

PROJECT FINANCE

Mozambique



Project Finance

Consulting editors

Ayesha K Waheed, Victoria Weir

Morgan, Lewis & Bockius LLP

Quick reference guide enabling side-by-side comparison of local insights into collateral and security packages; forex and withholding tax issues; remittances and repatriation of foreign earnings; foreign currency accounts; foreign investment issues, including investment, ownership, insurance, worker, equipment and nationalisation / expropriation restrictions and fiscal treatment; relevant government authorities; natural resource regulation; government approvals and filings; arbitration and governing law considerations; environmental, health and safety laws; project companies; public legislation, limitations and transactions; and recent trends.

Generated 17 July 2023

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2023 Law Business Research

Table of contents

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral
Collateral perfecting
Assuring absence of liens
Enforcing collateral rights
Enforcing collateral rights following bankruptcy

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes
Investment returns
Foreign earnings

FOREIGN INVESTMENT ISSUES

Investment restrictions
Insurance restrictions
Worker restrictions
Equipment restrictions
Nationalisation laws

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

GOVERNMENT AUTHORITIES

Relevant authorities

REGULATION OF NATURAL RESOURCES

Titles
Royalties and taxes
Export restrictions

GENERAL LEGAL ISSUES

Government permission
Registration of financing
Arbitration awards
Law governing agreements

Submission to foreign jurisdiction
Anti-money laundering rules

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

PROJECT COMPANIES

Principal business structures

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

PPP – LIMITATIONS

Legal limitations

PPP – TRANSACTIONS

Significant transactions

UPDATE AND TRENDS

Key developments of the past year

Contributors

Mozambique



Guilherme Daniel
gdd@gdaadvogados.com
VdA



Teresa Empis Falcão
tef@vda.pt
VdA



Mónica Levy
mcl@gdaadvogados.com
VdA



CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

What types of collateral and security interests are available?

Collateral and security interests may be created in the form of mortgages and pledges. Mortgages may be created over real estate and certain movable assets subject to registration (such as automobiles, ships and aircraft), and pledges on movable assets in general, including equipment, receivables, bank accounts, credits, deposits, quotas and shares (including new shares to be acquired).

Law stated - 29 June 2023

Collateral perfecting

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Movable assets

Security interest over movable assets and rights (movables) may be created 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), which was further developed by Decree 7/2020 of 10 March 2020. 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 and equitable charges, retention of title clauses and 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 movable, parts or ideal fractions of a movable or all movables owned by a security provider, either specific or generic, present or future (in this latter case, security only becomes effective when the security provider acquires rights over the relevant asset), tangible or intangible, may be given in security, provided that it 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 as between the parties immediately upon being created. As for the effectiveness of security against third parties, the new framework sets forth three publication methods:

- by filing the security with the Central Registry for personal property and rights subject to registration of title;
- through bailment or a document transferring possession of the movable to the creditor or a third party; or
- through a control agreement, if the security is created over a bank account, a securities and brokered financial assets account, as defined in a separate regulation.

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

The Movables Security Law also creates the Central Registry Office, which started operations in June 2021 and 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.

Note that, as ruled by Portuguese Decree-Law No. 29 833 of 17 August 1939 (included in the Mozambican legislation through Charter No. 9:811 of 7 June 1941, issued by the Ministry of the Colonies and still in force), in the case of commercial pledge (penhor mercantil) granted as security of banking credit facilities, the physical possession of the pledged assets is not required for the pledge to be fully valid and effective.

Real estate

Under Mozambican law, land cannot be privately owned and, accordingly, cannot be mortgaged. Land and its associated resources are the property of the state.

Mortgages of real estate assets (capable of being mortgaged) are granted by means of a public deed before a notary and must be registered with the competent registration office, The Land Law (Law No. 19/97 of 1 October 1997) grants private persons the right to use and benefit from 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 can be owned and consequently mortgaged (in case of immovable assets) and pledged (movable assets), including any machinery or equipment.

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 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.

Receivables

According to the Movables 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 under which, to ensure effectiveness of the security against third parties, the possession of the receivables must be transferred to the secured creditor. Security over receivables shall be registered with the Movable Guarantees Central Registry Office.

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

Bank accounts

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 with the depository bank will be required for it to be effective against third parties. Generally, the secured creditors will grant a mandate to the security provider for him or her to operate the relevant bank account in the absence of a default.

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

Shares and quotas

In a public limited company, the creation of security is made by written agreement between the parties and, where shares are represented by physical certificates, requires the endorsement of the share certificates by the security provider, the registration of the pledge in the company's shares ledger 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 operating in the Stock Exchange and at the Movable Guarantees Central Registry Office.

In a private limited company, where the shareholding is not materialised in share certificates, security is created by means of a written agreement 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 Movable Guarantees Central Registry Office.

Fees and charges

The costs of public notary and registration fees, if and 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 per cent 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 vary as follows: 0.03 per cent for loans with a maturity of less than a year; 0.4 per cent for loans with a maturity of more than a year; and 0.5 per cent for loans with a maturity equivalent to or more than five years.

Security agent

The concept of a trustee 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.

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. Alternatives may be put in place, as is the case where the security agent is made the registered beneficiary of the security and either benefits from a parallel debt or is made contractually bound to assign the secured obligations to all the lenders prior to enforcement of the security. Other alternatives include having the entire lending syndicate registered as secured creditors with proper intercreditor arrangements in place (setting up the rules for action by individual creditors and for allocation of the proceeds of security enforcement).

Law stated - 29 June 2023

Assuring absence of liens

How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

The Movable Guarantees Central Registry intends to unify the relevant information regarding security interest provided over most of the movable assets. Encumbrances over share capital can also be verified with the Central Securities Depository Office in relation to shares and the Legal Entities Register Office in relation to quotas. Regarding real estate assets, creditors can consult the corresponding Real Estate Registry Certificate to verify the status of any liens and

encumbrances over real estate assets. As such, the referred registries allow creditors to obtain the most relevant information concerning all existing encumbrances, as well as their rank and amount.

The Movables Security Law and Regulations further foresee the possibility of executing a control agreement in relation to security interest provided over balances outstanding for credit in bank accounts, with the registration in the Movable Guarantees Central Registry not being mandatory. In such cases, liens and encumbrances over balances in bank accounts will have to be verified directly with the depository bank.

Law stated - 29 June 2023

Enforcing collateral rights

Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

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 allows for appropriation or foreclosure of movables by the secured creditors. The price may be fixed in foreign currency; however, payments between resident entities shall be converted, automatically, into meticaís.

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.

Law stated - 29 June 2023

Enforcing collateral rights following bankruptcy

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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

The Insolvency Law also provides for the judicial and extrajudicial recovery processes. The extrajudicial recovery is initiated by the debtor. This procedure is a special mediation procedure in which the recovery plan is negotiated with the creditors, according to the rules of conciliation and mediation provided for in Law No. 11/99 of 8 July 1999 – the Arbitration, Conciliation and Mediation Regime. If the plan is approved by creditors representing three-fifths or more of the total amount of credit, 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. This regime is applicable to foreign and local creditors, and no special procedures or restrictions apply to foreign creditors.

Under the Insolvency Law, once a debtor declares insolvency all existing debts shall be automatically triggered thus, limiting the secured lenders' and creditors' access to gain possession of the secured asset. Such declaration prohibits the debtor from disposing of its assets resulting in the unenforceability of some transactions in which the debtor is involved. Moreover, the creditors are paid with the proceeds of the sale in the following order: labour creditors; secured creditors; tax creditors; ordinary creditors; contractual and tax penalties; and subordinated creditors.

When different security interests are granted over the same asset, the first (older or higher ranked) 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.

The insolvency regime is applicable to all persons or legal entities, except for public companies and entities, insurance companies and credit institutions, as well as financial corporations, which are subject to specific insolvency rules and proceedings in the respective regimes.

Law stated - 29 June 2023

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer?

Mozambique has strict foreign exchange rules and regulations. Foreign exchange (forex) must undergo a licensing process: that is, all transactions between resident and non-resident entities which result or may result in payments or receipts from abroad are subject to the exchange control legislation, which may or not require prior authorisation by, and registration with, the Bank of Mozambique (BoM), depending on the nature of the relevant transaction.

Forex transactions are classified as either current transactions or capital transactions. Current transactions are essentially payments or receipts for goods and services transacted between residents and non-residents. Current transactions are not subject to authorisation but to mere registration, which is done through the commercial bank used to make the payment.

Capital transactions are the inflows and outflows of currency and assets (in case of investments made through imports of equipment, transfer of IP rights and others) in the form of foreign investment, bank loans, shareholder loans, dividends and others that are not classified as current transactions. As a rule, forex operations classified as capital transactions require prior approval from the BoM. However, the law exempts from prior approval, deeming them approved, all capital operations consisting in the inflow of foreign currency in the form of foreign investment, namely, capital contributions into companies. Additionally, the following capital transactions are also pre-approved and therefore only subject to registration:

- shareholders and intercompany loans made by non-residents to their resident subsidiaries or affiliates if:
 - they are interest-free, the repayment period is at the latest three years and no fees and other charges apply; or
 - 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 US\$5 million. Note that, in those cases, registration relates to each disbursement amount received by the entity in Mozambique and to each repayment of principal made thereunder. Payment of interests and fees or charges under or in connection with finance contracts qualify as current transactions and are only subject to registration;
- real estate investment by non-residents in the country, which should have the same treatment as foreign direct investment;
- guarantees related to current transactions and related to the circumstances provided under Notice No. 20/GBM/2017 of December 27; and
- opening and operating accounts with local financial institutions, in a foreign currency, by non-resident entities.

Conversely, the following capital transactions require prior authorisation from the BoM:

- real estate investment;
- transactions involving participation units on collective investment undertakings;
- opening and using bank accounts with financial institutions abroad;
- credits related to the transaction of goods or provision of services;
- finance contracts for amounts equivalent to or higher than US\$5 million;
- finance contracts of less than US\$5 million in case any of the following conditions are not met:
 - the interest rate is less than the base lending rate for the relevant currency;
 - the sum of the relevant rate and margin is not more than the rate used in Mozambique; and
 - the repayment period is at least three years or more;
- guarantees;
- transfers in execution of insurance contracts;
- transactions on securities and other instruments traded on the capital markets;
- physical import and export of monetary instruments; and
- personal loans.

Finally, no fees are due for obtaining prior authorisation, or registration with the BoM.

Law stated - 29 June 2023

Investment returns

What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

Prior authorisation, where applicable, and registration are the main conditions for the repatriation of investment returns. Additionally, remittance of capital and dividends is subject to compliance with all tax obligations and obtaining tax clearance from the Ministry of Finance.

Except where double taxation treaties apply, a 20 per cent withholding tax is charged on both interest and fees paid to non-resident lenders.

Law stated - 29 June 2023

Foreign earnings

Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Mozambican residents must repatriate foreign earnings and, as a general rule, such earnings must be converted into Mozambican meticaís, except in the case of application of special foreign exchange regimes or exemptions granted by the BoM.

Law stated - 29 June 2023

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies may open and operate local bank accounts in foreign currency and foreign currency accounts in other jurisdictions subject to prior authorisation by the BoM.

Law stated - 29 June 2023

FOREIGN INVESTMENT ISSUES

Investment restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Law No. 8/2023 of 9 June 2023 was recently published, approving the new Investment Law and repealing Law No. 3/93 of 24 June 1993 (Investment Law), which had been in effect for 30 years.

The approval of the new Investment Law has as its primary objective the facilitation of authorisation and registration mechanisms for investments, both by nationals and by foreigners.

Still subject to additional regulations, the new Investment Law, which comes into effect in early September 2023, exempts from prior approval, being subject only to a mere registration regime, which consists in the simple submission of an investment proposal for the purpose of registration and granting of incentives applicable to investments that do not fall into the following categories, which are still subject to approval:

- large investment projects, as well as those involving economic activities with foreseeable economic, environmental, safety or public health implications;
- public-private partnership projects and business concessions;
- investment projects that require an extension of land of an area equal to or greater than 10 thousand hectares;
- investment projects that require a forestry concession for an area greater than 100 thousand hectares; and
- investment projects whose purpose is the industrial processing of mining or petroleum products.

In general, the Investment Law, both the current and the recently approved one, establish a regime of broad investment freedom as well as investor and investment protection.

Regarding the requirements for making investments with the benefits granted by the Investment Law and without prejudice to the changes that may be introduced in specific regulations, the minimum amount for foreign direct investment through the allocation of own capital is 7.5 million meticaais, and the minimum amount for annual exports of goods or services is 4.5 million meticaais).

Dividend payments are subject to a 20 per cent withholding tax, unless said dividends concern shares listed on the Mozambique Stock Exchange, in which case the withholding tax is 10 per cent. 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 per cent 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.

Insurance restrictions

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

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.

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.

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.

Law stated - 29 June 2023

Worker restrictions

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

The regimes for the employment of foreign workers in Mozambique which generally apply are the quota regime, the work permit regime and the investment projects regime approved by the government.

Under the quota regime, the allowed quotas for foreign employees are 5 per cent for all workers in large companies, 8 per cent off all workers in medium-sized companies and 10 per cent of all workers in small companies. In all cases, prior notice from the Ministry of Labour of 15 days is required.

In the case of investment projects approved by the government, the quota allowed for foreign workers is that approved for the project. Work permits are not required, and notice given within 15 days of the date of entry of the foreign workers in the country is sufficient.

Law stated - 29 June 2023

Equipment restrictions

What restrictions exist on the importation of project equipment?

Goods entering into Mozambique for use in the country must be cleared through the appropriate customs procedures, such as:

- temporary importation;
- temporary exportation;
- re-importation;
- re-exportation;

- customs transit;
- storage;
- industrial free zones; and
- customs warehousing.

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 Southern African Development Community 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).

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 a party.

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

Law stated - 29 June 2023

Nationalisation laws

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

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 was only 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 the Direito do Uso e Aproveitamento da Terra (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.

Law stated - 29 June 2023

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

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. Legislation provides 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.

Law stated - 29 June 2023

GOVERNMENT AUTHORITIES

Relevant authorities

16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The governmental agencies or departments with authority over projects depend 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 entities over projects are: the National Institute of Mining; the National Institute of Petroleum; the Ministry of Land Environment and Rural Development; the Agency for the Promotion of Investments and Exports; and the Bank of Mozambique.

Law stated - 29 June 2023

REGULATION OF NATURAL RESOURCES

Titles

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Natural resources located in and beneath the soil, in interior waters, in the territorial sea, on the continental shelf and in the exclusive economic zone are the property of the state. Under certain conditions, the state may grant rights with respect to natural resources to private parties by means of licences or concession agreements, provided that such rights are exercised in accordance with the applicable laws and for the benefit of the national economy. The rights granted by the state may include, among others, exploration, mining, treatment, processing, and trade or other forms of disposal of natural resources.

Besides customary obligations such as compliance with environmental and technical regulations, the mining law foresees obligations relating to the preservation of socio-cultural aspects of local communities as well as their adequate relocation.

There are no legal restrictions on the acquisition of natural resource exploration rights to foreigners. However, both the PPP Law and the petroleum and mining laws contain provisions that seek to impose the participation of Mozambicans, either through the state or through other public entities, or directly by Mozambican companies and individuals, in the

structure of the project companies. Between 5 per cent and 20 per cent of the capital of the project company or consortium must be reserved for placement, on commercial terms, on the Mozambique Stock Exchange within five years of commencing the activity, for social inclusion.

Law stated - 29 June 2023

Royalties and taxes

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

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 and oil and gas activities.

Petroleum Production Tax is levied on oil and gas produced in each concession area and is due from corporate entities performing petroleum operations under a concession agreement. The tax rate is 10 per cent for oil and 6 per cent 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:

- Tax on Mining Production (IPM);
- Surface Tax (ISS);
- Tax on Income Deriving from Mineral Sources (IRRM); and
- special rules to determine the taxable income under personal income tax and corporate income tax.

IPM tax rates vary: 8 per cent for diamonds, 6 per cent for precious metals, precious and semi-precious stones and heavy sands, 3 per cent for basic metals, charcoal, ornamental rocks, etc, and 1.5 per cent 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 17.50 meticaïs per hectare and 105,000.00 meticaïs per hectare, 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 (prospecting licence, research, mining concession or mining certificate).

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

Law stated - 29 June 2023

Export restrictions

What restrictions, fees or taxes exist on the export of natural resources?

Generally, the export of goods is exempt from taxes, duties and fees, and that applies to natural resources. However, existing laws in the natural resources sector establish that at least 25 per cent of the country's oil and gas production should be reserved to the local market.

Further, from a foreign exchange perspective, all invested capital must be registered with the Bank of Mozambique, under the penalty of non-recognition of the right to export profits or dividends as well as the re-export of the invested capital.

Law stated - 29 June 2023

GENERAL LEGAL ISSUES

Government permission

What government approvals are required for typical project finance transactions? What fees and other charges apply?

With regard to the remittance of capital from a local company to foreign investors, the rules and procedures to be observed in carrying out forex operations provide that the foreign investors (shareholders) and lenders must register, before the commercial bank – acting as intermediary of the Bank of Mozambique (BoM) – the import of capital within 90 days from the date of transfer of the funds, under the penalty of an infringement proceeding being filed. Furthermore, without prejudice to the consequences foreseen as to the non-registration of forex transactions under the general terms, the non-registration of FDI after three years from the date of the effective inflow of the investment value determines the non-recognition of the right to export profits or dividends, as well as the re-export of the invested capital. The same applies to the disbursement of loans.

Other than the BoM, the Agency for Promotion of Investment and Exports (APIEX) is another relevant authority in respect of the implementation of investment projects. Depending on the investment amount the government or the APIEX are responsible for the authorisation, monitoring and supervision of investment projects. A fee of 0.1 per cent of the amount of the proposed investment is due for the authorisation of the investment project.

Law stated - 29 June 2023

Registration of financing

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?

Besides the foreign exchange restrictions associated with cross-border financing structures and transfers of capital outside the jurisdiction, the Civil Code establishes that financing agreements of any amount must be notarised for it to be valid.

Furthermore, the regulations on the execution of civil construction works (Decree No. 94/2013 of 31 December 2013) impose the obligation of construction contracts being ruled by Mozambican law. Moreover, contractors are obliged to register the construction agreements they enter into with the ministry in charge of public works.

As far as enforceability is concerned, local law project document must be executed in Portuguese or translated into Portuguese, by a sworn translator. Mozambique is not a signatory of the Hague Convention; thus apostilled documents are not valid and cannot be used to instruct notary acts in Mozambique – all official documents issued abroad can be required to be legalised should the notary or registrar doubt the authenticity of the document. Therefore, it is advisable to legalise before the public notary and Mozambican consulate in the country of origin all official documents issued abroad that are to be used to instruct notary acts in Mozambique, and for them to be couriered to Mozambique for translation purposes.

To ease enforcement, it is advised that all signatures in project documents are notarised by a notary public.

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.

Law stated - 29 June 2023

Arbitration awards

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

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.

Mozambique is 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 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 ICSID convention, 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.

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

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.

Law stated - 29 June 2023

Law governing agreements

Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

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 into 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.

Financing agreements are typically governed by English 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.

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.

Law stated - 29 June 2023

Submission to foreign jurisdiction

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Submission to a foreign jurisdiction and waiver of immunity are generally 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.

Law stated - 29 June 2023

Anti-money laundering rules

Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Law No. 14/2013 of 12 August 2013, as amended, and related regulations impose upon certain entities the obligation to adopt and implement a compliance programme addressing money laundering and terrorist financing risks.

The investor's status does not in itself trigger any anti-money laundering compliance checks or other compliance rules. Yet, while the relevant activity entails wiring money to the Mozambique financial and banking system, the investor may be subject to anti-money laundering (AML) checks. Moreover, should the relevant scope of business be related, notably, with financial, banking, insurance, legal, real estate, mining, automotive, import and export of goods and gaming sectors, the investor will be subject to AML checks from the relevant supervisory body and must implement a comprehensive AML compliance programme.

Law stated - 29 June 2023

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

What environmental, social and governance (ESG) issues are relevant in typical project sectors? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations?

Environmental challenges, including deforestation, declining fish stocks, and loss and degradation of wetlands and rivers, are always critical in typical project sectors and projects are subject to environmental laws and regulations, impact assessments and approvals (as applicable) as well as environmental monitoring.

Projects are facing greater scrutiny from communities and public opinion, and social and governance issues are increasingly scrutinised. Companies are increasingly paying attention to gender diversity. The growing relevance of ESG issues is also reflected in the intention to include ESG-related clauses in some agreements. Also, following the global pandemic, project companies are considering implementing carbon footprint control via hybrid working and

digitalisation, with environmental benefits (reduced emission of carbon dioxide).

As part of the government's commitment to an inclusive middle-income country by 2030, by using its resources rationally to preserve its ecosystems and sustainable and effective development, a Green Economy Action Plan was developed and approved by the Council of Ministers on 15 October 2013. Although ambitious, progress is still limited.

As far as reporting and disclosure are concerned some project companies make voluntary disclosures and have created environmental and social management and monitoring plans that assess and manage projects' impact and risks. In particular, their main focus is to ensure that the projects' environmental and social plans align with the International Finance Corporations Performance Standards and the Equator Principles.

Law stated - 29 June 2023

PROJECT COMPANIES

Principal business structures

What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

The recently enacted commercial code, approved by Decree-Law No. 1/2022 of 25 May 2022, provides for four types of business structures:

- general partnership with limited liability;
- private limited company;
- public limited company; and
- simplified company by shares.

Hence, despite the introduction of the two new business structures, private limited liability companies by quotas and private limited liability companies by shares remain the two commonly used types of business structures.

Meanwhile, the most significant change introduced by the new Commercial Code with regard to companies in general is the admissibility of single shareholder or quotaholders, an update of high relevance that makes the corporate structure of project companies much simpler and puts an end to the need to include partners of convenience, as was often the case.

Although in general the shareholders are free to choose the form and structure of the company, the state requires entities created for the implementation of projects under the PPP law to adopt the form of public limited companies.

In addition to funding from shareholders, through either capital contributions or shareholder loans, companies investing in Mozambique are financed almost exclusively through bank financing. There are no known examples of project companies in Mozambique that have financed themselves through the issuance of bonds, commercial paper or shares through stock market capital.

Sovereign financing – through subsidies or guarantees – is not readily available as a credit enhancement mechanism.

Law stated - 29 June 2023

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Mozambique enacted PPP-enabling legislation in 2011, establishing the legal framework for the process of contracting and implementing large-scale projects and business concessions. Pursuant to the PPP Law, a PPP is defined as an undertaking in the public sector (excluding mineral and petroleum resources) or in areas of the provision of public services, in which under contract and with full or partial financing of the private partner, that partner undertakes to provide the necessary investment and perform the corresponding activity for the efficient provision of services or goods, which availability to users is the responsibility of the state to guarantee.

Further, under the PPP Law, the supply of goods and provision of services to the state, including public works and consultancy in public works, is excluded from the PPP Law as well as non-profit activities. Additionally, the PPP Law does not apply to natural resources ventures, including the oil and gas sector and the mining sector.

Law stated - 29 June 2023

PPP – LIMITATIONS

Legal limitations

What, if any, are the practical and legal limitations on PPP transactions?

One of the most relevant legal limitations is related to the local content obligations foreseen in the law. In addition to the more traditional local content measures, the PPP Law includes an obligation to sell equity interests in a PPP company in a regulated market as a means of fostering the capacities of the Mozambican capital market, as well as the creation of fixed or variable charges to be paid by the private partner in relation to the value of the PPP project or the revenues obtained, in the context of projects involving the use of natural resources. The appropriateness of these measures has been questioned in the light of the current size of the PPPs on which they are imposed – in the case of the requirement for the PPP companies to float on the capital markets – or simply because they were considered particularly onerous – in the case of the fixed and variable charges provided for in the law.

Law stated - 29 June 2023

PPP – TRANSACTIONS

Significant transactions

What have been the most significant PPP transactions completed to date in your jurisdiction?

There is no record, since the enactment of the PPP Law in 2011, of significant projects that have been implemented. Nevertheless, and although they do not meet the criteria set out by the PPP legislation, recently important project finance transactions have been launched or completed in the energy sector.

In 2020 the largest project finance structure in African history – which includes public and private partners reached its financial closing, amounting to around US\$24 billion. It corresponds to the Mozambique liquefied natural gas (LNG) project led by Total Energies and located at the offshore Area 1 of the Rovuma Basin. It encompasses more than 75 trillion cubic feet of gas reserves which has the potential to transform Mozambique into one of the world's top LNG producers. The first phase of the project involves the construction of two LNG trains that turn gas into liquid for transport, with output expected to reach 12 million tonnes per year. The sponsors also include co-venturers from Mozambique (including the state-owned Empresa Nacional de Hidrocarbonetos E.P.), Japan, Thailand and India.

In April 2021 and due to an escalation of Islamic State-linked violent insurgency in the area, including a March attack by militants near the project's main camp, Total Energies suspended the project indefinitely. However, with the improvement of security conditions more recently, it is expected that the resumption of the project will be announced in the current year.

Still in the Rovuma Basin, Eni, as Delegated Operator of the Coral South project on behalf of its Area 4 Partners (ExxonMobil, CNPC, GALP, KOGAS and ENH), announced in November 2022 the first shipment of LNG produced from the US\$4.675 billion financing of the Coral South Floating LNG (FLNG) project in offshore Mozambique, had departed from the Coral Sul FLNG facility. Since then, the project has been exporting LNG to Europe.

More recently, in May 2023, the Ministry of Mineral Resources and Energy, through the Mphanda Nkuwa Hydropower Project Implementation Office announced the consortium led by Électricité de France, which includes Total Energies, Sumitomo Corporation and Kansai, as the preferred bidder in the tender for selecting the strategic partner for Mphanda Nkuwa Project development.

With an estimated cost of US\$4.5 billion, the Mphanda Nkuwa Hydropower project includes the development of a run-of-river dam located 61 km downstream of Cahora Bassa, on the Zambezi River, in Tete province. It is a hydropower plant with an installed power generation capacity of up to 1,500 MW and a high-voltage power transmission line from Tete to Maputo of approximately 1,300 kilometres.

Law stated - 29 June 2023

UPDATE AND TRENDS

Key developments of the past year

In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

Although not specifically related to project finance, it is worth noting the effort being made by the state to create conditions that provide investors with a better business environment and facilitate project implementation. As an example, the government has introduced visa exemptions for citizens from 28 countries, among which are some of the most relevant in terms of foreign investment in Mozambique. The government has also introduced the exemption of obtaining licences for all economic and commercial activities without significant impacts, namely, for the environment, and VAT was reduced from 17 per cent to 16 per cent.

Together with the aforementioned introduction of the mechanism of registration of investors for the purposes of obtaining incentives as opposed to the need for approval of the investment (subject to the exceptions provided for by law), the government is sending strong signals with a view to making Mozambique a more attractive destination for investors and investments.

Law stated - 29 June 2023

Jurisdictions

	Australia	Allens
	Dominican Republic	Guzmán Ariza
	Germany	Bird & Bird LLP
	India	Cyril Amarchand Mangaldas
	Indonesia	ABNR
	Japan	Nishimura & Asahi
	Lebanon	Bijjani Advocates
	Mozambique	VdA
	Myanmar	Myanmar Legal MHM Limited
	Netherlands	Bird & Bird LLP
	Portugal	VdA
	South Korea	Shin & Kim
	Switzerland	Walder Wyss Ltd
	Taiwan	Lee and Li Attorneys at Law
	Thailand	Chandler MHM Limited
	USA	Morgan, Lewis & Bockius LLP
	Vietnam	Chandler MHM Limited