a concession regime.

It should be noted that certain activities in sectors such as oil, gas and mining are kept to companies in which the majority of the share capital is held by Mozambican persons or legal entities (i.e. 51% or more of the capital).

Please note, as referred to in question 2.2, that there is no private ownership of land in Mozambique.

**7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?**

The extraction or export of natural resources are subject to the payment of Corporate Income Tax, Value-Added Tax and other taxes levied under the tax regime applicable to mining, oil and gas activities, as applicable.

Petroleum Production Tax is levied on oil and gas produced in each concession area and is due by corporate entities performing petroleum operations under a concession agreement. The tax rate is 10% for oil and 6% for gas and is levied on the value of the oil and gas produced and may be paid in cash or in kind.

The following rules and taxes apply to mining activities: (i) Tax of Mining Production (IPM); (ii) Surface Tax (ISS); (iii) Tax in Income Deriving from Mineral Sources (IRRM); and (iv) special rules to determine the taxable income under Personal Income Tax and Corporate Income Tax. IPM taxes rates vary between 8% for diamonds, 6% for precious metals, precious and semi-precious stones and heavy sands, 3% for basic metals, charcoal, ornamental rocks, etc. and 1.5% for sand and stone, and are levied on the value of the extracted mineral product after treatment. ISS is due annually and is levied on the mining area of exploration. The rate varies between MT 17.50/ha (MT per hectare) and MT 105,00.00/ha, depending on whether they relate to the first year of prospecting and research or the sixth year onwards of the mining concession, respectively, and are levied on the number of hectares of the area subject to a mining title (prospering licence, research, mining concession or mining certificate).

The IRRM tax rate is 20% on the cash earnings accumulated during the year, determined according to specific rules.

**7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?**

All transactions between resident and non-resident entities in Mozambique, which may or may not result in payments or receipts from abroad, are subject to the exchange control legislation which may or not require prior authorisation of the Bank of Mozambique depending on the nature of the relevant transaction.

**7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?**

Approved foreign investments projects can remit and repatriate investment returns. Such remittances are concluded through the local banking system and upon obtaining tax clearance from the Ministry of Finance.

A 20% withholding tax is charged on both interest and fees paid to non-resident lenders. Where applicable, Value-Added Tax is also due at the rate of 17% on the total income from services rendered for consideration in Mozambique.

**7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?**

The opening and operation of onshore foreign currency and offshore bank accounts by non-resident entities is free, save if such accounts are related to capital market transactions, in which case, the opening of such accounts is subject to prior authorisation by the Bank of Mozambique. The opening and operation of onshore foreign currency and offshore bank accounts by entities resident in Mozambique is authorised for Mozambican residents with an established relationship with international/non-resident entities, such as exporters, companies or organisations, employees of international companies or organisations and all entities that generate or receive foreign currency. The opening of foreign currency bank accounts by entities resident in Mozambique without such established relationship requires prior authorisation from the Bank of Mozambique.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?**

Dividend payments are subject to a 20% withholding tax, unless said dividends concern shares listed on the Mozambique Stock Exchange, in which case the withholding tax is 10%. These tax rates may be reduced by the application of a tax treaty and are not applied in case of dividends paid to a Mozambican company that has held 25% or more of the share capital in an associated company in Mozambique for at least two years. Mozambique has tax treaties with Portugal, Mauritius, the United Arab Emirates, South Africa, India and others.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

Pursuant to Decree 54/2015, of 31 December 2015, any activity which may affect the environment is subject to an evaluation of the potential impact (an environmental impact assessment) to determine its environmental feasibility, which concludes with the issuance of an Environmental Licence.

Occupational health and safety in Mozambique is governed, in general terms, by the Constitution and the Labour Law. Special legislation may apply to specific activities, e.g. Legislative Diploma 120/71, of 13 November 1971 (for Civil Engineering), Legislative

Diploma 48/73, of 5 July 1973, Provincial Decree 61/ 73, of 20 November 1973 (for Industrial Establishments), Decree 61/2006, of 26 December 2006 (for geological and mining activities), Decree 13/2015, of 3 July 2015 (for mining activities), and Decree 28/2016, of 18 July 2016 (for production, transportation and commercialisation of cement). And, as referred to in question 7.1, the governmental authority responsible for administering those measures depends mainly on the relevant sector of activity of the project.

#### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

Mozambique's general procurement terms from the Regulation on the Contracting of Public Works, and Procurement of Goods and Services by the State (Decree 5/2016, of 8 March 2016), are applicable to all State bodies and institutions, including local government and companies owned by the State. The Regulation includes a general mechanism (public tender) and an exceptional contracting mechanism (limited call for tenders by prior qualification, limited call for tenders, two-stage tender, tender by auction, small tender, tender by means of quotes and direct award).

Sector-specific legislation (mainly in natural resources) and the mega-projects legislation also include procurement rules and principles of mandatory application, generally accommodating similar procurement rules or contracting methods (public tender, restricted tender, two-stage tender and direct award).

Special rules apply for activities and services under the exploration and production concession contracts in the Rovuma basin in accordance with Decree-Law no. 2/2014, of 2 December 2014.

## 8 Foreign Insurance

#### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Mozambican law generally requires insurance to be provided by local insurers. Because of the small local insurance market, entities can obtain insurance with foreign insurers where it is not possible to insure with local insurance companies and provided that prior notice is given to the regulator – *Instituto de Supervisão de Seguros de Moçambique* (ISSM).

Special rules apply for insurances in connection with the exploration and production concession contracts in the Rovuma basin under Decree-Law no. 2/2014, of 2 December 2014.

#### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Payment of insurance policies contracted offshore by the insured person requires presentation, by the interested parties, of evidence that the necessary approval has been obtained from the competent authority in the country in which the insurance has been taken out, in accordance with applicable legislation.

## 9 Foreign Employee Restrictions

#### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

The regimes for the employment of foreign workers in Mozambique which generally apply are (i) the quota regime, (ii)

the work permit regime, and (iii) the investment projects regime approved by the government.

Under the quota regime, the allowed quotas for foreign employees are 5% of all workers in large companies, 8% of all workers in medium-sized companies, and 10% of all workers in small companies. In all cases, prior notice to the Ministry of Labour within 15 days is required. Please note that in case of the exploration and production concession contracts for the Rovuma basin under Decree-Law no. 2/2014, of 2 December 2014, the quota is the one established in the workforce plan.

The work permit regime (out of quota) will only apply if there are no Mozambican workers who have the necessary academic or professional qualifications, or there are qualified but insufficient Mozambican workers.

In the case of investment projects approved by the government, the quota allowed for foreign workers is the one approved for the project. The work permit is not required, and notice given within 15 days from the date of entry of the foreign workers in the country is sufficient.

## 10 Equipment Import Restrictions

#### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Imported equipment to be used in Mozambique must be cleared through the appropriate customs procedures such as (i) temporary importation, (ii) temporary exportation, (iii) re-importation, (iv) re-exportation, (v) customs transit, (vi) storage, (vii) industrial free zones, and (viii) customs warehousing.

Certain products are excluded from entry under some of these regimes. This is the case for the importation of left-hand drive vehicles used for commercial purposes in Mozambique which is prohibited.

Other prohibitions and import restrictions apply based on health and moral grounds and in compliance with international conventions, to which Mozambique is a party, including prohibitions under the multilateral environmental agreements to which Mozambique is also a party.

Special rules apply for imports in connection with the exploration and production concession contracts for the Rovuma basin under Decree-Law no. 2/2014, of 2 December 2014.

#### 10.2 If so, what import duties are payable and are exceptions available?

All goods imported into Mozambican territory are subject to the payment of customs duties set forth in the Customs Tariff Book, which include *ad valorem* charges, service charges, Specific Consumption Tax and Value-Added Tax. Specific rules can be applied to SADC countries. Authorised investment projects and activities under certain sector-specific legislation may benefit from import duties on the importation of capital assets (equipment and machinery).

Goods imported under the temporary importation regime benefit from a grace period payment of the relevant customs duties and other import charges and require the delivery of a bond (the amount varies depending on the amount of the customs duties and charges suspended).

## 11 Force Majeure

### 11.1 Are force majeure exclusions available and enforceable?

Even though there is no specific legal provision on the issue, *force majeure* is accepted and enforceable in Mozambique under the Civil Code. In general, project contracts provide for detailed provisions in relation to *force majeure* events and terms under which the parties have agreed to mitigate the effects of *force majeure* and exclude liability for breach of contract resulting from a *force majeure* event. The terms agreed between the parties in this respect are generally accepted and enforceable in Mozambique.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

There are no specific rules which apply to corruption and bribery activities in the projects sector. Nevertheless, entities are subject to general criminal law.

According to the Mozambican Criminal Code and Law no. 6/2004, extortion, attempted corruption and bribery are prohibited.

The penalties for bribery and corruption are imprisonment for up to eight years and payment of pecuniary fines.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

The Mozambican Civil Code establishes that contracts are governed by the law elected by the parties – if such election has a connection with the contract or is supported by an interest in good faith of the parties.

If a foreign law is elected in accordance with those rules, it will not be acceptable if it violates the fundamental principles of Mozambican public policy and certain Mozambican principles and rules that are mandatory for the projects sector.

Concession contracts and other project agreements entered with public entities are typically governed by general laws and regulations of the Republic of Mozambique and by specific laws and regulations applicable for the sector where the project will be implemented. Construction contracts relating to works to be carried out in Mozambique must always be governed by Mozambican law.

Special rules apply in case of the exploration and production concession contracts for the Rovuma basin under Decree-Law no. 2/2014, of 2 December 2014.

### 13.2 What law typically governs financing agreements?

Financing agreements are typically governed by English law.

### 13.3 What matters are typically governed by domestic law?

The Mozambican conflict-of-laws rules regulate that rights regarding possession, ownership and other related rights over

movable or immovable assets are governed by the law of where the property is located. This includes the creation of security over those assets.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Submission to a foreign jurisdiction and waiver of immunity are valid and enforceable in Mozambique to the extent permitted by law. Submission to a foreign jurisdiction is prohibited, regardless of contractual provisions, if, in accordance with the Mozambican mandatory procedural rules, the Mozambican courts have jurisdiction to decide on a certain matter.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Arbitral awards are recognised by local courts subject to the requirements and procedures for enforcement of arbitration awards stated in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and provided that they are issued in the territory of another contracting State.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Mozambique has been a contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1998. The Constitution states that international conventions are recognised in the internal judicial system and have the same force as internal legislation. Also, the Arbitration Law states that the international conventions do prevail over the Law and other internal provisions.

Mozambique is also a contracting State to the Washington Convention regarding the Settlement of Investment Disputes between States and Nationals of Other States and the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), as well as to the Additional Facility Rules of ICSID approved on 27 September 1978 and is a member of the International Chamber of Commerce.

### 15.3 Are any types of disputes not arbitrable under local law?

Mozambican law establishes that all disputes are arbitrable, except disputes of a personal nature (e.g. family matters) or disputes that are expressly subject to the exclusive jurisdiction of a judicial court.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Disputes about labour rights and disputes arising out of or in connection with administrative agreements are subject to domestic arbitration.



Special rules apply in case of the exploration and production concession contracts for the Rovuma basin under Decree-Law no. 2/2014, of 2 December 2014.

## 16 Change of Law / Political Risk

**16.1** Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

While direct agreements with the government (in its capacity as grantor in a concession contract) are common, those agreements do not particularly offer any political risk protections.

Change-in-law risk is normally addressed by contract in the standard terms for international project finance deals.

## 17 Tax

**17.1** Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

A 20% withholding tax is levied on both interest and fees paid to non-resident lenders, except where there is a double taxation treaty in force between Mozambique and the lender's home country. The enforcement of security, in general terms, does not trigger any taxes. However, this must be analysed on a case-by-case basis (e.g. the enforcement of a mortgage, with the subsequent transfer of ownership over real estate property may trigger a 2% Property Transfer Tax – SISA).

**17.2** What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Mozambique has an attractive regime for foreign investors established in the Mozambican Investment Law, its regulation and the Tax Benefits Code. These laws provide a wide range of tax incentives to attract foreign investment to the country and for which foreign investors may be eligible, such as deductions from the amount of tax assessed, accelerated depreciation, tax credits, exemption from tax and the reduction in tax rate and other tax payments, the deferment of the payment of taxes, and other special tax measures.

For the costs and taxes to create any type of securities, please see question 2.6 above.

## 18 Other Matters

**18.1** Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

We believe that the most relevant issues have been addressed.

**18.2** Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

The capital market in Mozambique covers a primary market (the market for new issues of securities) and a secondary market (the trading market for previously issued securities between third parties). Other concepts within this framework include the stock market and over-the-counter market, the latter being a market in which supply and demand are dealt with outside the stock market, with the involvement of authorised financial intermediaries.

A limited liability company by shares (*sociedades anónimas*) may issue bonds (designated as corporate bonds) up to the value of their share capital inscribed in the most recent balance sheet and income statement, subject to authorisation by general meeting or the board of directors, as stipulated in the articles of association.

## 19 Islamic Finance

**19.1** Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

To the best of our knowledge, there is no experience of Islamic project finance in Mozambique, nor are there any finance instruments structured in accordance with Islamic law.

**19.2** In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

See question 19.1 above.

**19.3** Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

The inclusion of interest payment obligations in a loan agreement is valid and enforceable in Mozambique.

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