
THE MINING LAW REVIEW

FOURTH EDITION

EDITOR

ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH

THE MINING LAW REVIEW

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This article was first published in The Mining Law Review - Edition 4
(published in October 2015 – editor Erik Richer La Flèche)

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THE MINING LAW REVIEW

Fourth Edition

Editor
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LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-73-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOCAAT LAW PRACTICE

ANDERSON & ANDERSON LLP

BOOKBINDER BUSINESS LAW

CARCELÉN, DESMADRYL, GUZMÁN & TAPIA – ABOGADOS

CGA – COUTO, GRAÇA & ASSOCIADOS

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MINTER ELLISON

MIRANDA & ASSOCIADOS

PÉREZ BUSTAMANTE & PONCE

PINHEIRO NETO ADVOGADOS

QUINZIO & CÍA ABOGADOS

Acknowledgements

REM LAW CONSULTANCY

RICAURTE RUEDA ABOGADOS

RSM BOGARÍN Y CÍA SC

SALAZAR & ASOCIADOS ABOGADOS

SQUIRE PATTON BOGGS

STIKEMAN ELLIOTT LLP

ȚUCA ZBÂRCEA & ASOCIAȚII

VÁZQUEZ, SIERRA & GARCÍA SC

WILLIAM FREIRE ADVOGADOS ASSOCIADOS

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EDITOR'S PREFACE

I am pleased to have participated in the preparation of the fourth edition of *The Mining Law Review*. The *Review* is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, and their effects, and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 22 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes eight country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

The mining sector is facing uncertain times. Commodity prices are lower and continue to be soft. Demand growth from China, the world's largest consumer of commodities, has slowed considerably. New markets such as India are not picking up the slack. Operating costs in certain markets exploded during the good years and must now be reined in. Traditional lenders to the industry are more highly regulated and have less flexibility to assist companies during this difficult time. Equity markets know that big declines in the price of commodities have preceded recessions and bear markets and as a result are doubly cautious.

While times are tough, we know that mining is cyclical and that continued world population and economic growth as well as the depletion of current resources mean that growth in the mining sector will resume. The only question is when.

In the meantime, we are seeing a return to basics coupled with innovation. Companies are reducing their operating costs and curtailing exploration efforts. Executives are looking at new ways of doing things, from cost sharing to automation to alternative financing. When financing projects, companies now attempt to secure most if not all of the financing upfront. To do this they have to cobble together financings from various sources, including stream and royalty arrangements that in the past were only available once a project had been considerably de-risked. Adapting the financings to the particulars of each project and making sure that the various bits work together and form a coherent whole is a source of interesting and sophisticated work for mining lawyers these days.

But companies are not the only ones implementing change. In some jurisdictions, Quebec for example, governments and other stakeholders (e.g., indigenous peoples) are taking advantage of the lull to put into place comprehensive strategies for welcoming new mining projects. Such strategies include clear timelines for the approval of projects, objective project approval standards, investments in infrastructure (e.g., ports, roads, railroads, airports and power lines), and transparent rules regarding the sharing of project benefits among local communities, indigenous peoples and government, all so as to be able to ramp up quickly when opportunity strikes.

As you consult this book you will find more on topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

Erik Richer La Flèche

Stikeman Elliott LLP

Montreal

October 2015

Chapter 28

MOZAMBIQUE

Pedro Couto, Jorge Graça and Faizal Jusob¹

I INTRODUCTION

Mozambique's capital and financial markets remain small and undeveloped, but this situation is gradually starting to change to match the rapid growth and development of the country in the past decade.

This is also reflected in mining activity, which has not yet reported any notable deals, financings or IPOs except for the acquisition of equity in the share capital of the Mozambican mining company Rio Tinto Limitada. However, the relatively recently enacted Law 15/2011 (entering into force on 10 August 2011), establishing the regulations for the process of contracting, implementing and monitoring undertakings of public–private partnerships (PPPs), large-scale projects (LSPs) and business concessions (BCs), and its Regulations, approved by Decree 16/2012 (entering into force on the 4 July 2012), provides that the financial benefits for the country from each PPP, LSP or BC undertaking must be expressly referred to in the contract to be concluded between the contracting party and the contracted party. The requirement now exists for project companies to sell to Mozambican individuals – preferably via the stock exchange – a percentage of the project companies' capital ranging between 5 per cent and 20 per cent. It is hoped that these provisions will boost the capital and financial markets in the near future for mining activities in Mozambique.

It should further be mentioned that there is ongoing investment in mining activity, which has been financed mainly by foreign investment, so Mozambican investment capital is currently limited, in terms of private individual investors and Mozambican entities.

¹ Pedro Couto is a chairman, Jorge Graça is the managing partner and Faizal Jusob is the partner in charge of the mining department at CGA – Couto, Graça & Associados.

In this context, the main forms of capital market investments in mining activities are foreign direct investment, financing through financial institutions and even project finance.

Given the fact that Mozambique has little infrastructure and what is there is often damaged, those undertaking mining projects face high costs as the investment will reflect these limitations. The aforementioned financial conditions under Law 15/2011 may also be regarded as costs associated with the project.

II CAPITAL RAISING

i General overview of the legal framework

The principal corporate and securities requirements are generally governed by the Mozambican Civil Code, which classifies securities as personal guarantees and real guarantees. Personal guarantees are created by individuals or entities, pursuant to which they personally secure the fulfilment of certain obligations by their own patrimony.

In this case, the enforceability of such securities will depend on the availability of the guarantor's patrimony. As examples of personal guarantees for securing their own or third parties' obligations assumed in terms of certain agreements, a suretyship, a comfort letter or a bank guarantee are admitted in Mozambican law, although the general regime does not contemplate the comfort letter and the bank guarantee as typical personal guarantees and, therefore, does not regulate such guarantees in detail.

On the other hand, real guarantees that are regulated are pledges of moveable assets and rights, and mortgages of immovable assets. Real guarantees may assure the priority of the respective security interest in favour of the lender, provided that such security has been registered in its favour. However, there is no such mechanism for personal securities that would ensure the priority of the lender's security interest, hence personal securities are not registered.

Personal securities and pledges over moveable assets are perfected when the respective document or contract creating security is entered into, or (in case of a pledge) the pledged assets or the document granting exclusive disposal of the assets to the creditor of the pledged assets. Securities over immovable assets are perfected when they are registered with the relevant registration offices.

There are notary and registration costs for the perfection of securities that cannot be avoided or minimised, and such costs are calculated in accordance with a determined formula prescribed by law, based on the amount guaranteed by the securities that are created.

With respect to corporate law requirements relating to capital raisings, a company may have recourse to internal funding (through its own shareholders) or external funding (through third parties), which are subject to the prior approval of the Bank of Mozambique (Reserve Bank). The internal funding of the company may take place by means of supplementary capital subscriptions and shareholders' loans, and funding through third parties may assume the form of simple loans or project finance. It is also possible to increase equity and share capital and to obtain bond loans.

In the mining sector, the exploration of a mining project by a company falls within the scope of Law 15/2011, which contains provisions concerning the securities to be created over assets that have been allocated to the exploration of the mining activity

by a project company. In accordance with Law 15/2011, certain public assets (such as the land granted for exploring the project and the subsoil) cannot be subject to any form of security; however, the exploited minerals, as well as the proceeds of the sale of such minerals, can be subject to security, in particular, pledges.

If the project capital has been raised through a project finance model, the proceeds of the mining activity may be subject to securities (pledges, in particular); given the social and economic context of Mozambique, a simple form of project finance may not be feasible, so it may be necessary to create other forms of direct and indirect securities, such as the step-in rights, in the exploration of the mining activity, as the proceeds of the activity may be revealed as insufficient for securing the lender's position.

ii Market overview

Given the lack of technical and financial resources – as well as experience in the management and undertaking of mining activities – from Mozambican natural and legal persons, the vast majority of investors in the country are foreign mining companies with global coverage and vast experience in the sector. The new provisions of Law 15/2011, regarding the sale of a defined company share to Mozambican individuals, are also of relevance here.

iii Structural considerations

The main considerations to be taken into account are related to the aforementioned provisions of Law 15/2011 and its respective regulations regarding the financial benefits of the undertaking for the country, in particular the reservation for Mozambican persons of the share capital of the undertaking or joint venture equity; the payment of capital gains taxes on the transfer or sale of shares of the share capital, titles and licences whose value depends on a right to explore natural resources; and applicable exchange control provisions, notably in respect to repatriation of foreign capital.

iv Tax considerations

The Mozambique parliament approved the enabling law in respect of the Specific Regime of Taxation and Fiscal Benefits for Mining Operations (Law No. 28/2014, of 23 September), which implements the specific taxes in respect of the mining sector.

Note that under the Mining Law and Law No. 28/2014, of 23 September, the transfer of title, rights and obligations under a mining licence, whether to an affiliate or a third party, may only take place two years after the commencement of the relevant mining activities authorised by the mining licence. Such transfers must be in accordance with Mozambican law and will be subject to the approval of the government of Mozambique.

The new Mining Law expressly provides that indirect transfers of participating interests, titles or mining rights, notably by way of change of control of any licence holder, shall be considered as a transfer of rights and obligations under a mining licence and shall, therefore, require prior governmental approval.

Non-compliance with any transfer requirements will result in any such transfers being void and invalid.

Such transfers of rights may also be subject to the payment of capital gains tax. As of 1 January 2014, capital gains derived from the sale of shares of a resident company by

a non-tax resident are taxable. Further, tax relief depending on the holding period of the shares which was previously available has now been repealed, meaning now are subject to capital gains rated at 32 per cent and both seller and purchaser are several and joint liability for the payment of the tax.

The new addendum to the Corporate Income Tax Code by means of the Law No. 19/2013, of 23 September established that 'it is also considered to be obtained in the Mozambique territory, irrespective the location where the transaction occurred, the revenue/income resulting from direct or indirect transfer, onerously or gratuitously, between non-resident entities, of parts representing share capital or other shareholding interest and rights involving assets located in the Mozambique territory and any direct or indirect transaction, between non-resident entities, related to assets or shares pertaining Mozambique companies must trigger liability for taxation irrespective of where the transaction occurred, as far as directly related to Mozambique companies.'

Note that according to the new Mozambique Competition Law all transactions of concentration of companies that determine certain share of the market of certain annual turnover are subject to communication to the Competition Regulatory Entity. The determination of share of market or annual turnover will be regulated soon.

The Competition Law also mention that the transactions that are not covered by the concentration of companies as stipulated above are only subject to communication on those cases where the Competition Regulatory Entity specifically and expressly demands.

There is no distinction between taxes payable by domestic parties and those payable by foreign parties. Moreover, Mozambique has bilateral treaties for the avoidance of double taxation with the following countries:

- a* Portugal (Resolution No. 9/91 of 20 December, as amended by Resolution No. 34/2008 of 16 October);
- b* Mauritius (Resolution No. 54/98 of 12 November);
- c* Italy (Resolution No. 27/99 of 8 September);
- d* United Arab Emirates (Resolution No. 10/2004 of 14 April);
- e* Macao (Resolution No. 33/2008 of 16 October);
- f* South Africa (Resolution No. 35/2008 of 30 December);
- g* Vietnam (Resolution No. 22/2011 of 9 June);
- h* India (Resolution No. 23/2011 of 10 June); and
- i* Botswana (Resolution No. 24/2011 of 10 June).

Mozambique has entered into bilateral investment treaties with Algeria, Belgium, China, Cuba, Denmark, Egypt, Finland, France, Germany, India, Indonesia, Italy, Mauritius, Netherlands, Portugal, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States, Vietnam and Zimbabwe.

v Investment protection

Mining activities are excluded from the scope of the Investment Law, and its Regulation, which means that they do not benefit from the investment guarantees provided under the Investment Law.

However, the Mining Law sets out certain protections for foreign investors as follows:

- a* guarantee by the state of the respect and recognition of the foreign investors' property rights (including any intellectual property rights);
- b* undertaking by the state not to alter the tax regime applicable to a mining title except to make it more favourable to the holder;
- c* undertaking from the state not to expropriate the assets or rights of a mining titleholder unless required for legitimate public interest considerations and against payment of fair compensation;
- d* undertaking by the state to indemnify mining titleholders from any losses resulting from a change in mining laws (to the extent the issue giving rise to the loss cannot be remedied within 90 days); and
- e* guarantee by the state of the right to export amounts invested, profits, loan repayments (previously approved by the Mozambique Central Bank, royalties or other profits resulting from indirect investments (such as the granting of licences).

Although the applicability of these protections extend beyond what is usually offered by way of international treaties, the extent of these protections is somewhat lacking. For example, if justified by public interest and subject to the payment of fair compensation, expropriation is allowed under the new Mining Law in exceptional circumstances. As a result, foreign investors should also consider utilising protection provided by way of bilateral investment treaties when structuring their investments.

III DEVELOPMENTS

i New Mining Law

Mozambique has vast reserves of untapped coal – the Moatize coal mine in the Tete Province is currently the fourth largest in the world. The World Bank forecast in its latest report that, by 2032, Mozambique could generate up to US\$9 billion in revenues from its natural resources, in particular coal and gas, as demand from India and China continues to grow.

In July 2014, after experiencing, among other things, transportation difficulties, Rio Tinto decided to sell the entirety of its coal interests in Mozambique. Despite these difficulties, however, international mining corporations, such as Vale from Brazil and Coal India, are continuing to invest heavily in Mozambique.

In order to improve the existing poor infrastructure to unlock the coal from the Tete Province, Vale has opted to develop a new corridor that includes the building and rehabilitation of a railway line (from Moatize to Nacala) and a new coal terminal at Nacala. Other alternatives to the existing Sena-Beira Line (on which an expansion is also planned) are also under discussion. In particular, another railway corridor and associated port (from Moatize to Macuse) is being designed by the consortium Thai Moçambique Logística, which recently announced this as being a 'low cost logistics solution' to transport coal located in Moatize.

Recognising this potential, the Mozambican parliament approved a new Mining Law (Law No. 20/2014), to adjust the applicable legal framework to the current dynamics of mining activity and growing investment in the Mozambican mining market. Although this newly enacted law, among other innovative aspects, provides increased benefits for

Mozambican nationals (e.g., strengthened requirements for local content, requiring Mozambican entities to compete in public tenders, and incentives for mining companies to register on the Mozambique Stock Exchange), it is expected that it will have an impact on the mining-related capital market. Notwithstanding the recent downturn in the coal market, it is expected that, on a medium to long-term basis, the newly approved Mining Law will encourage the raising of capital for investment in mining projects.

Under the Mining Law, preference should be given to goods and services purchased or obtained from Mozambican individuals or entities. Further, the Mining Law requires that goods or services, the value of which exceeds a particular amount (to be determined in subsequent regulations), must be purchased by way of a public tender. Such public tenders must be published in widely read newspapers in Mozambique and on the website of the relevant interest holder.

In addition, foreign entities that provide services to mining operations in Mozambique are required under the new Mining Law to ‘associate’ with Mozambican entities. Details of how this obligation is fulfilled remain unclear and we expect this to be detailed in future regulations or secondary legislation.

ii New fiscal regime for the mining and petroleum industry

It is difficult to assess the impact of the new fiscal regime for the mining and petroleum industry, as the new legislation was only recently published (on 23 September 2014). It is safe to assume that the content of the new fiscal regime for the mining industry has been made publicly available to all mining industry investors, and it is premature at this juncture to assess whether, from the investors’ perspective, the raising of capital will be encouraged.

The Mining Law and Petroleum Law provides that the investors may benefit of the tax stability clauses, under which the investors may enjoy tax stability for a period of up to 10 years, counting from the date of production and may be extended up to the termination of the primary concession, subject to the additional payment of 2 per cent of the production tax.

iii Resettlement plan

Resettlement policy always entails difficulties and may raise unforeseen issues regarding investment, particularly with regard to the amount of investment in resettling affected communities.

Thus, problems and risks are to be expected, although it is not possible to accurately determine all the risks.

The new Mining Law provides that, when mining activities require the relocation of local communities already established in the area of the mining activities, the relevant licence holder must pay fair and transparent compensation, the details of which will be established in a memorandum of understanding between the licence holder, the state and the community. Where relevant, such memorandums of understanding will be a condition to the allocation of any mining exploration rights. The new Mining Law provides that, unless technical evidence confirms that mineral reserves exist in the area, any relocation of local communities must be temporary only.

Further, the new mining law provides that ongoing dialogues should be maintained between licence interest holders and local communities.

Appendix 1

ABOUT THE AUTHORS

PEDRO COUTO

CGA – Couto, Graça & Associados

With 21 years of experience providing legal and regulatory advice to private companies, government agencies and state-owned corporations throughout Mozambique, Pedro Couto is involved in initiatives such as BOT, BOOT, corporate restructuring, foreign investment, project financing, privatisation, and public tenders in areas of transport, mining, aviation, energy, oil and gas, port, rail, and commercial infrastructures. He has a solid understanding of financial, exchange control and tax legislation in Mozambique and has worked both at the municipal and national levels providing input into legislations and regulatory frameworks.

He has further worked for several governmental agencies, including the Ministry of Environmental Affairs, assisting with the establishment of toxic waste sites; the Ministry of Tourism, in the preparation of the concession tender process of the Limpopo National Park; and the National Roads Administration, in its major public works contracts.

In the private sector, Mr Couto has been involved in the negotiations of several PPPs: the concession for the Port of Maputo; the concession for the railway and the Port of the Nacala Corridor; and the concession for the Ressano Garcia power project.

JORGE GRAÇA

CGA – Couto, Graça & Associados

Jorge Graça has 37 years of experience in the law in Mozambique. He started his career as legal adviser to the government of Mozambique, where he held positions such as national director of public service organisations, secretary of the council of ministers; adviser to the President of the Republic in government and local government matters; deputy director of the local government elections office; inspector to public administrations. He was also a member of the Assembly of the Republic. In 1996 he founded the firm and since then has been advising on matters such as public and private corporate legal matters; concessions, PPP, project finance and relevant contracts; legal due diligences to

companies and public institutions in various sectors; business licensing of companies in various sectors; incorporation, mergers and acquisitions and conversions of companies; foreign investment applications; international and national funding agreements and related securities; legalisation of corporations assets; legal matters at the Assembly of Republic, review of law projects and its elaboration; public sector reform strategies and its legal instruments; and public regulation and procurement.

FAIZAL JUSOB

CGA – Couto, Graça & Associados

Faizal Jusob has 15 years of experience on juridical areas and on all corporate matters and, in particular, has worked with several banks, financial institutions, funding groups and companies regarding various issues, namely incorporation of branches in Mozambique, negotiations with Investment Promotion Centre, Gazeda – Special Economic Zones Office, Exchange Control Authorities, Mozambique Reserve Bank, Ministry of Finances and regulatory matters, advising companies exercising all activities in Mozambique.

He has further been involved in the incorporation of various mining companies, advising on all Mozambican mining legal framework, obtaining and transfer of mining titles, due diligences on mining titles, establishment of joint ventures for mining companies. His experience includes corporate restructuring, foreign investment authorisation project approvals, project financing, privatisation, and public tenders in the areas of transport, mining, aviation, energy, oil and gas activities and commercial infrastructure and has a solid understanding of financial, exchange control legislation in Mozambique and has a large experience on finance and corporate matters.

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