

Public-Private Partnerships

Contributing editors

Ivan E Mattei and Armando Rivera Jacobo



2016

GETTING THE
DEAL THROUGH 

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General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

Until 2011, PPP undertakings in Mozambique were implemented pursuant to the relevant sectoral legislation. In 2011, parliament approved the Mega Projects Law to establish a legal framework enabling, on the one hand, greater involvement of private partners and investors in the pursuit of investments in PPPs, large-scale projects (LSPs) and business concessions (BCs) and, on the other hand, greater efficiency, effectiveness and quality in the use of resources and other national assets, as well as the efficient provision of goods and services to society and the sharing, with equity, of the respective benefits.

Under the Mega Projects Law, a PPP is defined as an undertaking in a public sector, excluding mineral and petroleum resources, or in an area of provision of public services, in which, under contract and with full or partial financing of the private partner, that partner undertakes to provide the necessary investment and perform the respective activity for the efficient provision of services or goods, the availability of which to users is the responsibility of the state to guarantee. An LSP is defined as the undertaking of an investment authorised or contracted by the government with a value exceeding 12.5 billion meticalais (backdated to 1 January 2009). BCs are defined as undertakings whose object is the prospecting, exploration, extraction or use of natural resources or other resources or national property assets, carried out under the terms of the respective contract or other means of creating title to the rights granted by the government in the scope of that undertaking.

This legislation is applicable to all PPPs, LSPs and BCs carried out in Mozambique, at the initiative or under the control of public entities of either the central, provincial or district levels of government or of the municipalities. The following are excluded from the scope of application of this legislation:

- contracting for the simple provision of goods and services to state institutions, including the contracting of public works and consulting services by the state; and
- non-profit public-private partnerships of an altruistic, social, humanitarian, cultural or sporting nature, or other similar nature.

A PPP award takes the form of one of the following contractual modalities:

- a concession contract, which may take one of the following forms:
 - build-operate-transfer (BOT);
 - design-build-operate-transfer (DBOT);
 - build-own-operate-transfer (BOOT);
 - design-build-own-operate-transfer (DBOOT);
 - rehabilitate-operate-transfer (ROT); or
 - rehabilitate-own-operate-transfer;
- an assignment of operation contract; or
- a management contract.

A BC, which includes LSPs involving concessions for the use of natural resources, will take one of the following contractual modalities:

- a concession contract in one of the following forms:
 - BOT;
 - DBOT;
 - build-own-operate;

- design-build-own-operate;
- ROT; or
- rehabilitate-operate-own;
- an assignment of operation contract, which involves the assignment of operation of rights and obligations that are the object of the contract;
- a management contract for the undertaking, infrastructure and assets of the state or other public entity; or
- any other form of title of rights granted by the government for prospecting, exploration and extraction or use of natural resources or other national assets.

DBOOT and BOOT contracts are the most common forms of PPP in Mozambique.

2 What categories of public infrastructure are subject to public-private partnership transactions in your jurisdictions?

In line with the definition of PPPs provided in question 1, except for mineral and petroleum resources, which are not subject to PPPs, all other categories of public infrastructure may be subject to PPPs. Moreover, non-transferable sovereign functions may not be the object of PPPs.

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

PPP legislation comprises:

- Law No. 15/2011 of 10 August 2011, which establishes the guidelines for the process of contracting, implementing and monitoring PPPs, LSPs and BCs (the Mega Projects Law or PPP Law);
- Decree No. 16/2012 of 4 July 2012, which approves the regulations on the Mega Projects Law; and
- Decree No. 69/2013 of 20 December 2013, which approves the regulations on PPPs and small-scale BCs.

4 Is there a centralised PPP authority or may each agency carry out its own programme?

There is no centralised PPP authority and each agency carries out its own programme pursuant to the Mega Projects Law, which provides that PPPs carried out in the territory of Mozambique shall be governed by the Mega Projects Law and by the specific legislation of the sector in which the PPP is undertaken.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

The Mega Projects Law is applicable to all PPP, LSP and BC undertakings carried out in Mozambique, at the initiative or decision and control of public entities at either the central, provincial or district levels or of the municipalities.

6 How is the private party in a PPP remunerated in your jurisdiction?

As mentioned above, a PPP will take the form of one of the following contractual modalities:

- a concession contract;

- an assignment of operation contract; or
- a management contract.

A management contract consists of the assignment by the state of the management rights of an existing undertaking, at the risk of the private party and through remuneration to the private party of a management fee based on part of the revenues generated by the undertaking and the balance sheets delivered to the state.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

To prevent or mitigate political and legislative risks, notably the effects of unilateral measures or actions that may adversely affect the normal implementation, exploitation and management of a PPP undertaking or its competitiveness and financial and economic feasibility, the government or the competent and relevant public body is required to:

- submit a proposal containing the measures or actions to a competent commission or regulatory authority for its further analysis, assessment and evaluation from the point of view of its feasibility and enforcement, its technical, economic, financial and social impact and implications, and potential forms of indemnity to the private party, if any; and
- privilege the hearing and negotiation, with the private party, of matters subject to such measures or actions.

The project company shall comply with its financial, tax and exchange control obligations and prevent the occurrence of risks as well as mitigate financial, exchange control, tax and fiduciary effects that may occur. To prevent the occurrence of commercial, management and performance risks, the government shall ensure the follow up and effective monitoring and control, by the private party, of the commercial and management obligations and performance indicators. The risk of low supply or demand is to be borne by the private party, which is required to take all adequate measures to prevent its occurrence or mitigate its effects.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

No. Since the PPP agreement is subject to the Administrative Court, which decides on its legality and state budgetary provision, the approval from the Administrative Court is enough to legitimate any payment obligations from the government to the private party under the PPP agreement.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

No.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Any direct transfer of rights and obligations granted under the PPP agreement, to an affiliate or to a third party, shall be made in accordance with Mozambican law and is subject to the government's approval. The above-mentioned assignments may also be subject to the payment of capital gains tax since, as of 1 January 2014, capital gains derived from the sale of shares of a resident company by a non-resident without a permanent establishment in Mozambique are fully taxed and the tax relief previously available depending on the holding period of the shares has been revoked. Furthermore, gains resulting from a direct or indirect transfer between non-residents of capital shares or other interests and participatory rights involving assets located in Mozambique are deemed to be obtained in Mozambique, regardless of where the sale takes place and regardless of whether the transfer is gratuitous or for consideration.

Procurement process

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

The general legal regime for contracting PPPs is the public tender, and the rules governing public procurement shall apply on a subsidiary basis. Considering the public interest and once the legal requirements are met,

the contracting of a PPP may take the form of a tender with prior qualification or a two-stage tender. In particularly important and duly substantiated situations, and as a last resort measure subject to prior express approval by the government, the contracting of a PPP may exceptionally take the form of negotiation and direct award. In the event that there are no bidders, or the winner declines to develop the PPP, the contracting of the PPP may, exceptionally, take the form of negotiation and direct award. Lastly, proposals of PPPs on the initiative of private parties are subject to public tender with the intention of determining or ensuring the technical and quality criteria, price and further conditions offered by the proponent, which shall benefit from the preemption right with a margin of preference of 15 per cent in the assessment of the technical and financial proposals resulting from such tender, without any right to compensation for costs incurred in the preparation of the proposal.

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

The law does not allow for deviations from the scope or technical characteristics of the work included in the procurement documentation and provides that, if the proposal does not comply with the scope or technical characteristics of the work, it will be disqualified.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

As mentioned in question 11, proposals of PPPs on the initiative of private parties are subject to public tender with the intention of determining or ensuring the technical and quality criteria, price and further conditions offered by the proponent, which shall benefit from the preemption right with a margin of preference of 15 per cent in the assessment of the technical and financial proposals resulting from such tender, without any right to compensation for costs incurred in the preparation of the proposal.

14 Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?

No.

15 Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?

The government does not require that proposals include financing commitments for the PPP transaction and merely requires that the bidders should include an economic and financial model that will be applicable to the PPP undertaking within their proposals.

What the law stipulates is that the bidding entity and the contracted party in the PPP undertaking shall provide financial guarantees that ensure the full compliance with the obligations undertaken, namely: the good faith and seriousness of its participation in the tender, until the conclusion of the contract; the correct and complete implementation of the undertaking; and the reversion of the undertaking, at the end or on expiration of the contract, in good condition of conservation and operation.

Furthermore, the law provides that in the case of a strategic PPP undertaking or one of special social-economic interest for the country that is not financially feasible by itself and to which the state should contribute, the entity responsible for the financial oversight may, upon the express consent of the government: participate in its financing or provide a financial guarantee in favor of the undertaking for the purpose, on due consideration; facilitate access to guarantees for financing requested from multilateral or government institutions; or grant an allowance or compensation for the provision of its services or sale of products at prices or tariffs administratively fixed below or close to the actual cost of such services or products.

16 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

The government is entitled to request a legal opinion from the public prosecutor on legality matters, hence in theory it may request an opinion on the enforceability of a PPP agreement. However, and to the best of our knowledge, this has never happened since such agreements are subject to the administrative court visa, which is a condition precedent for its global effectiveness. Given this, it has been understood that a legal opinion from the public prosecutor would be unnecessary, since the administrative court visa is the proper way to confirm the enforceability of the agreement. The administrative court visa aims to assess the PPP agreement's legality and state budgetary provision, as well as confirm the fulfilment of the most favourable conditions to the state.

In addition to the above, it is common for the state, under a PPP agreement and in its role as conceding party, to provide certain representations and warranties, for instance:

- that such agreement was approved by the council of ministers or by the relevant and competent government entity;
- that the signatory of the agreement in representation of the state has the necessary power and authority to execute the agreement on behalf of the state; and
- that the agreement constitutes legal, valid and binding obligations of the conceding authority, enforceable in accordance with its terms.

17 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

The Mega Projects Law prescribes that the implementing entity of a PPP, LSP or BC shall:

- take the form of a commercial company, under the terms of the applicable legislation;
- have as its purpose, clearly defined and capable of being monitored, the implementation of the respective undertaking; and
- have a duration not less than the period of duration of the contract related to the undertaking.

As a consequence, the Mega Projects Law does not seem to provide any type of restriction on the participation of foreign entities in PPP projects. However, the Mega Projects Law provides that PPPs, LSCs and BCs carried out in the territory of Mozambique shall be governed by this legislation and, among others, by specific legislation of the sector in which the PPP, LSC or BC is located, which may contain legal provisions on minimum requirements for local participation or restrictions on the participation of foreign entities.

Design and construction in greenfield PPP projects

18 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

There is no particular form of contract for design and construction activities, however the Regulations on the Exercise of the Activity of Civil Construction Contractors and Consultants provides that construction or services contracts to be executed in Mozambique are governed by Mozambican law.

19 Does local law impose liability for design defects and, if so, on what terms?

Local law provides warranties for defects in the construction of buildings or civil works, but does not refer to liability for the design but merely for defects in construction by the contractor. In addition, the Mega Projects Law stipulates that the private partner and the contracted party are responsible for ensuring, through the PPP, the prevention and mitigation of risks of defective conception, design and engineering and construction related to the undertaking.

20 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

Warranties for defects in the construction of buildings or civil works are, in general, governed by the civil code and also by the Consumer Protection Law, since this is applicable to all natural and legal persons, public and private, that habitually perform activities of production, manufacturing, import, construction, distribution or commercialisation of goods and services to consumers, for a price.

With regard to construction works contracts in general, the developer shall verify the works before acceptance, with all parties being entitled to hire experts to perform this task. A lack of verification or communication implies acceptance of the works.

The developer of the works shall denounce the defects to the contractor within one year after their discovery.

If the purpose of the works is the construction, modification or reparation of buildings or other property destined for long-term use, the contractor is responsible before the developer if, within five years of the acceptance of the works or within the agreed warranty time frame, the building or property collapses totally or partially or presents serious defects or risk of collapsing.

If the defects can be corrected, the developer is entitled to request their elimination; if the defects cannot be eliminated, the developer is entitled to request a new construction.

If the defects are not eliminated or a new construction does not take place, the developer may demand the reduction of the price or the termination of the contract, if the defects do not allow the construction works to proceed with their stated aim.

These rights exist without prejudice to the right of being indemnified in the general terms of the law.

All of these rights expire within the period of one year from the date of refusal of the acceptance of the works or from the date of acceptance with reservations.

If the defects were unknown by the developer and he or she accepted the work, the expiry date is counted from the day the defects were denounced.

The contractor is not responsible for the defects if the developer accepted the works without reservations, knowing about the defects.

Therefore, Mozambican law provides for a mandatory warranty of five years for defects in the construction of buildings or civil works, with the parties being allowed to increase or reduce the warranty period.

Nevertheless, it has been widely discussed if the contracting parties are allowed to agree a reduction of the warranty time period or if the freedom given by law to agree a different warranty time frame only applies to situations where the agreed warranty exceeds the period of time established by law.

The legal doctrine tends to be of the position that the five-year warranty is a mandatory legal requirement and must not be reduced by the parties, as it is grounded on the need to protect the public interest, which includes the solidity of buildings, and the interest of the developer, who should also be prevented from the consequences, if any, of what could be its own inexperience and inability to detect the defects in a period of time shorter than five years.

With particular reference to public construction contracts, the law provides that the contractor shall offer a definitive warranty to the developer to secure the good and punctual fulfilment of his or her contractual obligations, this being a prior condition for the signing of the contract. The warranty may be offered in the form of a bank guarantee, bank deposit, certified cheque, government bond or guarantee insurance, and must not exceed an amount corresponding to 10 per cent of the value of the bid proposal.

The law lays down a five-year warranty for defects in public construction contracts, counting from the completion of the works, although, this warranty period may be reduced by the parties in the relevant contract to a minimum period of one year.

Given the above, public construction contracts and civil construction works contracts have the same mandatory, five-year warranty period for defects. However, specifically in the case of public construction works contracts, the law establishes that, depending on the nature of the works to be performed, the parties may agree in the contract to reduce the limit of the warranty period for defects to a minimum of one year.

21 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

Yes, liquidated damages for delay in construction are enforceable. Certain penalty clauses may be considered unenforceable if they are excessive, in which case the court is entitled to reduce them in a fair manner.

22 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

The law in force in Mozambique does not accept the exclusion of liability through a contract, meaning that parties agree in advance that, in the case of an event of non-compliance, faulty compliance or delay in compliance, the debtor shall not be made liable. However, the law accepts limitation of liability on the basis of a contractual clause. Therefore, a clause on limitation of liability shall be structured or worded in such a way that it does not mean or lead to an exclusion of liability.

If any of the events of default mentioned above take place, a non-liability clause in a contract would not prevent a claim from the creditor being accepted and ruled by the relevant court in Mozambique.

Regarding indirect or consequential damages, the law establishes compensation or indemnification as a duty of the debtor. The principle is that the debtor's duty to indemnify the creditor cannot be excluded in advance, meaning on a contractual basis.

In special cases stated by the law, such as selling third-party properties or selling encumbered assets, if the seller is not culpable the duty to compensate losses is excluded.

Thus, exclusion of liability clauses regarding direct or consequential damages are considered null and void under law, as one of the contracting parties renouncing compensation in advance would lead to exclusion of liability.

Nevertheless, the law allows:

- the limitation of civil liability;
- the establishment of a penalty clause, which may relate to limitation of liability as it would set a pecuniary amount for compensation to be paid to the creditor in the case of an event of default by the debtor; and
- the offended party to renounce a compensation entitlement following the occurrence of the unlawful act that caused the damage.

The obligation to compensate comprises not only direct and indirect damages, but also consequential damages (such as loss of profit and loss of contract or financial costs), provided that there is a relationship of cause and effect between the alleged event of default and the damages to be compensated.

Therefore, Mozambican law requires the existence of a causal link between the unlawful act and the damages or losses suffered, in order to prove that the damage only occurred due to, and as a consequence of, the unlawful act. Indeed, the obligation to compensate regardless of culpable behaviour is an exception and only takes place in cases duly specified by the law.

23 May a contractor suspend performance for non-payment?

Yes. Mozambican law provides a 'noncompliance exception', which is the prerogative given to the contracting parties, under bilateral contracts, to refuse to fulfil contractual obligations while the opposite party does not fulfil its obligations. Thus, a contractor may suspend performance for non-payment based on the noncompliance exception.

24 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

No.

25 Are 'equivalent project relief' clauses enforceable under local law?

Yes.

26 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

The revision or amendment of the terms of the PPP agreement shall take place only through addenda and subject to agreement by the contracting parties, or for purposes of correcting or adjusting situations arising from events or factors out of control of the will and professional capacity and

management of the contracting parties. Terms can also be revised or amended to mitigate the effects of force majeure events.

27 Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

Yes. In fact, the Mega Projects Law permits, without prejudice to the protection of the equitable economic-financial balance contractually agreed in PPP undertakings already executed between the contracting parties, the renegotiation of certain contractual clauses deemed relevant for such purpose, with a view to prevent and mitigate risks and equitably share benefits related to the undertaking, in conformity with the provisions of the Mega Projects Law. Furthermore, the Mega Projects Law provides that the renegotiation of the PPP agreement is justified if it is proven that the state suffered damages or loss of profits of at least 25 million meticaís per year.

28 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

No.

29 Are there any other material provisions related to design and construction work that PPP agreements must address?

No.

Operation and maintenance

30 Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

The management, exploitation and maintenance of the undertaking comprises all stages of the planned period of operation, in which the operational management and exploitation of the activity, as well as its current and periodical conservation and maintenance, occur in addition to and in compliance with the respective PPP agreement and the applicable legislation. Given this, private parties' obligations during the operating period are mainly defined in the PPP agreement, without prejudice to the need to comply with the applicable sectoral legislation, where relevant.

31 Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

Under the Mozambican legal system, the principle is that, if a person is required to repair damage, he or she should reconstruct the situation that would have prevailed if the event that caused the damage had not occurred. In terms of calculation, the law also prescribes that the obligation to indemnify comprises not only the damage caused but also loss of profits. Credit compensation is permitted, however the following credits are not subject to compensation:

- credits emerging from unlawful acts;
- credits not subject to seizure; and
- credits of the state or other public bodies, unless authorised by law.

32 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

There is no legal provision requiring that facilities be refurbished before they are handed back to the government party at the end of the term. However, the Mega Projects Law Regulations stipulate that the hand-back procedure comprises:

- the assessment of the fulfilment of the contractual obligations of each contracting party;
- due diligence to the assets;
- an assessment of the technical conditions and quality of the assets and goods subject to the hand back, as well as the value of investments made but not yet amortised and to be reimbursed by the private party; and
- the recipient of the reserve of economic stabilisation of the undertaking.

The planning for the hand-back of the undertaking, including the acts deemed essential to ensure the continuity and sustainability of its

management and functioning after the hand-back, shall be approved and commence at least three years in advance of the termination date.

Risk allocation

33 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

The prevention and mitigation of risks by the contracting parties constitutes their permanent obligation in the entire process of the PPP, through compliance with the following principles:

Risks inherent in or arising from the professional, technical, technological, commercial or management capacity, which when occurring have a negative impact on the accomplishment of the purposes, activities, goals or benefits contractually agreed, are the responsibility of the private partner and the contracted party, which is responsible for their prevention and mitigation and the assumption of the consequences, damage and losses that may arise from the occurrence of such risks.

Political and legislative risks, and risks of conflicts of interest of an institutional nature and of land concession and public planning which, when occurring, entail effective damages or losses for the undertaking, are the responsibility of the state, which is responsible for their prevention and mitigation and for the assumption of the consequences, damage and losses that may arise from the occurrence of such risks.

Moreover, the private partner and the contracted party are responsible for performing the prevention and mitigation of commercial, management and performance risks of the PPP.

34 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

Usually, under a PPP agreement the conceding authority has the contractual obligation to support and make every effort to assist the project company in identifying and seeking the grant or issuance, maintenance and renewal of all approvals, such as environmental permits, taxation, work permits, land, water or any other permits issued by relevant government authorities or private parties, and to support, accelerate, cooperate with, and provide assistance to the project company in its relationship with the competent government authorities in order to obtain any such approval and any renewal of such approvals in a timely fashion. Hence, a potential delay in obtaining the necessary permits, if not caused by the culpable behaviour of the private party, is understood to be a breach of contract by the government.

35 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

The Mega Projects Law provides that the effects of force majeure events shall be mitigated under fair terms for both parties, as well as for third parties affected, in accordance with the liability, obligations and rights contractually undertaken and applicable to each party. The occurrence of an event of force majeure exempts the parties from any liability related to the fulfilment of their contractual obligations, if such fulfilment was affected by the effects of the force majeure event.

PPP agreements executed in Mozambique usually include clauses providing that any failure or delay in performing any obligations under the contract by either party as a result of a natural force majeure event shall not be deemed a default or breach of contract, provided that the party affected by such an event has taken all prudent and reasonable precautions and reasonable alternative measures in order to prevent or reduce to a minimum and mitigate the effect of any delay caused by such an event, and complies with the terms and conditions of the contract. A natural force majeure event means any act, event, or circumstance or combination thereof of which:

- is outside the control of the affected party;
- is not the result of material breach by the affected party or his or her obligations;
- could not have been prevented or avoided by the affected party; and
- prevents or delays the fulfilment by the affected party of all or a substantial part of its obligations.

It usually refers to the following type of acts: acts of God, lightning, earthquake, hurricane, storm, typhoon, tornado, washout, epidemic, fire,

subsidence, flood, drought and other extreme weather or environmental conditions, meteorites, etc.

It differs from a political and legislative risk event that is usually defined as, amongst others, the following:

- insurrections, uprisings, civil unrest, revolutions, acts of sabotage, acts of terrorism or civil conflict;
- a change in law;
- an expropriation event;
- strikes or other labour union-motivated initiatives for political reasons;
- boycott, sanction or embargo imposed by any government on Mozambique; and
- any other event or circumstance of a similar nature to those described above.

To the extent that a natural force majeure event prevents or delays the performance by the affected party of any of its obligations under the contract, the time limits stipulated in the contract for the performance of such obligations shall be deemed suspended during the occurrence of the event. Neither party shall be excused from any failure to perform its obligations under the contract in the following circumstances, except to the extent that they result directly from a natural force majeure event:

- breakdown, failure, destruction or unavailability of, or accidents affecting, equipment, machinery, plants, spare parts or materials;
- delay in the performance of any contractor or subcontractor of the affected party; and
- normal wear and tear.

36 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

Commonly, PPP agreements executed in Mozambique merely refer to the risk of government entities in terms of potential lack of cooperation regarding the issuance of required permits and licences, providing that the conceding authority assists the project company with, and procures from the competent government authorities, the grant and transfer to the project company of all approvals necessary for the purposes of the project.

37 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

The PPP agreements usually define project expropriation events as:

- expropriation or revocation decreed as a result of any acts, events or circumstances or any combination thereof that are not the result of a breach by the project company of its obligations under the contract, and compulsory acquisition or nationalisation by any government authority of all or part of the project assets or any assets or rights of the project company or any of its shareholders under the project contracts;
- the revocation of all or part of the land rights granted to the project company over, or ancillary to, the project site;
- any politically motivated action by any government authority that is aimed at or that directly affects the project, the project company or its shareholders and that aims to deprive, or succeeds in depriving, the project company or any of its shareholders of any right or benefit conferred to them under any legal requirement or granted under the project contract, or that treats the project company or any of its shareholders less favourably than other entities in similar situations; or
- any other similar action by a government authority, or any omission of a government authority when it is legally or contractually obliged to act, which adversely affects the rights of the project company or any of its shareholders, the enjoyment of their respective benefits, or the fulfilment of their obligations under the project contract.

A change in law is commonly defined as:

- the effective start, revocation, amendment, extension or alteration of the interpretation or application of any legal requirement;
- the requirement for an approval that was not required on the signature date;
- a change to the terms and conditions or to the interpretation or application of any approval or addition of new terms and conditions after granting said approval; or
- the revocation or cessation of effectiveness of any approval before the expiration date of such approval, provided that the project company is in compliance with the material requirements and conditions

Update and trends

Most of the PPP undertakings recently awarded in Mozambique refer to power generation projects based on different energy resources, such as natural gas, coal, hydro and solar, since the government is keen to industrialise the country and, as a consequence, to respond to increasing electricity demand in the country.

established therein or, for an approval granted for a limited period, its non-renewal (or its renewal in terms or subject to conditions less favourable to the project company), provided that the project company has observed all the requirements applicable to the grant of that renewal.

38 What events entitle the private party to extensions of time to perform its obligations?

The Mega Projects Law stipulates that the government may, by means of an addendum to the PPP agreement, authorise the extension of the period of duration of the contract for compensation of:

- additional investments carried out at the express request of the government and agreed upon in an addendum to the contract approved by the responsible entity;
- a price or tariff administratively determined by the government below the cost price and the agreed margin of profit; and
- mitigation of effects of force majeure events that occurred.

39 What events entitle the private party to additional compensation?

Additional compensation for the private party may arise from acts of war, invasions, armed conflicts, acts of foreign enemies or blockades, insurrections, uprisings, civil unrest, revolutions, acts of sabotage, acts of terrorism or civil conflict, changes in law, expropriation events, strikes or other labour-union motivated initiatives for political reasons, boycotts, sanctions or embargoes imposed by any government on Mozambique, restrictions, rationing, or closure of ports or rail tracks, docks, or other installations intended for use by maritime or rail transport respectively, or in the provision of services for those activities, and any other event or circumstance of a similar nature, provided that, in each case, such events, circumstances, or actions described above:

- are outside the reasonable control (direct or indirect) of the project company;
- cannot, despite the exercise of reasonable diligence, be prevented or avoided by the project company;
- are not the direct or indirect consequence of material breach by the project company of material obligations under the contract; and
- occur in or affect Mozambique.

40 How is compensation calculated and paid?

The risk allocation structure and risk mitigation and compensation mechanisms set out in PPP agreements executed in Mozambique tend to be consistent with the requirements of the Mega Projects Law. The risks identified, whether potential or real, are attributable to the responsibility of the private party or public party within the term of the PPP undertaking. In the case of doubt about the assumption of risk between the contracting parties, the effects of such risk shall be proportionally borne by the parties, taking into consideration the levels of participation of each party involved in the PPP. The value of the risk subject to assumption is determined based on the assessment of the damages caused by, or arising from, the effects of the occurrence of such risks.

41 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

Commonly, under PPP agreements the project company shall establish and maintain in force (or cause to be established and maintained in force) insurance and reinsurance policies covering all risks to property of the project, subject to any exclusion from normal policies. It shall also establish and maintain in force policies of liability insurance and reinsurance with adequate levels of coverage against bodily injury, death and property

damage, provided that the project company is entitled to obtain any additional insurances it may require from time to time in connection with the project.

Default and termination

42 What remedies are available to the government party for breach by the private party?

If any of the grounds for termination established in the legislation or under the PPP agreement is fulfilled, the government is entitled to notify the private party to fulfil its obligations and repair damages potentially caused by the breach, within a period of 120 days as of the date of notification. If this does not happen, the government may immediately terminate the PPP agreement. In this case, the private party loses the performance guarantee, without prejudice to the entitlement of the government to claim further compensation for potential damages and losses emerging from the termination of the contract.

43 On what grounds may the PPP agreement be terminated?

The Mega Projects Law establishes that the contracting parties shall stipulate, in the PPP agreement, the causes for its rescission or termination and the respective mechanisms of indemnification, as applicable.

Moreover, it provides that, without prejudice to the provision of the preceding paragraph, the following constitute causes for rescission of the contract related to the PPP:

- serious breach of the contract, which affects the objectives and purposes of the PPP;
- abandonment of the execution of the contract or the implementation of its object, or the undue suspension thereof;
- transfer to a third party, by the contracted party, of its contractual position or the conclusion and operation of another business arrangement with the same objectives as those of the contract in force, whether temporarily or definitively, without the written approval or consent of the contracting party and the entities responsible for sectoral and financial oversight;
- lack of payment of fees or other consideration due under the terms of the contract; and
- breaching the provision of public goods or services under the contractually agreed terms.

44 Is there a possibility of termination for convenience?

As mentioned above, the Mega Projects Law establishes that the contracting parties shall stipulate in the PPP agreement the causes for its rescission or termination and the respective mechanisms of indemnification, as applicable (ie, the principle of contractual freedom of the contracting parties, in which the contracting parties are free to define the content of their contracts, applies to the PPP agreement). Thus, the possibility of termination for convenience may be applicable if agreed by the parties.

45 If the PPP agreement is terminated, is compensation available?

The Mega Projects Law prescribes that the contracting parties shall stipulate, in the contract, the causes for its rescission or termination and the respective mechanisms of indemnification, as applicable. There is a difference between termination for convenience, default by the private party, events outside the parties' control and government-party default. As an example, it is common to distinguish termination for:

- any breach of the material obligations;
- any political and legislative risk event; and
- the failure to make any obligated payment.

Termination compensation is usually paid taking into consideration several matters, such as the financial model, the formula agreed by the parties for calculating the purchase price, and senior debt and shareholder equity contributions.

Financing

46 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

The Mega Projects Law states that, for a strategic PPP project or project of special social-economic interest for the country, which is not financially

feasible by itself and to which the state should contribute for its economic-financial feasibility, the entity responsible for the financial oversight of the relevant PPP project may, upon express consent of the government:

- participate in its financing or provide a financial guarantee in favour of the project;
- facilitate access to guarantees for financing requested from multilateral or government institutions; or
- grant a subsidy or compensation for the provision of its services or sale of products at prices or tariffs administratively fixed below or close to the actual cost of such services or products.

47 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Direct agreements entered into between the government and lenders are common in PPPs. Under such agreements, lenders are normally granted certain rights, such as:

- step-in rights in the event of violation a PPP project contract by the entity that was awarded the relevant contract;
- government confirmation of its support for the relevant PPP project;
- subject to the mandatory applications, government confirmation of the awarding of the permits, consents, licences, authorisations, registrations, exemptions, submissions, etc, necessary to implement the PPP and perform its obligations under the necessary financing;
- government agreement for the provision of notice prior to termination or suspension and for the extension of the period for remedying the circumstances of breach of contract; and
- government confirmation of its consent to security over the contract and commitment to pay amounts as directed by the lenders.

48 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

As stated in question 47, direct agreements commonly provide for step-in rights in the relevant PPP in the event that the entity holding the rights violates the PPP agreement. Direct agreements are also structured in such a manner that lenders, when exercising their step-in rights, may appoint a qualified entity to take over the rights and obligations granted under the relevant PPP agreement.

49 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

The cure rights awarded to lenders are intended to remedy situations of breach of the PPP contract by the project company and are not intended to go beyond those available to the project company.

50 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

There are no restrictions on refinancing. The only requirement refers to the need to implement equitable sharing of extraordinary direct benefits to protect the country's economic competitiveness, under the contractually agreed terms. Pursuant to the Mega Projects Law, extraordinary direct benefits are defined as unforeseen gains or profits that recur over a minimum of three successive financial years, arising from market factors external to the company and its management capacity, the annual average of which in each three year-period exceeds, by a contractually agreed percentage, the agreed levels of return of the investment made. Extraordinary direct benefits cover, among other things, capital gains obtained in prices of transfer of profits on transactions between affiliates, and capital gains obtained within refinancing operations and purchase and sale of debts related to the PPP, regardless of the market in which such transactions and operations take place.

The equitable sharing mentioned above must take one of the following forms:

- reinvestment in the national territory;
- constitution of a reserve for carrying out additional investments or to cover extraordinary losses of the undertaking; and
- financial activities carried out and maintained in the country.

Governing law and dispute resolution

51 What key project agreements must be governed by local law?

As described in question 18, the Regulations on the Exercise of the Activity of Civil Construction Contractors and Consultants provides that construction or services contracts to be executed in Mozambique are governed by Mozambican law.



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52 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

Local law does not establish specific immunities for the government under a PPP, nevertheless and for the avoidance of doubt it has been common to include in PPP agreements a clause referring to the 'waiver of sovereign immunity', where the project company irrevocably and unconditionally agrees that it is subject to suit with respect to its obligations and that the execution, delivery and performance by it of the PPP agreement constitutes a private and commercial act. In addition, it is also common for the government to irrevocably and unconditionally agree that:

- in the case of any proceedings (including any arbitration proceedings) filed against it or against its assets in connection with the PPP agreement, neither the government nor any party on its behalf will claim immunity in respect of such proceedings or with respect to any of its assets;
- it irrevocably and unconditionally waives any immunity rights that it or its assets currently have or may have in future in any jurisdiction in connection with any such proceedings; and
- it consents generally to the enforcement of any judgment rendered against it in any such proceedings (including any arbitral proceedings), in any jurisdiction for the purposes of awarding any compensation or commencing any process in connection with said proceedings.

53 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

The resolution of disputes emerging in any phase of a PPP undertaking is processed under the terms contractually defined between the contracting

parties, in compliance with the applicable legislation in force on the matter. In order to enable greater speed in the resolution of disputes and preserve the dynamism of business economic life, especially to meet collective needs, the PPP contract may prioritise the resolution of disputes emerging therefrom via mediation and arbitration, under the terms of the applicable law.

54 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

There is no legal provision establishing a mandatory requirement to enter into mediation or other preliminary dispute resolution procedures as a condition for seeking arbitration or other binding resolution; rather, it mainly depends on the contractual provisions agreed by the parties. From our experience and in the event of a dispute, usually the contracting parties agree to attempt to resolve such dispute in good faith through negotiation between the representatives of each party or through submission to an expert's determination. In the event that the dispute is not resolved in either of the above-mentioned ways, the parties are entitled to submit the dispute to arbitration.

55 Is there a special mechanism to deal with technical disputes?

There is no special mechanism to deal with technical disputes, but it is common for the contracting parties to refer such technical disputes to expert determination. If the expert determination does not settle the dispute, it will be submitted to arbitration.

Getting the Deal Through

Acquisition Finance	Domains & Domain Names	Labour & Employment	Public Procurement
Advertising & Marketing	Dominance	Licensing	Real Estate
Air Transport	e-Commerce	Life Sciences	Restructuring & Insolvency
Anti-Corruption Regulation	Electricity Regulation	Loans & Secured Financing	Right of Publicity
Anti-Money Laundering	Enforcement of Foreign Judgments	Mediation	Securities Finance
Arbitration	Environment	Merger Control	Securities Litigation
Asset Recovery	Executive Compensation & Employee Benefits	Mergers & Acquisitions	Ship Finance
Aviation Finance & Leasing	Foreign Investment Review	Mining	Shipbuilding
Banking Regulation	Franchise	Oil Regulation	Shipping
Cartel Regulation	Fund Management	Outsourcing	State Aid
Climate Regulation	Gas Regulation	Patents	Structured Finance & Securitisation
Construction	Government Investigations	Pensions & Retirement Plans	Tax Controversy
Copyright	Healthcare Enforcement & Litigation	Pharmaceutical Antitrust	Tax on Inbound Investment
Corporate Governance	Initial Public Offerings	Private Antitrust Litigation	Telecoms & Media
Corporate Immigration	Insurance & Reinsurance	Private Client	Trade & Customs
Cybersecurity	Insurance Litigation	Private Equity	Trademarks
Data Protection & Privacy	Intellectual Property & Antitrust	Product Liability	Transfer Pricing
Debt Capital Markets	Investment Treaty Arbitration	Product Recall	Vertical Agreements
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