

Mozambique

CLIMATE CHANGE RISKS, FIDUCIARY DUTIES AND DIRECTORS' LIABILITY IN THE OIL AND GAS SECTOR

☞ Climate change; Directors' powers and duties; Fiduciary duty; Mozambique; Oil and gas industry

Abstract

Climate change is now deemed a key corporate governance issue, as opposed to a “mere” ethical or environmental concern. As a result, heated discussions are being held in connection with liability for breach of fiduciary duties triggered in cases where the directors fail to address climate change risks. In Mozambique, neither the Petroleum Law nor the Model EPCC provide for specific duties which the directors are required to comply with, merely stating that petroleum operations shall be carried out in accordance with international best practices. Hence, fiduciary duties and liabilities in connection thereto must be assessed considering the general laws in force, in particular the Commercial Code. Under the law, failure to address climate risks may be deemed a breach of, notably, the duty of care and diligence. Thus, civil and/or criminal liability may apply. As a result, implementing mitigation measures is critical.

Sailing new waters

Mozambique ratified the United Nations Climate Change Convention (UNFCCC) in 1994,¹ and a committed to the implementation of measures and programs to stabilise greenhouse gases' (GHG) emissions. Mozambique was also a signatory to the 2016 Paris Agreement and formally adhered to the latter in 2017.² The country's first Intended National Contribution for the

¹ Resolution No.1/94 of 24 August 1994.

² Resolution No.23/2017 of 29 December 2017.

reduction of GHG emissions, submitted in 2015, provided for overall emissions' reductions of about 76,5 MtCO₂eq in the period from 2020 to 2030 (being 23,0 MtCO₂eq by 2024 and 53,4 MtCO₂eq between 2025 and 2030). Following the ratification of the Paris Agreement, the Council of Ministers approved a revised Nationally Determined Contributions (NDCs), whereby Mozambique committed to reduce its emissions by about 40 MtCO₂eq between 2020 and 2025.³

As a result thereof, the Government is slowly, but consistently, embedding climate-related concerns in domestic legislation. From the outset, the Disasters' Risk Reduction and Management Law⁴ and Regulations⁵ thereof have been approved, which expressly aim at governing the climate change adaptation and resilience strategies, plans and actions. Additional regulations on urban climate resilience are currently under discussion. Scattered references to climate change, climate action, adaptation and/or resilience may also be found in different statutes, notably the zoning, forestry and biodiversity legal frameworks. This notwithstanding, the Petroleum Law⁶ and ancillary regulations thereof, including the Model Exploration Production and Concession Contract (Model EPCC), are silent on climate issues and/or on obligations in connection thereto. Reference must also be made to the recent creation of a specific section at the Maputo Province Court in Marracuene, expressly dedicated to land and biodiversity related disputes which, amongst others, shall have jurisdiction on climate-related matters. This seems to indicate that the domestic legislator is aware of the prospective increase of climate activism and climate litigation in-country. Furthermore, and considering the international commitments in connection with emissions reduction and promotion of sustainable development, the Government, in collaboration with the Africa Carbon Markets Initiative, is currently preparing the voluntary carbon market regulatory framework, aimed at providing clear guidelines for market participants, ensuring transparency, accountability and adherence to stringent environmental standards. Despite the foregoing, to date, no climate law nor specific regulations aimed at imposing climate action related measures on private companies—including those engaged in the oil and gas sector—have been enacted.

It is, however, now commonly understood that climate change causes foreseeable risks for companies which must be considered and addressed in their business models and investment plans notably: (i) physical risks—including damage or loss of assets and/or supply chains etc; (ii) economic transition risks—including regulatory and policy shifts, loss of finance, technological shifts etc; (iii) climate litigation and liability risks—resulting from a company's failure to manage climate change impacts on the business and/or failure to comply with regulatory requirement in connection with, notably, greenwashing, health and environmental risks and human rights; and, consequently, (iv) reputational risks. As a result, climate change is now deemed a key corporate governance issue, as opposed to a "mere" ethical or environmental concern.

Being a carbon-intensive industry and directly contributing to the worldwide increase of carbon emissions, oil and gas companies are now sailing new—and rather troubled—waters trying to adapt business strategies, operations and supply chains as to address climate risks and mitigation thereof. At the end of the day, addressing these risks may—and most likely will—encompass a complete shift of their business model and a move towards renewables and/or new forms of clean energy.

³ Republic of Mozambique: Ministry of Land and Environment, *Update of the First Nationally Determined Contribution to the United Nations Framework Convention on Climate Change: Mozambique (2020–2025)*, https://unfccc.int/sites/default/files/NDC/2022-06/NDC_EN_Final.pdf.

⁴ Law No. 10/2020 of 24 August 2020.

⁵ Decree No. 76/2020 of 1 September 2020.

⁶ Law No. 21/2014 of 18 August 2014.

In the meantime, energy demand is increasing—with oil and gas still being critical sources—alongside climate risks, climate activism and climate litigation, and a critical discussion is taking place in the corporate law realm: may liability for breach of fiduciary duties be triggered in case the directors fail to address climate change risks (or opportunities) for the company's business?

This discussion is also gaining momentum in Mozambique where, amongst others, the Mozambique LNG Project is emerging as a future leader in the global LNG industry, with approximately 75 trillion cubic feet of recoverable natural gas discovered in the Offshore Area 1. At present, neither the Petroleum Law nor the Model EPCC provide for specific duties which the directors are required to comply with, merely stating that petroleum operations shall be carried out in accordance with international best practices. Hence, this topic must be assessed considering the general laws in force, in particular the Commercial Code.⁷

Directors' duties under the Commercial Code

Articles 139 and 140 of the Commercial Code detail the general and fiduciary duties which directors of Mozambican companies are required to abide by, notably:

Duties of care, loyalty and promotion of company's interests

Amongst others, directors are subject to the general duties of care and loyalty, pursuant to which directors are required to: (i) demonstrate the required availability, technical competence and knowledge of the company's activity to perform their duties and apply the diligence of a judicious and orderly manager; (ii) act in the company's interest, considering the interests of the shareholders and weighing the interests of other stakeholders deemed relevant for company's sustainability, notably employees and creditors; (iii) exercise their functions as fiduciary administrators for all shareholders, whose rights shall be equally treated, irrespective of their respective stake in the share capital; (iv) ensure the protection of the interests of shareholders, employees and other company stakeholders, within the powers conferred upon it by law and the articles of association, in order to fulfil the company's object and function; (v) increase investor confidence so as to attract more long-term capital; and (vi) optimise the use of capital, reducing its cost; through more stable sources of financing.

Considering the rules in force, it feels safe to say that, under Mozambican law, directors are deemed to have breached fiduciary duties of care, skill and diligence in case of failure to assess, address and manage climate risks.

Duties of disclosure

Directors of Mozambican companies are also required to: (i) disclose, on the day immediately following the fact, any resolutions of the corporate bodies or other relevant facts, which that may influence, in a ponderable manner, the decisions of investors in the securities market; and (ii) prepare and submit the management report and annual accounts and ancillary accounting documents for the relevant financial year.

At present, domestic laws do not expressly require the disclosure of non-financial information—notably disclosure of climate change risks—nor provide for sustainability reporting requirements and/or mechanisms. However, climate disclosure obligations may still apply as a result of undertakings under international instruments—notably the Climate Change Reporting Framework⁸—and/or where domestic companies and/or companies

⁷ Decree-Law No. 1/2022 of 25 May 2022.

⁸ Climate Disclosure Standards Board, <https://www.cdsb.net/what-we-do/reporting-frameworks>.

operating in Mozambique are subject to disclosure requirements set forth in foreign laws—including, without limitation, the EU Corporate Sustainability Reporting Directive.⁹

Directors' liability and mitigation thereof

Under the law, directors are deemed liable for any damages caused to the company or its creditors, as a result of any actions or omissions of the same, in breach of any legal and statutory duties applicable, except where there is sufficient evidence that the directors have acted without fault. It should, however, be noted that directors shall not be deemed liable for acts or omissions taken based on or supported by (i) resolution(s) of the Board of Directors passed in meetings where the relevant director has not been present and/or, where present, the relevant director has voted against; and/or (ii) resolution(s) of the shareholders, except where said resolutions have been passed by proposal of the relevant director. Furthermore, directors shall also not be deemed liable where a given decision is taken in good faith and based on the recommendation of an independent technical committee appointed by the Board of Directors or the shareholders, irrespective of liability of the members of such committee. Directors are deemed jointly liable. The rules on directors' liability fully apply to liability of representatives, managers and members of other corporate bodies. Furthermore, the company shall be deemed liable for any actions or omissions of the managers/ancillaries pursuant to the vicarious liability regime.

Criminal liability may also apply in a scenario where certain actions omissions qualify as a criminal offence under domestic laws, notably the Criminal Code.¹⁰ One must stress that legal entities—including companies—can also be deemed liable for any criminal offences (including those listed above) when the offences are committed by directors/managers acting in their name and on their behalf, and/or by anyone acting under the authority of directors/managers as a result of breach of their fiduciary duties (i.e. duties of care, vigilance or control) and without prejudice to their own individual criminal liability.

Where applicable, criminal liability of legal entities may trigger the payment of fines and ancillary penalties, e.g. forfeiture of goods, prohibition of entering into contracts with the State, closure. It is worth noting that the criminal liability of the legal entity does not replace the liability of the individuals who carried out the relevant actions/omissions. This means that companies and any directors/managers or employees may be subject to criminal liability. Moreover, directors are subsidiarily liable for the payment of fines and indemnities for which the legal entity is convicted, with relation to crimes: (i) perpetrated during the exercise of their duties, without their express opposition; or (ii) perpetrated previously, where the final decision to impose them was notified while they were still in office and the non-payment is attributable to them.

That said, as to mitigate potential liabilities, directors shall: (i) seek in-depth knowledge on the applicable laws governing their obligations and duties; (ii) implement climate and environmental due diligence obligations, including at a supply chain level; (iii) call for the inclusion of environmental and climate clauses, and indemnification provisions in connection thereto, in contracts to be executed with clients, suppliers and/or services providers; (iv) implement robust governance and accountability systems at board level; (v) implement internal climate policies and integrate climate-related factors in the decision-making process; (vi) avoid any actions that may qualify as greenwashing; (vii) ensure that all resolutions are passed in accordance with the law and the best information available and properly recorded in the

⁹ Directive 2022/2464 amending Regulation 537/2014, Directive 2004/109, Directive 2006/43 and Directive 2013/34, as regards corporate sustainability reporting [2022] OJ L322/15.

¹⁰ Law No.24/2019 of 24 December 2019.

corporate books; and (viii) where resolutions are passed against their vote, the relevant directors shall ensure that this fact is accurately mentioned in the relevant minutes.

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