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# NEWSLETTER



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# EDITOR'S LETTER

Dear Reader:

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We wish you a Happy reading!

With regard to working hours DL 2/2014 allows for work periods to be differentiated based on shifts, without mandatory rest periods, as long as such shifts are followed by adequate compensatory rest periods to be determined by the employer in accordance with operational requirements and international best practice.Cont. Pág. 2

Situations resulting in annulment are any which violate any provision of law, but which do not lead to nullity under the CCom as indicated above, and also resolutions that have not been preceded by the provision to a shareholder of information requested and to which said shareholder is legally or statutorily entitled, or resolutions made at a general assembly the convocation of which contains any irregularity (this does not include irregularities...Cont. Pág. 4

## TECHNICAL INFORMATION

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# THE SPECIAL EMPLOYMENT REGIME APPLICABLE IN THE ROVUMA BASIN PROJECT

## I. Introduction

Mozambique's Rovuma Basin (RB) is located in the north of the country, partially covering Cabo Delgado Province.

The discovery of natural gas deposits in the RB has led to many local and foreign businesses setting up in the area and as a result there has been an increase in the contracting of both local and foreign staff.

Decree-Law no. 2/2014, of 2 December (Decree-Law No. 2/2014) establishes special legal and contractual arrangements governing the Rovuma Basin Project, and introduces special labor rules and conditions which modify the general standards found in the Labor Law, Law n. 23/2007 of 1 August (LT). This article will discuss those rules governing the entry and stay of foreigners and not the employment of foreigners, which will be analyzed in a separate article.

Decree-Law (DL) No. 2/2014 is only applicable to projects developed within the RB Project, under Concession Agreements for Exploration and Production, or additional terms joined to these, and under Governmental Agreements, as well as under other contractual arrangements to which the Government is a party.

Those legal entities entitled to use the terms and conditions of the special labor regime established by DL 2/2014 are:

a) Concessionaires with exploration and production contracts in Areas 1 and 4;

b) Special Purpose Entities directly or indirectly established by the Concessionaire(s) under a) above, for the purposes of the Rovuma Basin Project;

c) Persons who enter into contracts with the Concessionaire(s) per a) above, or with the entities referred to in b) above, for the RB Project;

d) Subcontractors and any other persons directly involved in the RB Project; and

e) The National Hydrocarbons Company, ENH, its affiliates or any other entity qualifying as a state-owned company as part of the RB Project.

## II. Special Employment Regime

### • Fixed term employment contracts

Article 42 of the LT establishes limits for fixed term employment contracts. The general rule is that fixed term contracts shall be for a period not exceeding two years and may only be renewed twice, with the exception of small and medium sized enterprises which are free to use fixed term contracts in the first ten years of operation without applying the general rule particularly as regards the number of contract renewals.

Article 42 is not applicable to the RB Project because under paragraph 1 of Article 21 of DL 2/2014 fixed term work contracts of both established and uncertain duration can be used and renewed one or more times, during the construction phase of each investment in the RB. Thus, employers covered by the RB regime do not run the risk of seeing fixed-term employment contracts converted into open-ended contracts as happens under the general rule of the LT when the number of renewals exceeds two. This provision applies to large, medium-sized and small businesses, provided that they are covered by DL 2/2014.

### • Limits to normal working hours

Article 85 of the LT establishes limits to normal working hours. Under this provision, the normal work period cannot exceed forty-eight hours per week and eight hours per day, except in the circumstances provided for in paragraph 2 of Article 85, which allows for the extension of normal working up to nine hours per day, or up to 12 hours per day when agreed as part of a collective bargaining instrument.

If normal working hours are extended, LT provides for a half-day supplementary rest period per week subject to a weekly rest of at least twenty consecutive hours.

Other than for administrative services, DL 2/2014 establishes a 12-hour working day as the standard without the need for a collective bargaining instrument. The DL provides that compensatory rest and holiday periods are to be established in the employment contract.

With regard to working hours DL 2/2014 allows for work periods to be differentiated based on shifts, without mandatory rest periods, as long as such shifts are followed by adequate compensatory rest periods to be determined by the employer in accordance with operational requirements and international best practice.

## III. Conclusion

Those entities subject to the special rules established under DL 2/2014 benefit from special and more flexible rules governing labor relationships as regards fixed term contracts and working hours.

Pursuant to Article 21 of the DL work periods can be defined per shift and without observing mandatory rest requirements as long as shifts are followed by a compensatory and adequate rest period. This rest period will be established by the employer depending on operational requirements and in compliance with international best practice in the industry.

Under the special regime, employers falling within the RB Project area may also implement other labor practices necessary for the development of projects to the extent that these comply at all times with Mozambican law and international labor standards applicable to the relevant type of work, as well as to social requirements such as health and safety, that the RB Project financiers are to define.

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## DISSOLUTION AND LIQUIDATION OF COMPANIES - BRIEF CONSIDERATIONS

Commercial companies are created to comply with the objectives set out in their articles of association. However, in the course of its existence a company may face various challenges. These may arise from decisions by partners or as a result of legal imposition, and can result in the company permanently ending its activities. In such cases the company will have to go through a process called "dissolution and liquidation" before it can be considered formally closed.

Pursuant to paragraph 1 of Article 229 of the Commercial Code, companies are dissolved as provided for by law and the company's own articles of association. Article 229 provides examples of potential causes of dissolution, including a decision by shareholders. In this article we will focus on this type of dissolution which generally includes matters such as (i) how the liquidation process will be conducted, (ii) appointment of liquidators, who are usually the company's administrators, (iii) establishing a deadline for completion of the process, and (iv) establishing a deadline for approving the company's accounts after registration of the dissolution.

In order for the dissolution to take effect it must be registered with the Registry of Legal Entities (hereinafter "CREL") by presenting a resolution taken by the shareholders. This registration must be duly published in the Government Gazette. Once registered the company being dissolved immediately goes into liquidation. Note that liquidation may be judicial or extra-judicial. Extra-judicial liquidation takes place with the consent of the partners while judicial liquidation takes place under the supervision of the court. Extra-judicial liquidation should take place within a maximum period of three years from the date of registration of the dissolution to the final closure (paragraph 1 of Article 236 of the Commercial Code). If the process is not completed within the statutory period, then it continues in court (paragraph 2 of Article 236 of the Commercial Code).

In our opinion dissolution reflects the desire of the partners to close the company, and this desire is expressed in a resolution of the General Assembly and in registration with CREL. Liquidation on the other hand, is a procedure comprising a series of acts intended to quantify assets, pay liabilities and allocate the balance, if any, among the partners. The liquidation process precedes the extinction of the company. Therefore, one should not refer to a "dissolution process" since dissolution is an act by the shareholders, but instead refer to a "liquidation process" which occurs immediately after the registration of the dissolution.

When the company enters liquidation the following must be carried out: (i) notification of dissolution to the relevant authorities (including the licensing entity, labor organizations, social security, the Ministry of Finance, and the Investment Promotion Centre if applicable), (ii) shareholders' resolution approving the asset list and accounts of profits and losses at the date of registration of the dissolution, (iii) shareholders' resolution approving the liquidation and the proposed division of company assets, (iv) payment of debts and other acts, (v) shareholders' resolution concluding the liquidation and division of assets, (vi) registration and publication of the termination of the liquidation and, (vii) closure of company bank accounts. It is important to note that the Commercial Code establishes deadlines for each of these acts.

In terms of communication with the relevant authorities, particular attention should be paid to communication with the Ministry of Finance, otherwise the company continues to be obliged to submit regular tax returns, which, if not submitted could lead to fines. In fact the company must cease activities for tax purposes by presenting the appropriate form duly completed and close the company's accounts for the year. If the company is liable to pay tax, it will be issued with a certificate which will be reflected in the cessation of activities for tax purposes database.

After the liquidation procedure is completed this must be registered with CREL, and the company is then considered closed, the dissolution having taken effect.

However, an issue that has concerned shareholders is accountability during the liquidation process. The law requires that following approval of the final accounts and the proposed distribution of remaining assets, the liquidators must meet or secure all claims by third parties known to them. Liquidators must also appoint a depository of company books and documentation, which shall be retained for a period of five years. Note that the liquidators are personally and directly responsible to creditors for damage resulting from non-compliance with the aforementioned obligations, especially as regards satisfaction of claims known to them. If the company's assets are insufficient to meet all debts, the liquidators must immediately file for bankruptcy according to the procedures in Decree-Law No. 1/2013, of July 4 (which approves the Legal System for Insolvency and Commercial Business Recovery) - see Article 240 of the Commercial Code.

It should also be noted that, after the extinction of the company, the former partners remain jointly responsible for any liability that has not been considered during the liquidation process. With regard to assets remaining after the extinction of society, the law provides that if it assets which have not been shared are identified, at the time of dissolution any one of the partners may propose that these be shared between the shareholders (Article 244 of the Commercial Code).

There remains the question of possible lawsuits if the company is dissolved pending the same. In such cases Article 245 of the Commercial Code provides that the lawsuits continue after the extinction of the company, and in terms of liability the company is replaced by those who were partners at the date of the dissolution. Dissolution does not lead to a stay of proceedings

It is also important to note that in the case of companies with foreign partners, any withdrawal of capital resulting from the settlement process is subject to prior authorization by the Bank of Mozambique, with proof of successful completion of the process in question, and of fulfillment of tax obligations. Note that if the company has not registered the project, investors and their capital invested in the country, the shareholders in question will not be allowed to expatriate capital resulting from the liquidation process.

These are our brief comments on the dissolution and liquidation of companies, procedures which, if not carried out strictly in accordance with the relevant legal provisions, can cause problems for the shareholders of the companies concerned.

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# REQUIREMENTS FOR LICENSING CONSTRUCTION CONSULTANCY IN LIGHT OF NEW REGULATIONS

The construction sector in Mozambique is growing and becoming increasingly attractive to investors, as a result of the increasing number of public and private construction projects. There is an influx of investors intending to operate in this sector and new challenges are emerging in areas such as safety and quality of construction work.

In 2013 the government approved the Regulation of Activities by Contractors and Civil Construction Consultants - Decree No. 94/2013 of 31 December (hereafter "Decree 94/2013"), which repealed Decree No. 38 / 2009 of 1 September. Unlike the earlier regulation which only applied to contractors, Decree 94/2013 includes requirements and conditions for licensing companies to exercise, modify, suspend or terminate businesses in construction consultancy.

Under Decree 94/2013, construction consultancy includes the following activities: (a) infrastructure studies and projects; (b) architecture and urban design; (c) inspection and supervision; (d) contract management; and (e) technical consulting. Prior to Decree 94/2013, construction consultancy activities were licensed by the Ministry of Industry and Commerce, through One Stop Shops ("BAUs"), based on the Commercial Licensing Regulation - Decree No. 34/2013, of August 2. Even after Decree 94/2013 took effect on 31 December 2013, the BAUs continued to license this activity, since Decree 94/2013 still lacked the regulations necessary for its implementation.

The Ministry of Public Works, Housing and Water Resources recently passed a series of regulations to implement Decree 94/2013 (including those relating to licensing civil construction contractors) and, based on a notification in the national daily paper Notícias, on August 01, 2015, announced that it would begin implementing Decree 94/2013 and its regulations on August 10, 2015.

As regards the licensing of construction consultancy it is important to note that the supplementary regulations now require all entities that are already licensed to update their licenses within 90 days of the entry into force of the Licensing Rules for Civil Construction Consultancy Regulation, which was approved by Ministerial Decree No. 76/2015 of 22 May (the "Regulations").

Therefore in order to inform those affected and other interested parties this article presents some of the main legal requirements for licensing construction consultancy, focusing on the new requirements as well as transitional arrangements applicable to those with existing licenses.

Under the Regulation, civil construction consulting services can cover both public and private works and are grouped into the categories established in Decree 94/2013. These services are divided into four classes according to their complexity.

The licensing of construction consultancy for public works can be either permanent or temporary. For private works licensing is permanent.

Construction consultancy can be carried out by any duly authorized national or foreign company. However, permanent licensing for public works is only authorized for sole proprietorships or for companies that are one of the following: (a) Mozambican consultants; (b) foreign consultants that have been legally operating in construction consultancy in Mozambique for over 10 years; (c) branches or subsidiaries of foreign construction consultants, constituted and registered in the country of origin, and which have been operating legally in Mozambique for more than 10 years with a license covering private works.

Mozambican consultants are considered to be sole proprietorships owned by Mozambican citizens or companies registered and incorporated under Mozambican legislation, based in Mozambique, and in which more than 50% of the share capital is owned by nationals or public or private Mozambican companies.

Paragraph 1 of Article 17 of the Regulation establishes situations in which foreign companies may be allowed to operate temporarily on public works.

The licensing authority is now the Licensing Commission for Contractors and Civil Construction Consultants. Therefore, licensing applications by the duly identified interested party are addressed to the Minister of Public Works, Housing and Water Resources in case of Maputo for all classes of license. In other provinces applications for 2nd to 4th category licenses must be addressed to the Minister or to the Provincial Governor if the license is for 1st category projects. The application must include proof of legal existence, nationality, suitability, and technical, economic and financial capacity.

The technical capacity test depends on the class of works and requires a minimum amount of company facilities, professional insurance and technicians comprising the permanent technical staff of the company. For each technician the application requires among other documents the curriculum vitae, employment contract with the company and a declaration under oath that the relevant person is not in a situation of incompatibility and is not also a member of the technical staff of another company of the same nature. Under the provisions of clause c) of paragraph 3 of Article 10 of the Regulation, the licensing authority may request other documents when assessing the company's application.

In the case of sole proprietorships proof of economic and financial capacity is based on a declaration of tangible, attachable assets, a report of such assets including the value of each and the ownership title, and in the case of a company the Articles of Association must be provided.

It is important to be aware of the requirement that companies that are already operating in this sector must apply for a new license and all must report annually to the licensor, providing information about turnover in the previous year, a copy of the balance sheet, a statement of accounts and other statements for tax purposes relating to the previous year, as well as a certificate of no impediment from both the Ministry of Finance and INSS.

As noted above, Article 42 of Regulation allows 90 days from 22 May 2015 for construction consultancy firms which are already operating to request new licenses, meaning that all licenses previously granted outside the provisions of the Regulation are no longer sufficient.

Based on the foregoing, we note that while the new licensing procedures may bring guarantees and safeguards, there is also an increase in the number of requirements and a change in licensing authority. Construction consultancy in public works has become more limited by the imposition of restrictions on foreign companies. While recognizing that construction activities are inherently risky and therefore require assessment of technical and financial capacity by the license issuer, we note that one of the major challenges facing companies as a result of the changes is the lack of information about how existing civil construction consultancy companies will manage the time period for the updating their licenses which is, in our view, extremely short, and also about how they will cope with the new requirements.

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# ANNULMENT, NULLITY AND SUSPENSION OF COMPANY RESOLUTIONS

Many decisions are made as part of the management and operation of commercial companies. Some of these decisions especially the most strategic ones, or those which involve amendments to company statutes, must be made by the relevant body in order to legally bind the company. The structure of ordinary decisions may be determined by law, and therefore be mandatory.

Since corporate resolutions determine the direction of commercial companies, the law regulates them in order to establish basic standards for the procedures to be followed and the way that partners and other stakeholders (as defined in art. 144 of the Commercial Code [CCom]) who may be disadvantaged by the decisions taken, are able to react against them and defend their interests.

These matters are regulated in the CCom, approved by Decree-Law No. 2/2005, of 27 December, as amended by Decree-Law No. 2/2009 of 24 April, and in the Civil Procedures Code (CPC), approved by Decree-Law no. 44129 of 28 December 1961, which was applied to Mozambique through Decree No. 1930 of July 30, 1962, as amended, including the amendments introduced by Decree-Law No 1/2005 of 27 December and No 1/2009 of 24 April. In this article we will briefly examine the legal provisions which apply to nullity, annulment and suspension of resolutions by the general assembly of commercial companies.

Resolutions by general assemblies of commercial companies are approved by shareholder vote. A decision is not considered valid unless it has been approved by the number of votes required by law or by the articles of association, as set out in paragraph 1 of art. 139 of the CCom. The number of votes required for the resolution to be deemed valid depends on the type of commercial company and on the matter under consideration, subject to what is established in the articles of association of the company, as long as this does not contravene the mandatory rules laid down in the CCom. In general, at the first call a general assembly may make resolutions with whatever number of shareholders or representatives are present, unless the matter under discussion concerns changing the articles of association, or merger, division, transformation, dissolution or other matters in which the law requires a qualified majority or if a qualified majority requirement is not expressly indicated then at least one third of the share capital must be present or represented, as set out in paragraphs 1 and 2 of Art. 136 of the CCom.

Certain formalities must be followed by the partners in all companies, as provided in art. 128 and following of the CCom, so that a general assembly can be constituted validly. If these formalities are not complied with, the decisions taken may be invalid which can lead to nullity or annulment.

Situations that can lead to the nullity or annulment of the proceedings are established in articles 142 and 143 of the CCom respectively. In particular resolutions passed at a general assembly which was not correctly convened will be null as will those made in writing when any shareholder has not exercised the right to vote in writing, as well as decisions that are contrary to morality, that deal with matters that are not by law or nature subject to shareholders' resolution, or are not on the agenda, or are in violation of legal standards for the protection of the company's creditors or of the public interest.

Situations resulting in annulment are any which violate any provision of law, but which do not lead to nullity under the CCom as indicated above, and also resolutions that have not been preceded by the provision to a shareholder of information requested and to which said shareholder is legally or statutorily entitled, or resolutions made at a general assembly the convocation of which contains any irregularity (this does not include irregularities in signing the convening notice and particulars that must appear on the same - date, time, place and agenda).

It is important to note that nullity of resolutions may be lodged within 5 years from the date of registration, unless the resolutions in question constitute criminally punishable acts in light of paragraph 2 of art. 142 of the CCom. With regard to voidable deliberations, action shall be brought within 30 days as from the date on which the decision was taken or the date on which the shareholder learned of the decision, if said shareholder has been irregularly prevented from participating in the meeting or the meeting has been irregularly convened, in accordance with paragraph 2 of art. 144 of the CCom.

The following have standing to challenge a decision that may be annulled:
a) Any partner who participated in the decision in question, unless he voted with the winning majority;
b) Any partner who has been irregularly prevented from participating in the meeting, or who has not taken part, the meeting having been irregularly convened;
c) The corporate supervisory body; and,
d) Any director or supervisory board member if the implementation of the resolution might result in them incurring any criminal or civil liability.

It should be noted that actions for nullity and annulment have aspects in common, as referred to in art. 145 of the CCom, namely:
a) both actions can only be filed against the company;
b) the company bears any costs of actions proposed by the supervisory board, even if the actions are unsuccessful;
c) the decision to declare a resolution null and void is effective against or in favor of all partners and company bodies, even if they have not been part of, or intervened in, the action;
d) the declaration of nullity or annulment does not affect rights acquired in good faith by third parties, based on acts committed in implementing the resolution; and
e) there is no good faith in both cases, if the third party knew or should have known of the cause of nullity or annulment.

It is also important to note that any person entitled to apply for a declaration of nullity or annulment may bring an injunction for the suspension of the resolution if it has been or is in the process of being carried out, as referred to in paragraph 1 of art. 146 of the CCom in order to safeguard the effectiveness of the action for declaration of nullity or annulment.

Such injunctions are always urgent and should be decided by the court within 30 days after filing. However, it is important to clarify that the deadline within which the injunction must be applied for is 5 days, counting from the date when the deliberation was known about. The applicant must indicate the interest they have and the damage that the execution, continued implementation, or effectiveness of the resolution may have, as set out in paragraphs 2 and 3 of art. 146 of the CCom.

Complementing the CCom, paragraph 1 of art. 396 of the CPC states that corporate resolutions subject to suspension of operation or effectiveness, are contrary to the law, the articles of association, or contract, provided that the partner who applies for suspension justifies his right to do so and shows that implementation might cause significant harm.

Based on the foregoing, we believe it is important to alert partners in commercial companies to the need to make their decisions in accordance with the provisions of the company's articles of association and the Commercial Code, in order to safeguard the validity, enforceability, and enforcement of their decisions under penalty of the same being subject to annulment or nullity.

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