



# Project Finance Report **2017**

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INTERNATIONAL FINANCIAL LAW REVIEW

# Mozambique

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## Section 1. National update

### 1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

Mozambique's ability to attract large investment projects in natural resources is expected to sustain high growth rates in coming years. The country is however under international scrutiny given recent events involving over \$2 billion in secret loans. The International Monetary Fund (IMF), World Bank and several other donors have suspended much needed assistance to the state and demanded that an independent audit be conducted to investigate the loans.

The devaluation of the metical (MZN) is a major macroeconomic concern. Since late 2015 the metical has seen its value progressively eroded, arriving at 77:1 levels (October 2016). The Bank of Mozambique's measures to control inflation are putting a strain in the economy and have considerably reduced access to local funding. Reserves of foreign currency continue to drop and high interest rates are discouraging borrowing.

ENI's final investment decision on Mozambique's deep-water Coral South floating liquefied natural gas, expected by December 2016, is believed to be a triggering point for further large investments into the country.

## Section 2. ECAs and Multilateral

### 2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

In the current economic outlook, export credit agencies (ECAs) are continuing to play a leading role in bringing energy and infrastructure projects to completion. The African Development Bank (AfDB), International Finance Corporation (IFC), German Investment and Development Corporation (DEG), Dutch development bank (FMO) and the Chinese Import-Export Bank (C-Exim), remain involved in supporting investments in the private sector and in bolstering investor confidence by backing projects seen as high risk due to the country's political, social and economic instability.

## Section 3. Public-private partnerships

### 3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

Mozambique has approved and implemented a piece of mega-projects legislation: a cross sectorial or horizontal legislation, ruling on any sectors and activities that fall under its scope and provisions. This legislation establishes the guiding rules for the process of contracting, implementing and monitoring undertakings of public-private partnerships (PPPs), large-scale projects and business concessions. Both greenfield and brownfield projects are permitted within this legal framework, with contracts lengths depending on the type of infrastructure to be developed.

### 3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

Public domain assets (such as the land granted for exploration of the project activity) may not be granted as security by concessionaires to the lenders.

Also, the total or partial transfer of the rights or assets covered by the concession, sub-concession, sale, encumbrance or any form of disposition of the concession are subject to prior approval by the relevant authority.

## Section 4. Foreign investment and ownership restrictions

### 4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

The mega-projects legislation and the petroleum and mining laws impose new restrictions on foreign equity participation for foreign investments, establishing provisions accommodating not only a mandatory and progressive increase of the State participation but also mandatory mechanisms and conditions for the involvement of local companies and individual entrepreneurs in projects.

The Petroleum Law even accommodates a transparency mechanism, whereby foreign entities participating in petroleum operations must be incorporated in jurisdictions transparent to the government, for instance jurisdictions where the government may independently verify the ownership, management, control and fiscal situation of the foreign entity interested in participating in petroleum operations. Private security services, public construction works and media activities also include express national content restrictions.

The competition legislation must also be taken into account when it comes to assessing actual or potential restrictions to foreign investments. Although the implementation of this law is expected to be gradual, the public interests being enforced go beyond the protection of a competition process, such as the promotion of national products and services, the competitiveness of small medium companies and the consolidation of the national economy (incidentally these are objectives that can justify restrictive agreements).

### 4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?

Blocking or unwinding of transactions involving foreign investors does not easily or often occur but there are laws and regulations expressly allowing the state or governmental authorities to expropriate companies and nationalise assets or compulsorily acquire assets in the private sector for strategic, national security or other reasons (pertaining to situations in which public interest must prevail over private interest). These laws and regulations also establish the right to compensation.

Notwithstanding the above, it is worth stressing that Mozambique is a party to several bilateral investment treaties (BIT) with: South Africa, Germany, Algeria, Belgium, China, Cuba, Denmark, Egypt, USA, USA (OPIC), Finland, France, Indonesia, Italy, Mauritius, Netherlands, Portugal, Sweden, United Kingdom, Vietnam, India, Switzerland, Spain and Zimbabwe. All BITs generally aim to foster foreign direct investment into Mozambique, provide investors with guarantees and protection measures (security and protection of property rights, access to foreign loans and loan repayment, remittance of dividends, arbitration by the International Commercial Court (ICC) or International Centre for Settlement of Investment Disputes (ICSID) for dispute resolution) and liberalised banking rates.

## Section 5. Foreign Exchange, remittances and repatriation

### 5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

The Bank of Mozambique controls all transfers of direct investments and inward and outward payments. In general, remittance of profits and repatriation of proceeds from the sale or liquidation of an investment in Mozambique is permitted for duly approved foreign investment projects.

Foreign investors with approved investments are entitled to transfer abroad up to the whole amount of the profits accruing each financial year, provided tax obligations have been satisfied. Remittances may only be affected through the local banking system upon presentation of tax clearance from the ministry of finance. The payment of interest and any other charges flowing from loans is regarded as a current transaction, not subject to prior authorisation.

As Mozambique has a number of double tax treaties in force, the withholding tax rate may be considerably reduced. For example, under the double tax treaty between Mozambique and South Africa interest paid to and beneficially owned by a bank in South Africa, is subject to 0% withholding tax; payment of dividends, interest or royalties made to an entity resident in Macau is subject to a withholding tax rate of 10%.

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

In accordance with Mozambican foreign exchange control rules the opening and operation of foreign bank accounts by a Mozambique resident entity and any transfer of funds from foreign bank accounts to Mozambican bank accounts and from Mozambican bank accounts to foreign bank accounts is subject to the prior authorisation by the central bank.

## Section 6. Insurance

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

As a rule, pursuant to Mozambican Insurance Law and the Insurance Regulations, only Mozambican insurance and reinsurance companies, and Mozambican branches of insurance and reinsurance companies with registered offices abroad, are allowed to carry out the insurance and reinsurance business in the country, provided that they are authorised by the ministry of finance and registered with the Mozambique Insurance Supervision Institute (ISSM).

Taking out insurance abroad may be authorized by ISSM when it is evidenced that the local authorised insurers have refused to subscribe the policy, or that the foreign insurers offered better conditions than local insurers.

Contracts with the government may include insurance clauses pertaining to insurance policies placed internationally and in accordance with international good practices. On the basis that the lender or the political risk insurer or guarantor participating in project financing transactions is a foreign entity, the advance of any loan and the provision of any risk insurance or guarantee to a domestic borrower is subject to prior authorisation and registration with the central bank.

### 6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?

N/A

## Section 7. Choice of law and jurisdiction

### 7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Submission to a foreign jurisdiction and a waiver of immunity are effective and enforceable contract provisions in Mozambique, to the extent permitted by law. Under the Mozambican Civil Procedural Code, as a rule, the Mozambican courts cannot be deprived of their jurisdiction (irrespective of contractual provisions providing otherwise) if, in accordance with the Mozambican mandatory procedural rules, the Mozambican courts are deemed as having jurisdiction to decide on any matter arising from an agreement.

### 7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?

The choice of English or New York law with respect to contracts entered into with or by Mozambican entities and rights and assets related to the Mozambican jurisdiction have to be analysed on a case-by-case basis.

Pursuant to the Mozambican Civil Code, contracts are governed by the law chosen by the parties, provided that such election has a connection (*nexus*) with a relevant element of the contract or is otherwise supported by an interest in good faith, (a *bona fide* interest) of the parties. However, a foreign law elected in accordance with those rules will not be acceptable if it involves a violation of a fundamental principle of Mozambican public policy; also there are certain Mozambican principles and rules that are mandatory, even if a foreign law is validly chosen.

The capacity, powers and authority to enter into an agreement and bind the Mozambican parties, as well as any related mandatory approvals, authorisations and permits, are subject to Mozambican law. Mozambican conflict of law rules also determine that the creation, assignment and cancellation of rights of possession, ownership and other related rights, including guarantees, over movable or immovable property, are governed by the *lex rei sitae*.

### 7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?

Any foreign judgment can be recognized and enforced by a Mozambican court without re-litigation and re-examination of the merits of such judgment, provided that the following requirements are previously met:

- the foreign judgment must be legible and genuine;
- the foreign judgment must be final, non-appealable and conclusive in accordance with relevant laws;
- Mozambican courts must have no jurisdiction to hear the dispute, and the foreign court which rendered the judgment must have such jurisdiction;
- the foreign proceedings were conducted in accordance with the applicable procedures and the parties to the dispute had been duly notified and properly represented in the proceedings;
- no concurrent proceedings are pending in a Mozambican court;
- the foreign judgment does not conflict with a prior Mozambican or foreign judgment in the same matter; and
- the foreign judgment is not contrary to public policy of Mozambique or to the Mozambican conflict of laws rules.

Mozambique is signatory to the Washington Convention of March 15 1965 on 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); and is also signatory to the Additional Facility Rules of ICSID. Mozambique is also signatory to the New York Convention on the recognition and execution of foreign arbitral decisions, however on the basis of reciprocity.

## Section 8. Security

### 8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?

Mortgages and pledges are preferred securities; being the subject of rights *in rem* generally entitle creditors the right to be repaid from the proceeds of the sale of certain assets with preference over other creditors of the debtor (except for privileged creditors and in circumstances where a first ranking similar security is already in place). As a general rule, the creditor right *in rem* determines the type of security being created. Immovable or real estate property and moveable assets subject to registration such as vehicles, vessels and aircrafts are mortgaged, whilst movable assets that cannot be mortgaged and rights (such as shareholding) are pledged.

Other available instruments include the surety, the debt confession, the right of retention, the novation, the cession of receivables and the assignment of rights (contractual position, debts, credits, insurance).

The assets that cannot be used as security are listed in the Mozambican Civil Procedural Code, as follows: assets which garnishment would constitute an offence to the public ethical standards or those which garnishment has no economic justification; assets used in religious ceremonies; graveyards; railways, locomotives and trains; military equipment and public uniforms; essential assets of the household; and essential clothes and bedroom accessories.

In addition, as there is no private ownership of land – it belongs to the state by virtue of the law and Constitution – land, as such, cannot be used as security.

### 8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?

Arrangements whereby debt is subordinated by way of a contractual agreement are allowed. Note however that creditors are paid with the proceeds of the sale in the following order: employment credits; secured credits; tax credits; ordinary credits; contractual and tax penalties; and subordinated credits.

Contractual agreements relating to subordinated debt often relate to shareholders' loans or intercompany related loans.

Shareholders' loans have a specific regime Mozambique and some elements must be considered. Furthermore, the creation of securities to guarantee payments under shareholder loans is not allowed.

Intercompany and related company loans, in general, are subject to the following rules:

- the interest rate, shall be below the market rate, and preferably be zero;
- whether the entity's proposed activity is able to generate income in a foreign currency through its normal business to support the debt.

In addition, the deduction of intercompany interest may be limited where the indebtedness to a non-resident related party is twice the equity; for instance thin capitalisation rules are applied when the debt to equity ratio exceeds 2:1.

## Section 9. Perfection, priority and enforcement

### 9.1 How is a security interest in each type of security perfected and how is its priority established?

The majority of the securities available under the Mozambican legislation are created and perfected through a written agreement between the debtor and creditor, with the respective signatures certified by notary public.

For mortgages, however, the debtor and creditor are required to sign a deed in the presence of a notary public, which deed must be subsequently registered with the applicable Registrar, depending on the asset being mortgaged (immovable or real estate property, vehicle, vessel or aircraft).

For pledges, specifically where shareholding rights are concerned, the rules for creation and perfection of the security depend on the manner of materialization of the shareholding.

In case of different securities granted over the same asset, the *prior in tempore, potior in iure* principle applies, and the first (holder) creditor shall be paid first, except in the case of the right of retention – the right retention prevails over common credits and credits secured by pledges or mortgages even if the latter were already created. Where the security is subject to registration, the *prior in tempore, potior in iure* principle is assessed by reference to the date of registration.

### 9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

The enforcement of securities would not, in general terms, trigger any taxes. However, this must be analysed on a case-by-case basis since the enforcement of a mortgage, with the subsequent transfer of ownership of real estate, could trigger a two percent property transfer tax (SISA).

### 9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?

Securities may be held and enforced by corporate entities, in the capacity of agent or trustee and intercreditor arrangements to accommodate recognition of this role are common in Mozambique.

## Section 10. Bankruptcy proceedings and enforcement

### 10.1 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 collateral/security?

Under the Mozambique bankruptcy and recovery regime a debtor's declaration of insolvency triggers the automatic maturity of all the debts of the debtor and involves both an automatic stay on assets (for example secured creditors cannot gain possession of a secured asset or sell such asset separately in order to be paid); the inability of the debtor to carry out any business activities and to administer and dispose of its assets; and the unenforceability of certain transactions related to the debtor carried out immediately prior to the declaration of insolvency.

All security over the debtor's assets must be enforced within the bankruptcy proceedings: judicial recovery proceedings or extra-judicial recovery proceedings.

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

Outside the context of the bankruptcy and recovery proceedings above, Mozambique law generally grants the creditor the right to be paid for the sale of the secured assets with preference over other creditors in an event of default.

### 10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

Secured parties rights over collateral/security must be enforced by means of judicial or court proceedings.


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