



# ICLG

The International Comparative Legal Guide to:

## Project Finance 2015

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A practical cross-border insight into project finance

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# Mozambique

Paula Duarte Rocha



Ana Berta Mazuze



## Mozambique Legal Circle Advogados (MLC Advogados)

### 1 Overview

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

The much anticipated enabling legal framework for Offshore Areas 1 and 4 (Decree-Law 2/2014), which includes the construction and operation of liquefied natural gas (“LNG”) facilities and related activities, is expected to “boost” the Mozambican economy in particular and accelerate the projected global market impact of the region’s resources.

Alongside this enabling legal framework, the approval of the new “Mining Act” and the new “Petroleum Act” provide attractive growth opportunities to deploy capital and/or skills.

Construction, services, transport, communication and infrastructure development, in general, showcase correlated investment opportunities in Mozambique, stimulating and increasing local entrepreneurship and direct and induced new investments, broadly fuelling the financial sector and credit expansion.

Our experience shows increasingly high levels of financing potential and a strong appetite from international banks and financing agencies to fund and take advantage of this value chain, which is so important to the growth of the national economy.

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

Growing at around 7% each year, the country’s economy is seen as one of Africa’s strongest performers. Foreign companies have increasingly chosen to invest here, particularly in natural resource areas. The main relevant deals in recent years include: Moatize’s coal mines; Palma’s LNG production plant; the gas fields/pipeline of Pande and Temane; Moma and Chibuto’s heavy mineral sands projects; Ressano Garcia’s thermal power plant; Nacala’s airport and deep water port; the Maputo-Catembe Bridge; the Ressano Garcia-Matola gas distribution network; and the Mozal aluminium plant.

### 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?

As a general rule, the creditor right *in rem* determines the type of

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

Immovable and real estate property and movable assets subject to registration (vehicles, vessels and aircrafts) are mortgaged, whilst movable assets that cannot be mortgaged and rights (such as credits or shareholdings) are pledged.

For mortgages 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 (real estate property, vehicles, vessels or aircraft registrars).

Pledges are not subject to special formalities (other than a written document); neither are they subject to any type of public registry, except in case of pledges of securities.

#### 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?

There is no private ownership of land in Mozambique as the Mozambican Constitution contains the fundamental principle that the land belongs to the State.

Private persons – either Mozambican or foreign – may, however, be granted the right to exploit and use the land (a “DUAT”) and become owners of any buildings, premises or other immovable assets built on the land to which the DUAT relates, and may create mortgages over such assets.

Machinery and equipment in an immovable asset, such as in a plant, may be granted as security together with the immovable asset and under a “general mortgage” deed – without the need to enter into a separate pledge agreement – which must include a list allowing for clear identification of the plant machinery and equipment included in and subject to the mortgage.

#### 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?

The most common form of security over claims and receivables is a pledge. In general, securities over claims and receivables can only be constituted over existing (present) claims and by an entity which is the owner of the same and is duly entitled to transfer them,

meaning that the creation of said securities over future claims and receivables is not permitted.

Pledges over claims and receivables are created by a written agreement between the parties like any other pledge, with the particularity that the debtor must be notified or accept the pledge of the credit or receivables in order for the security to become effective.

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

A pledge over cash deposited in bank accounts is deemed a pledge of credits or receivables. Please see question 2.3 above.

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

Pledging shareholding rights in a joint stock company (“*sociedade anónima*”) wherein the shareholding is represented by nominative shares and the creation and perfection of the security requires the endorsement of the share certificates by the pledger (debtor), the registration of the pledge in the company’s share register book and the delivery of the share certificates to the pledgee (creditor); should the shares be warrant-to-bearer, the delivery of the shares to the pledgee is sufficient for creation and perfection of the security.

Pledging rights in a private limited liability company (“*sociedade por quotas*”) in which the shareholding is represented by quotas (corresponding to percentages of the company share capital and not materialised in share certificates) requires and is subject to the execution of a pledge agreement between the debtor and the creditor, the notification of the company of the creation of the pledge (if prior consent is not required by the company and/or by the shareholders for creation of the pledge) and the registration of the pledge with the Commercial 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)?**

Costs and taxes to create and perfect any type of securities include notary public and applicable registrar charges, plus Stamp Duty, which is assessed on all documents, contracts, books, papers and deeds designated in a Schedule that is attached to, and forms an integrated part of, the “Stamp Duty Code”.

Calculation of notarisation and registration fees is based on variable percentages, depending on the loan amount/secured amount and the number of pages of the deed (where applicable).

For short-term securities (created for a period of less than a year) a fixed rate of 0.02% is charged, plus a fixed fee charged by the notary upon certification of the signatures in the document creating the security. For securities created for a period equal to or exceeding one year, a rate of 0.2% is charged, plus the notary fixed fee for certification of the signatures in the document. For securities without a term or for a term exceeding five years, a rate of 0.3% is charged plus the notary fee already referenced.

Stamp Duty on mortgages and pledges is charged at 0.3% of the total amount secured, plus a fixed fee charged by the notary (per page of the mortgage as this security is created through signature of a public deed as referenced in question 2.1 above), plus a variable fee on each thousand of the amount secured.

#### **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 relevant authorities (notary public and registrars) are straightforward and do not involve a significant amount of time.

Stamp Duty costs, however, are often assessed as a “deal-breaker”.

#### **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.?**

The creation of security over assets which are in the private domain does not, in general, require any regulatory or similar consents.

Securities over public domain assets are generally not allowed or restricted. These restrictions include governmental consent and/or approval, imposed through sector-specific regulations, the relevant concession contracts or general public administration laws.

### **3 Security Trustee**

#### **3.1 Regardless of whether Mozambique 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?**

Securities may be held and enforced on behalf of third parties acting via an acting agent (or security trustee), and intercreditor arrangements to accommodate recognition of this role are common in Mozambique.

#### **3.2 If a security trust is not recognised in Mozambique, 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?**

Please see question 3.1 above.

### **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?**

Where a mortgage is in place, the enforcement of the security either by the creditor or its agent (or security trustee) must be effected by means of proper judicial proceedings.

In the case of pledges, the sale (the usual means to retrieve the amount equivalent to the debt) may be performed – either by the

creditor or its agent (or security trustee) – either judicially or, when previously agreed by the parties, by means of a private sale.

Usually, an irrevocable power of attorney is granted to the creditor under which the creditor is entitled to sell the secured asset on behalf of the debtor and be paid from the proceeds of such sale.

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

In essence, transactions with and/or between entities of foreign nationality must be approved by, and registered with, the Bank of Mozambique. Provided that this requirement has been met, the remittance of proceeds in the event of foreclosure is permitted.

## 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?

A debtor's declaration of insolvency triggers the automatic maturity of all the debts of the debtor and involves an automatic stay on assets (i.e., 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.

Pursuant to the bankruptcy and recovery regime, all security over the debtor's assets must be enforced within the bankruptcy proceedings (judicial recovery proceedings or extra-judicial recovery proceedings).

#### 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?

Creditors are generally paid from the proceeds of the sale and in the following order: (i) employment credits; (ii) secured credits; (iii) tax credits; (iv) ordinary credits; (v) contractual and tax penalties; and (vi) subordinated credits.

In case of different securities granted over the same asset, the *prior in tempore, potior in iure* principle applies, and the first (older) creditor shall be paid first, except in the case of the right of retention. Where the security is subject to registration, the *prior in tempore, potior in iure* principle is assessed by reference to the date of registration.

Moreover, certain creditors are entitled. The right of retention ("*direito de retenção*") or lien entitles creditors to retain certain assets in their possession until their credit is paid, prevailing over common credits and credits secured by pledges/mortgages even if the latter were already created at the time the right of retention/lien arises.

Whenever different unsecured creditors concur, and if there are no legitimate preferential rights or a security-sharing agreement providing otherwise, creditors have the right to be paid on a *pro rata* basis when the debtor's assets are not enough to satisfy the credit.

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

Bankruptcy proceedings are generally applicable to all persons or legal entities, except to the State and public entities and companies. Furthermore, insurance companies, credit institutions as well as financial corporations are subject to specific insolvency rules and proceedings.

#### 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?

Please refer to question 5.2 above, regarding the "right of retention" ("*direito de retenção*").

#### 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 Mozambique bankruptcy and recovery regime provides for extra-judicial recovery proceedings, which serve the purpose of obtaining an agreement between the company which may be insolvent or becoming insolvent, and its creditors. In practice, this involves an arrangement between the company and all or part of its creditors. Note that the company must meet some requirements in order to be eligible for this type of procedure.

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

According to the bankruptcy and recovery regime, directors may continue trading and remain in their positions, provided that they act within the special duty of care and do not violate general legal duties and principles applicable to the management of companies. Directors may however be subject to penalties, in the case that they have contributed to the worsening of the economic situation of the company, and due to felonious or gross fault during the period before commencement of the insolvency proceedings.

## 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 law enables foreign entities to do business in the country with limited liability either by incorporating a company or registering a representative office. Except for designated sectors (e.g., media, public works, private security companies) there are no limitations for foreigners (individuals or corporate) to hold shares or quotas in the capital of Mozambican companies.

Note that all foreign direct investment transactions are qualified as capital transactions, and are subject to authorisation by the Bank of Mozambique and to subsequent registration with the same entity.

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

Mozambique is a party to several bilateral investment treaties with key nations, generally to promote and strengthen investment relations between Mozambique and other countries (South Africa, Germany, Algeria, Belgium, China, Cuba, Denmark, Egypt, USA, USA Overseas Private Investment Corporation (“OPIC”), Finland, France, Indonesia, Italy, Mauritius, the Netherlands, Portugal, Sweden, the United Kingdom, Vietnam, India, Switzerland, Spain and Zimbabwe). As a common characteristic, all these bilateral investment treaties aim at fostering foreign direct investment into Mozambique, providing 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 Chamber of Commerce (“ICC”) or the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID”) for dispute resolution, and liberalised banking rates), but do not overcome nor 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?

There are laws and regulations expressly allowing the State or governmental authorities to expropriate companies and nationalise assets and/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).

Note that such laws and regulations also expressly establish the right to compensation.

## 7 Government Approvals/Restrictions

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

Where foreign investments are concerned, the Ministry of Economy and Finance, the Ministry of Land, Environment and Rural Development, the Investment Promotion Centre and the Bank of Mozambique are the most relevant Government authorities with a cross-sector role in investment projects.

### 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?

Private agreements that set out an obligation, notably a payment, shall only be enforceable before the courts after being authenticated or certified by a notary or by any competent authority.

Financing documents when involving non-resident entities are subject to prior authorisation by, and registration with, the exchange control authority, the Bank of Mozambique.

### 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)?

The exercise of economic activities in Mozambique is subject to licensing.

Note 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?

Taxpayers under mining and petroleum activities are subject to the application of the general taxation rules in Mozambique, namely corporate income tax, valued added tax and, cumulatively, to the fiscal regimes 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 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 on Mining Production (IPM); (ii) Surface Tax (ISS); (iii) Tax on Income Deriving from Mineral Sources (IRRM); and (iv) special rules to determine the taxable income under Personal Income Tax and Corporate Income Tax.

IPM tax rates vary between 8% for diamonds, 6% for precious metals, precious and semiprecious 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 rates vary between MZN 17.50/ha (metals per hectare) and MZN 25,000.00/ha, depending on whether they relate to the 1<sup>st</sup> year of prospecting and research or the 6<sup>th</sup> 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% 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?

The undertaking of any arrangement, transaction or operation between resident and non-resident entities in Mozambique, which results or may result in payments or receipts from abroad, is subject to the exchange control legislation, thus requiring the Bank of Mozambique’s (central bank) prior authorisation.

### 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?

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.

Any such remittances may only be effected through the local banking system and upon presentation of tax clearance from the Ministry of Finance.

Except as otherwise provided by a double taxation treaty existing between Mozambique and the lender's home country, a 20% withholding tax is levied on both interest and fees paid to foreign lenders. Where applicable, VAT is also due and levied at the rate of 17% upon the total income in connection with 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 is subject to prior authorisation by 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 Mozambique or abroad?**

Dividend payments are subject to 20% withholding tax, except for dividends paid in connection with shares listed on the Mozambique Stock Exchange, which are subject to 10% withholding tax. 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 shares in an associated company in Mozambique for at least two years.

Mozambique has concluded tax treaties with Portugal, Italy, Mauritius, the United Arab Emirates, the Special Administrative Region of Macau, South Africa, India, Vietnam and Botswana.

#### **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?**

As a rule, any activity which may affect the environment is subject to evaluation of the potential impact ("environmental impact assessment") to determine its environmental feasibility and concludes with the issuance of an Environmental Licence.

Occupational health and safety in Mozambique is governed in the first instance by the Constitution, in the second instance by the "Labour Act" and finally by an ample body of subordinate legislation, much of it of colonial origin.

The governmental authorities which administer those laws or regulations are the Ministry for Land, Environment and Rural Development and the Ministry of Labour.

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

Mozambique's general procurement terms stem from the "Regulation on Contracting Public Works, and Procurement of Goods and Services by the State" (Decree 15/2010, as amended by Decree 45/2011), applicable to all State bodies and institutions, including local government and State-owned companies. 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 and direct award).

Sector-specific legislation (mainly in the natural resources areas) 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).

## **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 usually requires insurance to be placed with local insurers. Given the limited size of the Mozambican insurance market, entities are allowed to obtain insurance with foreign insurers to the extent it is not possible to insure with local insurance companies and pursuant to notification of the regulator.

Transfers in execution of insurance contracts between residents and non-resident entities exceeding one year in duration, or which are related to a capital transaction, are classified as capital operations, thus being subject to prior authorisation and registration with the Bank of Mozambique.

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

Forex operations undertaken with a view to the payment of insurance contracted offshore by the insured himself, or by the person taking out such insurance, shall require presentation, by the interested parties, of proof that the necessary approval has been obtained from the competent entity in the country for the taking out of insurance offshore, in terms of 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?**

Under the terms of the Mozambican "Labour Act", there are basically two means of employing foreigners in Mozambique:

- (i) Authorisation of the Minister of Labour, granted on a case-by-case basis if the following prerequisites are met:
  - there are no Mozambican employees qualified to do the particular job; or
  - the number of qualified Mozambican employees is insufficient to meet the demand.

Authorisation is also the required approach in cases of "specialised technical assistance", among others.

- (ii) Communication to the Minister of Labour in the following circumstances:
  - the number of foreign workers meant to be contracted is within established quotas;
  - there is specific provision in the prospective employer's investment contract with the Government of Mozambique for an explicit percentage of foreign workers greater or lesser than the percentages set forth above; or
  - the prospective worker is to be hired for a short-term assignment, i.e., for a period of up to 30 days, consecutive

or interspersed. Foreigners may work in Mozambique for up to 30 days (consecutive or interspersed) per calendar year by means of communication from the Mozambican employer (understood here to mean a Mozambican company or the foreign parent of a Mozambican company) to the Minister of Labour. Such 30-day period can be extended, for up to two further 30-day periods, on application to the Minister of Labour. Extension is at the discretion of the Minister of Labour.

The following quotas are currently established for the employment of foreigners:

- 5% of the total number of employees in large enterprises (i.e., more than 100 workers);
- 8% of the total number of employees in medium-sized enterprises (between 11 and 100 workers); and
- 10% of the total number of employees in small enterprises (10 or fewer workers).

## 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?

Mozambique's customs regimes include (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.

The importation of left-hand drive vehicles used for commercial purposes in Mozambique 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.

Goods imported into Mozambique are subject to duties and taxes applied at the border.

Some goods imported are subject to a pre-shipment inspection procedure. Goods imported from within the Southern African Development Community ("SADC") region, subject to complying with SADC rules of origin, are subject to zero- or reduced-duty tariffs.

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

Imports into the national territory are subject to payment of import duties as consigned in the "Customs Tariffs Book", which include *ad valorem* charges, service charges, Specific Consumption Tax and Value Added Tax. Specific preferential rules apply for imports within SADC countries.

Authorised investment projects and activities under certain sector-specific legislation may benefit from exemption from import duties on the importation of capital assets (equipment and machinery).

## 11 Force Majeure

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

Mozambican law does not provide a specific provision regarding

exclusion of liability in cases of *force majeure*; the principle is generally accepted and enforceable in Mozambique.

General liability principles are found under the Mozambican "Civil Code". Clauses that totally limit or completely exclude liability are prohibited. In fact, liability can only be limited under certain circumstances and by establishing a compensation ceiling or overall limit of liability, or liquidated damages. In principle, this type of clause will be valid, provided it is not simply a way to exclude parties' liability, and shall not apply to situations of gross negligence and intentional or wilful misconduct.

## 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?

Besides the provisions established under the "Criminal Code", Mozambique has anti-corruption legislation (Act 6/2004), criminalising extortion, attempted corruption, as well as active and passive bribery.

Civil and criminal penalties for bribery and corruption practices include imprisonment (up to a maximum of eight years) and monetary fines.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

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 the violation of a fundamental principle of Mozambican public policy and there are certain Mozambican principles and rules that are mandatory, even if a foreign law is validly chosen.

Concession contracts and other project agreements entered into with public entities are governed by Mozambican law.

### 13.2 What law typically governs financing agreements?

Please see question 13.1 above.

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

The capacity, powers and authority to enter into an agreement and bind Mozambican parties, as well as any related mandatory approvals, authorisations and permits, are subject to Mozambican law.

The 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*.



## 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 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.

## 15 International Arbitration

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

Mozambican law recognises arbitration as a valid method of dispute resolution in Mozambique.

The definition of international arbitration set out in the Mozambican "Arbitration Act" follows the one adopted in the 1985 Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL"). The "Arbitration Act" contains express provisions on its territorial scope of application, under which law it shall apply to all the arbitrations taking place in Mozambique. Also, if the parties do not expressly agree to exclude its application, the provisions of the "Arbitration Act", adapted as necessary, will apply to international arbitrations having their seat in Mozambique.

Any foreign judgment can be recognised 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:

- (i) the foreign judgment must be legible and genuine;
- (ii) the foreign judgment must be final, non-appealable and conclusive in accordance with relevant laws;
- (iii) Mozambican courts must have no jurisdiction to hear the dispute, and the foreign court which rendered the judgment must have such jurisdiction;
- (iv) 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;
- (v) no concurrent proceedings are pending in a Mozambican court;
- (vi) the foreign judgment does not conflict with a prior Mozambican or foreign judgment in the same matter; and
- (vii) the foreign judgment is not contrary to public policy of Mozambique or to the Mozambican conflict of laws.

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

Mozambique is a signatory to the Washington Convention of 15 March 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 a signatory to the Additional

Facility Rules of ICSID approved on 27 September 1978 and a member of the International Chamber of Commerce.

Mozambique has been a signatory to the New York Convention on the recognition and execution of foreign arbitral decisions since 10 June 1998, which is fully applicable in national territory. However, as permitted by Article I(3) of the New York Convention, when it acceded thereto Mozambique declared that it would apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State, on the basis of reciprocity.

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

The Mozambican "Arbitration Act" expressly recognises the general principle that all disputes may be referred to arbitration, with the exception of disputes relating to non-disposable rights (typically, of a personal nature), or disputes which by special law are exclusively subject to the jurisdiction of a judicial court or a necessary arbitral tribunal.

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

Disputes concerning labour rights regulation are subject to domestic arbitration.

Matters of an economic nature arising from administrative agreements, contractual liability and torts of the public administration may be submitted to voluntary administrative arbitration in, and under the ruling of, the administrative court.

## 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?

The "Mega-Projects Act" accommodates provisions allowing for access to guarantees from multilateral or governmental institutions against non-commercial risks, which may originate from governmental institutions' actions, particularly in matters concerning the scope of coverage, terms, and conditions of each guarantee.

## 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?

Except as otherwise provided by a double taxation treaty existing between Mozambique and the lender's home country, a 20% withholding tax is levied on both interest and fees paid to foreign lenders.

The enforcement of securities would not, in general terms, 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 of real estate, could 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?**

Besides a favourable exchange control regime, foreign investors may be eligible for tax incentives in Mozambique such as deductions from taxable income, deductions from the amount of tax assessed, accelerated depreciation, tax credits, exemption from tax and the reduction of the rate of taxes and other fiscal payments, the deferment of the payment of taxes and other special fiscal measures, as provided for under the “Investment Act”, the “Investment Act Regulation” and the “Tax Incentives Code”, a set of rules designed mainly to attract foreign investment into the country.

For the costs and taxes to create and perfect 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 Mozambique?**

There are no other material considerations.

**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 comprises a primary market (market for new issues of securities) and a secondary market (trading market for previously-issued securities between third

parties). Additional 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.

All public offerings for subscription and public offerings for sale of securities, as well as the form and content of advertising these offerings, are subject to approval and registration with the Bank of Mozambique.

## 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 Mozambique.**

Prior to the end of 2014, there were no reports of the use of Islamic instruments in project finance in Mozambique.

**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?**

Please 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 Mozambique? If so, what steps could be taken to mitigate this risk?**

It is common practice in Mozambique to include interest payment obligations in a loan agreement subject to Mozambican law, which is fully valid and enforceable. The law foresees maximum rates of interest. In the event such interest rates are higher, the interest rate shall be reduced to the maximum interest rate allowed.



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Even before she finished her degree in law Paula started her career as a Legal Assistant in GAPI and then as a Legal Assistant to Mrs. Maria João Dionísio Santos, former Partner at Pimenta, Dionísio & Associados. Later she provided multidisciplinary legal consultancy at the Tax and Legal Services Department of PricewaterhouseCoopers, cooperating with national and foreign investors. She was also an Associate Lawyer and Senior Legal Advisor at MGA – Advogados & Consultores. More recently Paula was Managing Partner and Lawyer at Ferreira Rocha & Associados, Sociedade de Advogados. Throughout this professional experience she intervened in all areas of practice: advising national and foreign private companies with respect to public sector laws, public tenders and contracts, as well as advising foreign entities on compliance with all Mozambican tax, labour and commercial obligations.



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MLGTS LEGAL CIRCLE

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