

Mozambique

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SECTION 1 – Collateral/security

1.1 What types of collateral/security are available?

The Mozambique Civil Code rules on the types of collateral and security available to creditors.

Mortgages and pledges are preferred securities. Being the subject of rights in rem generally entitles 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 created. Immovable property or real estate and moveable assets subject to registration such as vehicles, vessels and aircrafts are mortgaged, whilst moveable assets that cannot be mortgaged and rights (such as shareholdings) are pledged.

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

SECTION 2 – Perfection and priority

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

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

For mortgages, however, the debtor and creditor are required to sign a deed in the presence of a notary public. The deed must be subsequently registered with the applicable registry, depending on the asset being mortgaged (immovable property or real estate, 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 materialisation of the shareholding.

Pledging shareholding rights in a joint stock company or *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 debtor (pledgor), the registration of the pledge in the company's share register book and the delivery of the share certificates to the creditor (pledgee). Should the shares be warrant-to-bearer, the delivery of the shares to the creditor (pledgee) is sufficient for the creation and perfection of the pledge.

Pledging rights in a private limited liability company or *sociedade por quotas* – in which the shareholding is represented by *quotas* (corresponding to percentages of the company's share capital and not materialised in share certificates) – requires and is subject to execution of a pledge agreement between the debtor and the creditor, the notification to the company of the creation of the pledge (if not the prior consent of the company or by the shareholders for creation of the pledge) and the registration of the pledge with the legal entities registry.

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

Mortgages and pledges and over *quotas* as recordable securities allow creditors to confirm the existence or absence of liens with priority to the creditor's envisaged lien, and based on updated and recent certificates obtained from the applicable registry with respect to the asset being mortgaged or from the legal entities registry when pledging *quotas*. A verification of the share certificates or the verification of the company's share register book are sufficient to confirm the existence or absence of prior liens in the case of nominative shares.

It is worth stressing that in the case of different securities granted over the same asset, the *prior in tempor, potior in iure* principle applies, and the first (holder) creditor will be paid first, except in the case of the right of retention. Where the security is subject to registration (please refer to the previous paragraph), the *prior in tempor, potior in iure* principle is assessed by reference to the date of registration.

2.3 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?

Costs and taxes to create and perfect any type of securities include notary public and applicable registry charges, plus stamp duty. Stamp duty is assessed on all documents, contracts, books, papers and deeds designated in a schedule that is attached and forms an integral part of the Stamp Duty Code. Mortgages and pledges are subject to 0.3% stamp duty, due and payable by the borrower, assessed with reference to the amount secured by such securities, unless such transactions are deemed ancillary to another transaction (a loan) already subject to stamp duty in Mozambique (0.5% over the loan amount when the maturity is equal to or higher than five years, 0.4% when the maturity is between one and five years, and 0.03% when the maturity is less than one year).

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

Corporate entities may hold collateral or security on behalf of project lenders and in the capacity of an agent of security trustee. Such corporate entities are, however, not allowed to provide security for third-party debts, unless there is a justified self-interest on the part of the corporate entity, or the third party debtor is a company of the same group or controls or is controlled by the entity providing the security. Therefore, the self-interest justification must be contained in a report or resolution passed and approved by the board of directors.

SECTION 3 – Foreign investment and ownership restrictions

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

Until recently, except for designated sectors (such as media, private security companies) there was no real obligation to have indigenous equity participation in companies conducting business in Mozambique.

The approval of the mega-projects legislation (a cross sectorial or horizontal legislation ruling on any sectors and activities that fall under its scope and provisions) along with the recent approval of the new Petroleum and Mining Laws, imposes new restrictions on foreign equity participation for foreign investments in Mozambique. It establishes provisions accommodating not only a mandatory and progressive increase of state participation, but also

mandatory mechanisms and conditions for the involvement of local companies and individual entrepreneurs in project activities in such sectors.

The new Petroleum Law even accommodates a transparency mechanism, whereby foreign entities participating in petroleum operations must be incorporated in jurisdictions transparent to the Government. This refers to jurisdictions where the Government of Mozambique may, independently, verify the ownership, management and control and fiscal situation of such a foreign entity interested in participating in petroleum operations.

3.2 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?

Mozambique is a party to several bilateral investment treaties with key nations, to promote and strengthen investment relations between Mozambique and other countries, such as South Africa, Germany, Algeria, Belgium, China, Cuba, Denmark, Egypt, US, US (OPIC), Finland, France, Indonesia, Italy, Mauritius, Netherlands, Portugal, Sweden, United Kingdom, Vietnam, India, Switzerland, Spain and Zimbabwe. 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 or the International Centre for Settlement of Investment Disputes liberalised banking rates and, simultaneously, an increase in international cooperation.

Mozambique is also a party to and has ratified double tax treaties with Portugal, Italy, Mauritius, United Arab Emirates, Macau, South Africa, Vietnam, India and Botswana, which generally cover taxes on (corporate and individual) income and complementary tax.

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

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

The blocking or unwinding of transactions involving foreign investors does not easily or often occur. However, 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). Such laws and regulations also establish the right to compensation.

SECTION 4 – Documentation formalities and government approvals

4.1 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, Mozambican courts cannot be deprived of their jurisdiction (irrespective of contractual provisions providing otherwise) if, in accordance with the Mozambican mandatory procedural rules, they are deemed as having jurisdiction to decide on any matter arising from an agreement.

4.2 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?

N/A

4.3 What government approvals are required in relation to environmental concerns for typical project finance transactions? What fees and other charges apply?

Where foreign investments are concerned, the Ministry of Planning and Development and the Bank of Mozambique are the most relevant government authorities with a cross sector role over investment projects. Their main roles include the authorisation, monitoring and supervision of investments and projects and relevant inflow and outflow of capital and foreign currency.

SECTION 5 – Bankruptcy 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 collateral/security?

Mozambique approved and implemented in late 2013 a new regime for bankruptcy and recovery procedures, which provides that debtors with favourable economic prospects be allowed to continue operating. The regime also envisages the liquidation of companies with little economic prospect by maximising the value of the assets and by preferably selling the entire business.

The maximisation of the value of the debtor's assets, active participation from the creditors and the protection from destruction of value and loss of human capital are the key ideas in 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 an automatic stay on assets; that is, secured creditors cannot gain possession of a secured asset or sell such asset separately in order to be paid. The declaration also prohibits the debtor from carrying out any business activities or administering and disposing of its assets, and implies the unenforceability of certain transactions related to the debtor carried out immediately prior to the declaration of insolvency.

Creditors are paid with the proceeds of the sale 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.

5.2 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

Both judicial recovery proceedings – encompassing a request to the court by the debtor for protection of his assets against creditors, together with the submission of a recovery plan approved by the creditors (share capital increases, changes in the control of the company, sale of assets) – and extra-judicial recovery proceedings – a special mediation procedure whereby the debtor's assets are not protected from creditors' claims. However, once approved (through a recovery agreement enabling the restructuring of the debtor's claims), it is deposited in a judicial court and constitutes an enforcement order.

5.3 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/security?

Outside the context of the bankruptcy and recovery proceedings, Mozambican law generally grants the creditor the right to be paid for the sale of secured assets with preference over other creditors in the event of default. Where a mortgage is in place, the enforcement of the security must be effected by means of proper judicial proceedings. In the case of pledges, the sale may be performed

either judicially or, when previously agreed upon by the parties, privately. Usually, an irrevocable power of attorney is granted to the creditor under which the creditor is entitled at his discretion to sell the secured asset on behalf of the debtor and be paid from the proceeds of such sale.

SECTION 6 – Foreign exchange, remittances and repatriation

6.1 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 undertaking of any arrangement, transaction or operation between resident and non-resident entities in Mozambique, which result or may result in payments or receipts from abroad is subject to exchange control legislation. It thus requires the Bank of Mozambique (Central Bank) to give prior authorisation. Such legislation specifically governs the undertaking of exchange transactions by non-resident entities and in respect of goods or monetary assets located within the Mozambican territory and rights over such goods or assets, or when pertaining to activities exercised within the Mozambican territory.

The granting of credit to a resident in foreign currency is classified as a foreign exchange transaction, and therefore subject to and requiring authorisation from the exchange control authority (the Central Bank). Application for authorisation for contracting the loan offshore will be effected by completing a standard form provided by the Central Bank, substantiated by or attached with the following documentation: (i) parties identification – certificate of incorporation or registration, power of attorney granting authority to any individuals to execute the facility agreement (and supporting or ancillary documentation) and to represent the relevant entities before any authority in Mozambique, and shareholders or board of directors' resolutions agreeing to the terms of the transaction; (ii) copy of the loan, credit, or facility agreement – in draft (non-executed); (iii) rationale, setting out the economic or social reasons which justify the indebtedness; and, (iv) borrower's latest financial statements, or confirmation of availability of resources for settlement of the debt.

For purposes of consolidating the foreign exchange registration and commencement of disbursements, a certified copy of the loan, credit or facility agreement should be submitted to the Central Bank within 30 days, counting from the date of execution of the agreement. To this effect, the agreement must be sworn and translated into Portuguese.

Registration of the loan disbursements should be made by the borrower by completing a standard form provided by the Central Bank, substantiated with the bank *bordereau* issued by the lender's bank, evidencing the entry of funds. Payments relating to the repayment of capital (principal) are made through an intermediary or commercial bank and are subject to subsequent registration with the Central Bank by way of completion of another standard form, also provided by the Central Bank and substantiated by attaching a demand or debit note.

The payment of interest and any other charges flowing from the loan is regarded as a current transaction, and therefore not subject to authorisation by the Central Bank. It should be effected through presentation, by the interested party, to the intermediary bank, of the following: (i) parties' identification; (ii) proof of foreign exchange authorisation for contracting the loan, credit or facility; (iii) proof of registration of the disbursements; (iv) repayment plan or debit note; and (v) proof that tax due in respect of the transaction has been paid or guaranteed (withholding tax).

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 zero percent withholding tax.

Foreign exchange registration of the transfer of income from foreign direct investment in the form of profits or distributed dividends should be effected against the presentation by the interested party to the intermediary bank, with the following: (i) identification of the parties involved; (ii) proof of registration of the investment with the Bank of Mozambique; (iii) declaration, issued by an independent auditor, confirming that the profits flow from the financial year or years in question, and from operations relating to the activities of the company, explaining whether the profits were determined prior to or after any transfers required by law; (iv) proof of consent of the competent corporate body, or, in the case of the transfer of dividends, a resolution of the General Assembly meeting which decided upon the distribution of profits; and (v) proof that tax owing, in respect of the transaction, has been paid or guaranteed.

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

Mozambique resident entities are obliged to declare to the Central Bank all amounts and rights acquired, generated or held abroad, and to remit to Mozambique all income from the export of goods, services and investments made abroad. Part of the income in foreign currency may be retained abroad under specific circumstances and are subject to effective submission to the Central Bank of a monthly bank statement by the bank with which the entity in question holds the account and income offshore.

The income must be remitted by way of bank transfer and should be reflected in national currency in the account of the beneficiary at the rate of exchange used by the bank intermediating the export operation on the date of the effective remittance.

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

Besides the favorable exchange control regime highlighted herein, foreign investors may be eligible to tax incentives in Mozambique – 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 tax and other fiscal payments, deferment of the payment of taxes and other special fiscal measures as – as provided for under the Investment Law, the Regulation of the Investment Law and the Code of Fiscal Benefits, a set of rules designed mainly to attract foreign investment into the country.

SECTION 7 – Public private partnerships

7.1 Is there a public private partnership act or similar statute authorising PPPs and are both greenfield and brownfield PPP projects permitted?

Mozambique has approved and implemented a 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 PPPs, large-scale projects and business concessions.

Both greenfield and brownfield projects are permitted within this legal framework, with contract lengths depending on the type of infrastructure to be developed.

7.2 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 the concessionaire 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 competent authority.

7.3 Are government guarantees or other payment obligations of the government or contracting authority subject to appropriations or other periodic authorisations?

As a general rule, Government guarantees and other payment obligations are subject to issuance of the prior supervision *visto* by the Administrative Court.

7.4 May the government or contracting authority unilaterally amend or terminate a concession?

The Government or contracting authority may not unilaterally amend or terminate a concession contract, which must specifically describe the conditions for termination and the mechanisms for compensation in case of termination. Nevertheless, the law sets out some general conditions under which the contract can be terminated (noncompliance, abandonment, transfer of the contract without consent, and non-payment of taxes).

SECTION 8 – National update

8.1 In no more than 250 words, please describe any relevant project finance developments within your jurisdiction. This can include noteworthy projects, new structures or techniques.

The new Mozambique legal framework applicable to mining and petroleum operations, including liquefied natural gas (LNG), is expected to accelerate the implementation of the long-awaited \$50 billion onshore LNG project.

Raising capital for such a project through project finance and available securities models will certainly pose restrictions, and the Government may have to consider exceptional rights and assurances to lenders in this project, including additional sharing of risks and more robust undertakings, guarantees and assurances. Otherwise, the project may simply not be bankable, or imply commitments that cannot be met by the private partners and by the required special purpose vehicle, as entailed in most project finance models.

New bidding rounds for exploration of hydrocarbons in the offshore Rovuma, offshore Zambezi and Angoche and onshore around the Pande-Temane concession and Palmeira areas are expected to be launched shortly. However, the new Petroleum Law is still to be regulated, thus creating uncertainty and opening room for grey areas where potential bidders are concerned.



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Duarte Rocha has also been a consultant to MLGTS in all matters pertaining to Mozambique since January, 2014. From 2000 to 2002, she provided multidisciplinary legal consultancy to 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 (2002-2008). Duarte Rocha was also a managing partner and lawyer at Ferreira Rocha & Associados, Sociedade de Advogados (2008-2012), taking part in all areas of practice and advising national and foreign private companies on public sector laws, public tenders and contracts, as well as advising foreign entities on compliance with all Mozambican tax, labour and commercial obligations.

Duarte Rocha has a law degree (Polytechnic University, 2001) and attended the arbitration course at the Center of Arbitration, Conciliation and Mediation (2002).



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Prista Cunha's work focuses on legal advice to national and foreign clients in various fields of law with particular emphasis on areas of employment, commercial, corporate, investment and insurance. She has a law degree from the Polytechnic University (2008).