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# THE MINING LAW REVIEW

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SECOND EDITION

EDITOR  
ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH

# THE MINING LAW REVIEW

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# THE MINING LAW REVIEW

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Second Edition

Editor  
ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH LTD

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## EDITOR'S PREFACE

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I am pleased to have participated in the preparation of the second 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, 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 23 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, with Canada and the United Kingdom being dominant. As a result, the second part of this book includes 10 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.

In the preface to the first edition I wrote that mining had a bright future because the demographic profile of China and other emerging markets would continue to favour accelerated economic growth. At the same time I identified economic or resource nationalism as the most important threat to the industry.

I continue to be of the opinion that mining will be a growth story for many decades to come. The world population continues to increase and projections are for the addition of at least another 2 billion individuals by 2050.

In the short and medium term, however, the mining sector must successfully navigate the complex waters of continued economic nationalism and changing investment sentiment.

Governments around the world continue to exert pressure on the sector. They want more immediate revenues and benefits for their exchequers and people. This is

true in developed as well as emerging jurisdictions. In last year's preface I suggested that the best mitigation strategy was for the industry to have a strong social licence. Unfortunately, government demands have yet to be tempered by the additional challenge faced by the industry in the last 12 months.

The relative slowing of emerging market economies has caused a shift in market sentiment away from the mining sector. Investors are less sanguine about the medium-term prospects. China and India are looking at lower growth rates. Europe and Japan continue to experience little or no growth. Recovery in North America remains tepid. The froth is gone from the sector and prices of some minerals and metals are at their lowest in recent memory. This in turn has caused many investors to rethink their involvement in mining and seek opportunity elsewhere. The resulting lower stock valuations have been particularly painful for smaller mining concerns.

Not all is dark, however.

China and certain other emerging market economies have entered into a more sustainable growth phase that should allow for more predictable planning and better adequation between the demand and offer of minerals.

As investors shift from a 'growth story' to one of 'income and performance' quality is being rewarded. Greenfield projects with strong fundamentals and sponsored by technically competent companies continue to be funded and developed. This is particularly true of those projects with reasonable transportation costs to Asia.

Mineral demand continues to rise, albeit at a slower pace, but some new supplies are being deferred, particularly as cash for exploration and development remains constrained. As a result prices should stabilise over the short and medium term and perhaps strengthen thereafter.

The changes in the mining ecosystem are attracting new entrants. Valuations are down, and capital is less plentiful and more demanding. Owners of mining assets are retrenching and selling non-core assets. Some manufacturers are once again looking at securing supplies through vertical integration. Financial investors, such as private equity firms and pension funds, are starting to look at mining. This should create numerous M&A opportunities and be welcome news to mining lawyers around the world.

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 relevant.

**Erik Richer La Flèche**  
Stikeman Elliott LLP  
Montreal  
October 2013

## Chapter 28

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# MOZAMBIQUE

*Jorge Graça, Taciana Peão Lopes, Paulo Ferreira and Márcio Paulo<sup>1</sup>*

### 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.

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<sup>1</sup> Jorge Graça is the managing partner, Taciana Peão Lopes is a partner and Paulo Ferreira and Márcio Paulo are senior associates 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 a cost 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). 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**

Law 13/2007 of 27 June provides certain fiscal benefits for mining and petroleum activities. In terms of mining, this law provides that mining undertakings benefit, for five years as of the date of commencement of the mining exploitation, from exemption of customs duties due on the import of equipment for mining reconnaissance or exploration, classified under class K of the customs tariff and expressly referred to in the annex to Law 13/2007.

Such imports also benefit, for the same period of time, from an exemption on VAT and excise duties, as provided under Law 15/2002 of 26 June. These benefits are granted only when the goods to be imported are not produced in Mozambican territory, and their production in Mozambique does not fulfil the particular needs or characteristics inherent to the nature of the activity to be developed and explored.

To apply for these benefits, applicants need to (1) have been authorised by the competent authority to undertake mining activities; (2) be registered with the Tax Authority Department and have a taxpayer number; (3) have organised accounting, as per the provisions of the Code of Corporate Income Tax; and (4) have no fiscal infringements on their record.

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* Macau (Resolution No. 33/2008 of 16 October); and
- f* South Africa (Resolution No. 35/2008 of 30 December).

#### **v Investment protection**

Mining activities are excluded from the scope of the Investment Law, 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.

Foreign investors are eligible for these protections as long as their investment exceeds US\$50,000.

These protections are the following:

- 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 title holder unless required for legitimate public interest considerations and against payment of fair compensation;
- d* undertaking by the state to indemnify mining title holders 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, royalties or other profits resulting from indirect investments (such as the granting of licences).

### **III REVISION OF THE MINING LAW**

Due to the recent boom in the Mozambican mining industry, in particular the coal industry, with huge and unexploited coal deposits in the Tete province attracting significant attention from international mining companies, the government has decided to proceed with a revision of the Mining Law, mainly based on the following grounds:

- a* to give the state a share in projects in strategic sectors, such as coal;
- b* to adapt the Mining Law to the new dynamics of the mining industry in Mozambique, responding to some of the concerns emerging from the need to attract investment for the internal production and processing of mineral products;
- c* to introduce other terms and conditions for the transfer of mining titles, such as the case of transfer fees;

- d* the need to reserve the mining certificate for the undertaking of mining activities on a small scale exclusively for national citizens;
- e* to adjust the environmental classification of mining activities accordingly with the environmental legislation;
- f* to adjust the law to the mining and geological policy, which will also be subject to revision; and
- g* to harmonise the mining legislation with the principles adopted in the regulations of harmonisation of sectorial policies within the Southern African Development Community (SADC).

Some of the most relevant and innovative provisions of the draft New Mining Law, which has recently been approved by the government (and now awaits parliament ratification, in order to be published in the government's official gazette and enter into force), are related to the following matters:

Mineral water is expressly included in the scope of application of the draft New Mining Law, while methane gas associated with deposits of coal is excluded from the scope of application of the draft New Mining Law and will be governed by the Petroleum Law, mainly given that it is a non-solid mineral resource;

The reconnaissance licence no longer exists and, further to the exploration licence, mining concession, mining certificate and mining pass, the following three mining titles were added:

- a* mining treatment licence;
- b* mining processing licence; and
- c* mining products commercialisation licence.

The exploration licence is valid for two years for mineral resources for the construction industry; and five years for other mineral resources, including mineral water.

The mining certificate is valid for a maximum period of 10 years, subject to renewal.

The mining pass is valid for a maximum period of five years.

The mining concession is still valid for 25 years.

In terms of the newly added licences, the New Mining Law does not establish any time limit for its validity, but refers to specific regulations on the matter.

The mining activities and operations under a mining concession must commence within a maximum period of time of 12 months, while the mining production must commence until a maximum period of time of 48 months, as of the date of issuance of the mining concession.

The exploration licence holder is entitled to apply, with right of first refusal, for a licence authorising the exploration of minerals for construction (identified in the area subject to the exploration licence), and also for a right of use and development of methane gas associated (identified in the area subject to the exploration licence).

Moreover, the exploration licence holder is now required to communicate the discovery of minerals to the Ministry of Mineral Resources, prior to its public disclosure.

The mining certificate holder is now required to commence mining production within a time limit of 24 months, as of the date of issuance of the mining certificate.

The government may execute a mining contract with the holder of an exploration licence or mining concession, under a public tender launched for this purpose.

The mining contract must contain the following clauses:

- a* the form of participation of the government in the undertaking;
- b* local employment and training;
- c* incentives for the value addition of the minerals;
- d* actions to be taken by the mining title holder under the corporate social responsibility of the company; and
- e* a dispute resolution clause, including provisions related to arbitration.

The execution of a mining contract emerging from a public tender implies the payment of an award fee to the government.

The mining activity must be carried in compliance with:

- a* the laws and regulations in force on the use and development of mineral resources, as well as the rules over the environment protection and conservation, including social, economic and cultural aspects;
- b* the best practices for mining, in order to ensure the conservation of biodiversity, minimise the waste and the loss of natural resources and protect against adverse effects to the environment; and
- c* the respect for the rules on technical safety according to specific regulations.

Mining activities are classified as Category A, Category B and Category C.

Mining activities under a mining concession constitute Category A activities; mining activities in quarries and under exploration licences and mining certificates constitute Category B activities; and mining activities under a mining pass and exploration licences that do not involve mechanised methods constitute Category C activities.

The keys instruments for the environmental management under the draft New Mining Law are as follows:

- a* environmental impact assessment, for Category A activities;
- b* simplified environmental impact assessment, for Category B activities; and
- c* an environmental management programme, for Category C activities.

The transfer of rights and obligations under a mining title to an affiliate or third parties must be done in accordance with Mozambican legislation and subject to government approval. This is also applicable to other direct and indirect transfers of participating interests, titles and mining rights, including the transfer of shares or other forms of participations, provided that it implies the change of control of the entity holder of the mining titles and rights.

The transfer of mining titles and rights may take place two years after the commencement of the mining activity.

The transfer of mining title and rights made without complying with the above provisions is ineffective and invalid.

Moreover, the draft of the New Mining Law provides that the government will be required to approve the specific regulations on the New Mining Law within 180 days as of the date of its entry into force.

The acquisition of goods and services by the mining title holders, over a certain value, must be made by public tender and published in newspapers with high circulation in Mozambique (the value will be determined through regulations).

In terms of rights acquired prior to the entry into force of the New Mining Law, the draft New Mining Law lays down that rights acquired under an exploration licence, mining concession or mining contract will remain in force and effect, notwithstanding that the title holders may opt to be fully governed by the draft New Mining Law, as long as they convey such intention within a period of 12 months, as of the date of entry into force of the New Mining Law.

#### **IV NEW FISCAL REGIME FOR THE MINING AND PETROLEUM INDUSTRY**

In parallel with the discussion of the draft New Mining Law, the process of revision of the fiscal regime applicable to the mining and petroleum industry is currently ongoing, allegedly in order to adapt it to the present economic context of the country and to best international practices.

Some of the concerns that have been made public regarding the contents of the draft new fiscal regime for the mining and petroleum industry include that:

- a* taxpayers should have other forms of contesting the calculation of taxable income other than the judicial method (for example, administrative complaint, administrative appeal, etc.);
- b* the regime of undercapitalisation is not clear enough, namely in respect of its potential application to funding obtained from banks and other independent third parties; and
- c* the legal regime of capital gains taxation is still not clear from a technical perspective (e.g., under double taxation treaties) and from a practical point of view (e.g., the IMF issued a report on this matter, raising a question on the application of the legal regime of capital gains taxation on a hypothetical situation of a takeover in a foreign stock exchange of a company, which indirectly and at the end of the chain of participations, holds minerals or petroleum rights in Mozambique).

##### **i Capital gains taxed at fixed 32 per cent rate from 2014**

Local newspapers have reported that future sales of assets owned by foreign companies operating in the mining sector in Mozambique will be subject to a 32 per cent capital gains tax, quoting a Tax Authority official.

Allegedly, the managing director of the Department for Planning, Studies and International Cooperation at the Tax Authority said that following a change in the law approved by Mozambique's parliament, the 32 per cent rate will be applied to all deals regardless of the period of the contract.

So far the sales of assets in Mozambique owned by foreign companies or groups have been taxed at a progressively lower rate based on the length of time they had been owned by those companies or groups.

According to the news, this change to the law will be applied from 1 January 2014, but will not be retroactively applied to deals that have already been concluded.

## V RESETTLEMENT PLAN

The recently enacted Decree 31/2012 of 8 August 2012 approved the Regulations on the Process of Resettlement Resulting from Economic Activities.

These Regulations establish the basic rules and principles of the process of resettlement, resulting from economic activities of a public or private nature undertaken by natural or legal persons, nationals or foreign nationals, aiming to promote the quality of life of the citizens and protect the environment, applicable to all Mozambican territory and to natural or legal persons, public or private, nationals or foreign nationals, involved in the process of resettlement.

Under these Regulations, an 'economic activity' is defined as any action, project or undertaking, of public or private initiative, related to the use or exploration of environmental components, the application of technology or productive processes, plans, programmes, legislative or regulatory acts that affect or may affect the territory, while 'resettlement' is defined as the displacement or transfer of population affected from one point of the Mozambican territory to another point, accompanied by the restoration or creation of conditions equal or superior to the previous living standards.

The rights of the affected population are the following:

- a* to restore or increase income;
- b* to restore or increase living standards;
- c* to be transported along with its goods to the new location;
- d* to live in a physical site with infrastructure and social equipment;
- e* to have space to practise their livelihood; and
- f* to provide opinion in respect to the process of resettlement.

The person responsible for the economic activity is required to:

- a* develop and implement the resettlement plan;
- b* participate, whenever requested, in the meetings of the technical committee;
- c* implement the resettlement project in accordance with the approved resettlement plan, specific regulations and the recommendations arising out of the process of resettlement; and
- d* bear the costs related to the process of elaboration and implementation of the resettlement plan.

Public participation is ensured throughout the whole process of development and implementation of the resettlement plan, and comprises clarification requests, submission of suggestions, and recommendations and appearances in public hearings.

The infringement of the provisions of these Regulations constitutes an administrative offence, punishable by fines.

## Appendix 1

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# ABOUT THE AUTHORS

### **JORGE GRAÇA**

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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.

### **TACIANA PEÃO LOPES**

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Taciana Peão Lopes is the head of the energy, natural resources and infrastructure practice and has 15 years of experience providing legal and regulatory advice to private companies, government agencies and state-owned corporations throughout Mozambique. She has a solid understanding of public law in Mozambique, experience that includes initiatives such as BOT, BOOT, project financing, and public tenders in areas of mining, energy, oil and gas, transport, port, rail, tourism and commercial infrastructure.

Her main area of work is energy, mining, and oil and gas legislation, and she is an expert on concession matters related to these sectors.

Ms Peão Lopes also has a strong academic background providing training in arbitration and commercial law and has been a researcher with several publications related to judicial reforms and policies, and legislation drafting.

**PAULO FERREIRA**

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Paulo Ferreira has six years of litigation experience in civil, commercial, labour, administrative and arbitration fields. He joined the energy, natural resources and infrastructure department in June 2011 and has been active in the areas of energy, mines and natural resources.

**MÁRCIO PAULO**

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Márcio Paulo has six years of experience in the corporate and banking practice. He joined the energy, natural resources and infrastructure department in December 2011 and has been active in the areas of energy, mines and natural resources.

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