REPORT ON EXTRALEGAL BARRIERS TO THE EMPLOYMENT OF FOREIGNERS IN MOZAMBIQUE

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The present Report is limited to issues related to the Mozambican legal system with respect to extralegal barriers to the employment of foreigners. Its preparation followed a thorough analysis of the legal procedures established by the national legislation in force on the date of its preparation.

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Abbreviations

Art.	Article
BI	Identity Card (*Bilhete de Identidade)*
CPLP	Community of Portuguese-Speaking Countries (*Comunidade de Países da Língua Portuguesa*)
DIRE	Residence Identification Document of a Foreign Citizen (*Documento de Identificação de Residência para Estrangeiros*)
DITESS	Labor, Employment and Social Security Directorate (*Direcção de Trabalho, Emprego e Segurança Social*)
DM	Ministerial Order (*Diploma Ministerial*)
DPTESS	Provincial Directorate of Labor, Employment and Social Security
MITESS	Ministry of Labor, Employment and Social Security
MITRAB	Ministry of Labor
NGO	Non-Governmental Organization
PA	Public Administration
SENAMI	National Immigration Service

Glossary of translated official legal terms

Portuguese	English
alvará	company trading license
Atestado (de comunicação de trabalho)	confirmation document (of communication of work; admission of employee)
averbamento	(written) annotation
Boletim da República	Government Gazette
certidão de quitação	quittance certificate
certidão de registo comercial	commercial registration certificate
Circular	Circular
cópia autenticada	certified copy
Despacho (de autorização de trabalho)	order, decision, dispatch document, work authorization
deferimento	Granting, acceptance
diploma	legal instrument
Diploma Ministerial	Ministerial Order
indeferimento	refusal
mapa da relação nominal	nominal list
Portaria	Ordinance
processo de tramitação	procedure
quadro de pessoal	staff establishment plan
sócio administrador	managing partner

CONTENTS

1. INTRODUCTION

This technical report is provided in response to a request by DAI SPEED to SAL & Caldeira Advogados, Lda. (S&C) for a consultancy on the extralegal barriers that arise in the scope of the employment of foreigners in Mozambique.

It should be noted that the employment of foreigners in Mozambique, as well as the applicable procedures for doing so, are duly regulated by various national legal instruments (referred to as the Legal Framework).

For the purpose of this report, ''extralegal barriers'' are held to be all requirements and any kind of procedures, not laid down in the Legal Framework, but imposed by Government officials on employers regarding the contracting of foreign employees.

The expression ''extralegal barriers'' can also apply to the non-application of legal provisions in force for promoting the business environment or even to the erroneous application of a legal provision resulting from an interpretation that is not in line with the spirit of the law.

The preparation of this report included the following:

i. Research and analysis of relevant legislation on the employment of foreign citizens in Mozambique;
ii. Research, analysis and identification of the requirements/procedures applied by the authorities that do not fall within the provisions laid down in the Legal Framework (extralegal barriers);
iii. Identification and inventory of the constraints created by the extralegal barriers to business of the investors;
iv. Preparation of preliminary findings for each extralegal barrier identified;
v. Preparation of conclusions and recommendations.

For the purpose of point i. above, the legislation listed in the bibliography of this report was consulted.

For the purpose of point ii. above, interviews were conducted with several employers and/or their complaints were registered with regard to any extralegal barrier faced by them.

This technical report is divided into chapters. Chapter I – Introduction deals with the definition of the extralegal barriers which are then presented in the subsequent chapters:

- Chapter 2: Introduction to the Legal Framework for the Contracting of Foreign Employees in Mozambique; and
- Chapter 3: Introduction to the Legal Framework for the Entry, Stay and Residence of Foreign Citizens.

The Conclusions and Recommendations are presented in Chapter 4.

1.1 Background

Economic growth in Mozambique makes the country more attractive for foreign investment, which is necessary for the development of the national economy. We believe that there are also other key factors with relevant economic implications, namely: i) the recent discoveries of mineral resources; ii) the prudent management of the macroeconomic policy; iii) the implementation of key structural reforms to facilitate investment; and, last but not least, iv) the preservation of political stability and peace in the country.

It should be noted that although the business environment has improved in recent years and Mozambique has gone up 15 positions in the Doing Business 2015 ranking[1], companies, be they small, medium-sized or large, have suffered from demands on the part of the authorities, for compliance with formalities not established in the Legal Framework (extralegal barriers) for processing applications for authorizations, permissions and other decisions concerning the legalization of foreign labor in Mozambique. To a large extent this has imposed difficulties on operations and considerable costs for the companies.

These formalities, since they are not established bylaw, are conducive to a lack of legal certainty and contribute negatively to the business environment of the country. Thus, there is no point in simplifying the procedures for the establishment of companies (Doing Business), when, after their establishment, investors are faced with extralegal barriers related to their own employment and the legalization of their stay in Mozambique and also that of the staff they require to go ahead with their business.

In some cases the extralegal barriers result from ignorance of the law and the absence of qualified staff in Public Administration (PA) and in others, the more serious cases, from abuse of power and the authorities' disorderly exercise of their discretionary power, which goes against the principle of legality which is expected to guide the performance of public administration.

It should be noted that these extralegal barriers are totally opposed to the objectives of the Government's Five-Year Program for 2015-2019, as regards the simplification of procedures and the improvement of competitiveness, with a view to making the business environment more attractive for investment and allowing Mozambique to take up a reference position in the regional and global ranking.

We believe that the achievement of the Government's objectives, which are listed in the above-mentioned document, depends greatlyon the interaction between the various branches of Government for the promotion of foreign investment. The realization of these objectives is also closely linked to the facilitation of the entry and stay of key persons, essential for investment, and the improvement of the business environment so as to attract more investment, and the creation of more jobs as well as the increase of business opportunities for the local business community. We are however not requesting the liberalization of the entry of foreign citizens, but instead appealing for the application of the Legal Framework as it is established, which already provides for the conditions that should be observed for the employment of foreigners in the country.

This report aims to identify the extralegal barriers to the employment of foreigners, in which extralegal barriers are understood to include all aspects, procedures or requirements not established by law and which are being applied and are creating obstacles to the private sector, as well as all aspects, procedures or requirements that should be applied because they are established by law and are not applied, to the detriment of the private sector.

[1] In http://www.doingbusiness.org/data/exploreeconomies/mozambique, accessed on 01.10.2015.

Finally, this report aims to provide recommendations for the elimination of these barriers, thus creating a more business-friendly environment in Mozambique, in favor of strong and sustainable economic growth, which is so greatly anticipated.

2. INTRODUCTION TO THE LEGAL FRAMEWORK FOR THE EMPLOYMENT OF FOREIGNERS

The legal instruments listed below are particularly relevant for the employment of foreign citizens in Mozambique:

- The Labor Law, approved by Law 23/2007, of 1 August ("LL");
- Decree 55/2008 of 30 December, which approves the Regulation of the Mechanisms and Procedures for Contracting Foreigners ("D55/08"); and
- Decree 63/2011 of 7 December, which approves the Regulation for the Employment of Foreign Citizens in the Petroleum and Mining Sector.

In accordance with the Legal Framework above, there are two main ways in which foreigners can be employed:

(a) *Obtaining the authorization of the Minister of Labor.* Authorization is granted by the Minister of Labor on a case-by-case basis if the following prerequisites are met: (*i*) there are no Mozambicans qualified to do the particular job; or (*ii*) the number of qualified Mozambicans is insufficient to meet demand.[2] Authorization is also required in cases of "specialized technical assistance", including such contexts as employment in NGOs, scientific research and teaching, among others.

(b) *Communication to the Minister of Labor.* Communication is the correct procedure in the following circumstances:

i. The number of foreign employees to be contracted is within established quotas,[3] namely:
- 5% of the total number of employees in large enterprises (i.e., with more than 100 employees);
- 8% of the total number of employees in medium-sized enterprises (with 11 to 100 employees); and
- 10% of the total number of employees in small enterprises (10 or fewer employees).

ii. There is specific provision in the prospective employer's investment contract with the Government of Mozambique, for an explicit percentage of foreign employees, greater or lesser than the percentage set forth above.[4]

iii. The prospective employee is to be hired for a short-term assignment, i.e., for a period up to 30 days, consecutive or interspersed. Under the terms of D55/08, foreigners may work in Mozambique for up to 30 days (consecutive or interspersed) per calendar year, by means

[2] Note that the authorization system is meant to be used only once the quota to which the company is entitled, as discussed above in (b) i., is exhausted. It is also important to note that the contracting of managers, agents and representatives of employers is done under the quota system and, alternatively (once the quota is exhausted), under the authorization system.

[3] The quota corresponds to the number of foreign employees that a Mozambican employer is allowed to have without seeking authorization from the Minister of Labor.

[4] If the company is located in an Industrial Free Zone, the special rules on hiring foreigners for such zones, set forth in Decree 75/99 of 12 October, apply. Under that decree the currently stipulated quota is 15% of the total workforce.

of a communication from the Mozambican employer (understood here to mean a Mozambican company or the subsidiary of a foreign company in Mozambique) to the Minister of Labor. Such 30-day period can be extended, for up to two further 30-day periods, on application to the Minister of Labor. The extension is at the discretion of the authorities.

It should be noted that for the mining and petroleum sector, the short-term regime is for contracting foreign citizens to perform occasional, unpredictable and specific work, for no longer than 180 days per year, consecutive or interspersed.[5]

2.1 Contracting under the quota regime

2.1.1 Regime

As we saw, in accordance with D55/08 an employer may, depending on the type of company, employ foreign citizens, according to the following quotas:

- 10% of the total workforce for small companies, with up to 10 employees;
- 8% of the total workforce for medium-sized companies, with between 11 and 100 employees; and
- 5% of the total workforce for large companies, with more than 100 employees.[6]

This regime is also known as the ''quota regime''. The admission of foreign employees under this regime is done by means of a communication to the Provincial Directorate of Labor, Employment and Social Security (DPTESS) in the province in which the citizen will be working.

For this purpose, in accordance with article 6 of the aforementioned Decree, the following documents must accompany the application form:

- Three copies of the employment contract;
- Quittance certificate issued by the National Institute of Social Security (INSS);
- Fiscal quittance certificate;
- Nominal list of employees for the previous calendar year;
- Certified copy of the passport or Residence Identification Document for a Foreign Citizen (DIRE);
- Deposit slip proving payment of a fee corresponding to three times the minimum wage in force for the company's area of activity.[7]

The decree also stipulates that ''the conformity of the communication shall be verified at the time it is presented, and a document confirming its receipt shall be drawn up immediately in the presence of the bearer thereof''.[8]

[5] D63/11, article 3, paragraph 6
[6] LL, article 31, paragraph 5, in conjunction with article 34, paragraph 1.
[7] D55/08, Art. 6.
[8] *Ibid.*, Article 7

2.1.2 Extralegal barriers

2.1.2.1 The obligation to present the company trading license (*alvará*)

Though the law does not stipulate the trading license as a requirement for communication of admission of an employee, it has been *praxis* of the DPTESS to require the submission of the trading license for these procedures.

The requirement to submit the trading license constitutes an extralegal barrier insofar as:

- It is not established by law, since article 6 of D55/08 does not stipulate, as we saw, the trading license as a necessary requirement for the communication of the admission of a foreign employee;
- It obstructs the start of the implementation of the work plan drawn up by the investors, since the period from submission of the application for a trading license up to the date on which it is issued may take at least 3 to 4 weeks[9] and may even take up to 6 months in the case of a trading license for carrying out specific activities with more stringent requirements, such as activities in the health and pharmaceutical sector, large and medium-sized manufacturing industry and the building industry; and
- It delays the fulfilment of the commitments made with counterpart companies already established in Mozambique, which were subcontracted for the implementation of projects, many of which are awarded by the State itself for public needs.

As a consequence of this requirement:

- Start-up companies are late in starting their activities, thus delaying the entire implementation of their work plan, resulting *ab initio* in deficits in the company's productivity indicators;
- Managing partners end up overseeing the company licensing process, such as contacts with the competent entities for the purpose of organizing an inspection and signing company documents related to applications for other legal requirements for licensing the company, before they have obtained theconfirmation document, which effectively enables them to work; and
- In the course of the licensing process, the foreign managing partner is obliged to visit the facilities of the company to comply with inspection obligations, thus incurring the risk of a labor inspection which may not be coordinated with the demands made by the DPTESS but instead undertaken within the scope of the discretionary power the Inspectorate enjoys in determining what is actually considered work.

We believe that the DPTESS require the trading license in order to verify to which sector of activity the company belongs so as to check if the value paid is correct.

[9] Note that this period becomes more prolonged, particularly for activities whose licensing requires a prior inspection of the facilities.
For example, for the licensing of a commercial activity for which a previous inspection is required whenever this activity involves food products, raw materials, chemical, biological or radiological components and products that constitute a potential risk to life, health and the environment, 4 weeks are not enough in most cases to complete the procedure and issue a trading license.

However and mainly for start-up companies which are for the first time submitting a communication of the admission of a foreign employee, for their first employee (the managing partner), the DPTESS should request the commercial registration certificate of the company instead of the trading license, in order to: i) verify the sector of activity to which the company belongs (which is the reason behind the request for the trading license); and ii) avoid the consequences of the trading license as a requirement.

It should be noted that the commercial registration certificate provides more information about the company than the trading license, such as for example its share capital, the names of the shareholders and their respective shares and how the company binds itself, in addition to the data contained in the trading license, such as the company's name, address and purpose.

Thus, and especially for the first communication of the admission of a foreign employee, and above all for start-up companies, the commercial registration certificate could replace the DPTESS' demand with respect to the company's trading license, insofar as this certificate suffices as an indication of the activities the company intends to perform, conferring the possibility to check its sector of activity, in addition to which the certificate provides other relevant information to the labor authorities, such as in relation to whom and how the company binds itself, which is relevant for the employment process.

2.1.2.2 The non-acceptance of the simplified license in the communication of the admission of a foreign employee

Clause f) of article 1 of Decree 5/2012 of 7 March, which approves the Regulation for Simplified Licensing (''D5/12'') defines simplified licensing as the processing and issue in the presence of the applicant of a license for the exercise of an economic activity.

In accordance with the Regulation, the areas of economic activity subject to simplified licensing are the following: agriculture, trade, industry, building, communications, culture, fisheries, services and tourism.[10]

Under the terms of clause f) of article 11 of this Regulation, one of the obligations of the holder of a simplified license is to, ''[o]bserve the legal provisions for the contracting of national and foreign employees''. In other words, the license holder has the obligation to observe the mechanisms and procedures for the employment of foreigners set out in the respective Legal Framework. However, in the month of July of this year, the Maputo City DPTESS issued a notice, determining the following:

''... by superior order, applications by companies that included copies of simplified licenses in the communication of work procedures for foreign citizens, are pending and awaiting further instructions. Moreover, we advise that new applications with the above-mentioned licenses and trading licenses appended will not be received until new superior orders are received.''

[10] D5/12, article 3, paragraph 2

In other words, this notice determined that no communications of the admission of foreigners from companies submitting licenses obtained under the simplified licensing regime would be received or analyzed.

The non-acceptance of simplified licenses on the part of the authorities constitutes an extralegal barrier insofar as:

- In accordance with the Legal Framework, the trading license (including the simplified license itself) is not a requirement for the procedures, both with respect to the communication of work and the authorization of work;
- Simplified licenses were created by law and are applicable to economic activities which, by their nature, do not have negative impacts on the environment, public health, security and the economy in general;
- The Regulation for Simplified Licensing itself establishesthe license holder's obligation to observe the legal provisions for the contracting of foreigners, so that by law, if the authorities want to demand a licensing document for the contracting of foreigners, simplified licenses must be accepted, for all due purposes; and
- This extralegal barrier contradicts one of the objectives of the Government's Five-Year Program for 2015-2019, which emphasizes the simplification of procedures and the improvement of competitiveness, with a view to rendering the business environment more competitive and allowing the rise of Mozambique in the regional and global ranking.

In fact, this extralegal barrier has, among other things, created the following constraints and delays for companies:

- It has discouraged investors, be they national or foreign, from licensing under the simplified licensing regime;
- It has impeded investors from taking advantage of the celerity that the simplified licensing regime offers; and
- It has led to uncertainty and instability in the legal order and the national economy, thus withholding investment necessary for the growth of the national business sector;

It should be noted that, thanks to the intervention of the new Minister of Labor, Employment and Social Security, from the 1st of October the above-mentioned notice is now without effect and the communication of work procedures which include simplified licenses have begun being accepted again.

2.1.2.3 The requirement of the nominal list

The legal regime covering the nominal list is established by Ministerial Order 1/89 of 4 January, which alters the nominal list created by Ordinance 92/78 of 30 March ("DM 1/89").

Under the terms of this legal instrument, the nominal list, containing details of the employees' salaries, their categories, as well as other relevant information, must be filled in annually in quadruplicate and submitted to the DPTESS in the second quarter of each year. The information must be reported up to the month of March of the year in question[11]. In cases in which the start

[11] DM 1/89, paragraphs 4, 5 and 6

of activities occurs after the month of March, employers must submit the nominal list within 30 days following the start of activity.[12]

Furthermore, clause e) of article 6 of D55/08 establishes the nominal list for the previous calendar year as a requirement for the first communication.

Currently, some DPTESS demand the nominal list from start-up companies, and this list must necessarily contain details concerning the names of national employees contracted by the company. This requirement applies to cases in which the company does not yet have any employees and the contracted foreigner is the company's first employee. This requirement is a way in which the authorities force a start-up company to contract national staff.

This requirement appears as an extralegal barrier for the following reasons:

- In accordance with the law, the nominal list that should be submitted refers to the previous calendar year and start-up companies do not have this document as they have just been established and do not have any contracted employees yet;
- It implies the contracting of national employees, without the foreign representative of the company having first obtained a confirmation documentof communication of work, so that it creates a paradox in the understanding propagated by the authorities, according to which the foreign citizen must possess a confirmation document of communication of work,in order to execute any act on behalf of the company, including, among others, the signing of documents concerning the contracting of employees.
- For the contracting of staff a whole recruitment and selection process is necessary, including interviews that have to be conducted in the company's facilities, so that in the event of an inspection and in the absence of coordination between the labor authorities themselves, this is a requirement which implies work and at the same time acts are being executed that in the event of an inspection may actually be considered work and the foreign representative who finds himself compelled to execute these acts, may be sanctioned.

As a consequence of the requirement for start-up companies to submit a nominal list, these companies suffer, among other things, from the following constraints:

- Delay in the start-up of the company, due to all the procedures that the organization of the nominal list implies, from the recruitment of employees, and employment negotiations, to the filling in, organization, and submission of the duly stamped nominal list;
- The representative carries out the selection of employees, by means of interviews at the company's facilities, under the fear of a labor inspection during that period, which therefore is a paradoxical situation, in which one part of the same entity requires theconfirmation document of communication of work,, which can only be obtained by initiating a recruitment process, while another part of the same entity may fine the company for the representative de facto recruiting employees without having the respective document; and
- Demotivation on the part of investors seeking new business opportunities, since this demand is made after the submission of the application and in itself it means another

[12] *Ibid.:* paragraph 8

procedure, creating the idea that the communication of the admission of a foreign employee, which initially seemed very simple, is after all very bureaucratic.

Considering this, we think that in the case of start-up companies, the DPTESS should not require the nominal list of the current year, because the representative's confirmation document of admission of employeeshould first be issued, so that the employment of other employees can occur in accordance with the business needs, and then the submission of the nominal list can be complied with within the legally stipulated time limits.

2.1.2.4 The delay in the issue of the confirmation document

In accordance with article 7 of D55/08 the conformity of the communication of work shall be verified at the time it is presented and the respective confirmation document is issued immediately and handed over to the bearer of the communication.

However, no DPTESS in the country issues the communication of work on the same day, in accordance with the legislator's intent in establishing this rule in these terms. As a matter of fact, the issuing of communications of work tends to take on average 7 working days.

It should be noted that one of the reasons that has led to delays in the signing of the confirmation documents, is the fact that they can only be signed by the Director of the DPTESS (who is not always available to sign these documentss, either being out of office in Government meetings, or being in the office with an overloaded agenda). There have already been instances of confirmation documents having been issued a month after the submission of the communication.

The lack of timely decisions on the communications of work constitutes an extralegal barrier insofar as:

- The law is not being complied with according to the precise provisions laid down; and
- The excessive delay violates the fundamental purpose of the very provision that intends to speed up the communication of work procedure.

As a consequence of this delay, the company is faced with the following constraints and delays in its business:

- Non-fulfilment/delays in the activities plans and program, affecting the objectives defined by the company;
- Interruption of the work the employee has to, or should provide to the company, when dealing with the renewal of the employment contract until the issue of the confirmation documentof the communication; and
- Departure of the foreign employee from the country, for the purpose of legalizing his stay, in cases of renewal of employment contracts in which the DIRE expires while waiting for the confirmation document of the communicationof work, due to excessive delay in its issuing.

In order to eliminate this extralegal barrier, and thus to avoid the disastrous consequences these delays imply for companies in our country, we think it necessary that:

- The authorities make an effort to comply with the provisions of the law, issuing the conformation documents of admission of the employee on the same day on which they are submitted, when the respective set of documents is properly organized to this end;
- The DPTESS pay special attention to the validity period of the Residence Identification Document of a Foreign Citizen (DIRE), a copy of which is annexed to the communication, in order to give priority to the issuing of confirmation document of admission of employee, to those whose DIRE is about to expire, so as to avoid constraints for the employee regarding travel, and for the company regarding expenses associated with the regularization of his stay.
- The Immigration Services consider accepting DIRE renewal applications whenever the DIRE expires, because of the delays in processing confirmation documentsof communication of work. This consideration could be requested by submission of a copy of the protocol demonstrating submission of the application for a communication of work and, on the condition that the company submits the respective confirmation document as soon as it is issued, to avoid the cancellation of the DIRE and be able to collect the same.

It should be noted that the delay in the issuing of confirmation document fosters corruption, insofar as companies driven by the need to obtain these documents or even other documents related to the employment of foreigners, bribe civil servants or are bribed by them, in the expectation of having the respective documents issued without further delay.

In this respect, it is important to share a measure taken by the head of the Maputo City Office of the Department of Social Security, in order to fight corruption. He gave orders to display in the Public Attendance Department information about the average time required to process cases, and calling on INSS contributors to abstain from engaging in any kind of bribery in order to try and secure a timely response to their quittance certificate requests. This order, dated 31 July 2014, determines a deadline for the issuing of INSS quittance certificates of 5 working days and provides a green line number with two contacts for complaints.

2.1.2.5 The requirement to apply for the transfer of a foreign employee and cases of visits by foreign employees to other of the company's facilities situated in other provinces

2.1.2.5.1 Transfer

Article 75 of the LL allows for an employer to transfer an employee from his workplace. In most cases this transfer means moving the foreign employee from the company's head office to one of its branches situated in another province of the country.

It should be noted that a transfer may take one of the following forms:

- Temporary transfer - when circumstances of an exceptional nature occur, related to the administrative or productive organization of the company; or
- Definitive transfer - allowed, save a contrary contractual provision, in cases of a total or partial relocation of the company or establishment in which the employee to be transferred provides services.

In accordance with paragraph 1 of article 75 of the LL and paragraph 2 of article 18 of D55/08, transfers must be communicated to the authorities.

In 2013, the labor authorities issued a Circular 004/MITRAB/DTM/GD/211/2013 of 19 August, according to which ''*all communications of a transfer shall indicate its duration, and if temporary, it shall not exceed the period of its authorization*''. The objective of this Circular is to enable the authorities to carry out inspections of companies that, in order to circumvent the lack of a quota, contract a foreign employee within the quota of the province where they have quota available and subsequently transfer the employee to another province, where they do not have a quota.

In fact, this practice has dictated that, once the communication of a transfer has been submitted, it is necessary to wait until a decision on the transfer is issued by the authorities. The issuing of this decision is slow and constitutes an extralegal barrier for the following reasons:

- The law stipulates that a transfer must be communicated and does not stipulate that it must be requested;
- The temporary transfer regime established by law is for cases related to the productivity of the company and the definitive transfer is for cases of a partial or total relocation of the company, so that to subject the temporary transfer of an employee to a decision contradicts the spirit of the regimes herein referred to, as regards the needs felt by the company.

As a consequence of this extralegal barrier, we observe, among others, the following constraints and delays to companies:

- It wastes time in the organization and preparation of the submission, while the company could use this time for the execution of other productive tasks;
- Companies are afraid to send the transferred employee to the new workplace while awaiting the decision, since, if a labor inspection is carried out at these specific company facilities, the employer can be fined on the grounds that the transferred employee does not have permission to work in that province (despite the fact that some DPTESS verbally indicate that once the ''application'' for a transfer has been submitted, the employee is allowed to work in the province to which he was transferred); and
- Employers are constrained insofar as they need the employee at the place to which he was transferred, but they are afraid to place him there without the decision being issued, due to the changeability of the instructions.

2.1.2.5.2 Visits

Another issue related to this extralegal barrier has to do with simple visits by employees (often senior employees such as administrators or directors) to company offices situated in another province, different from the one in which they were contracted. In these cases, some authorities require that the same procedure as that in the above-mentioned cases of transfer is to be followed. Meanwhile, some DPTESS only demand a letter containing the exact dates of these visits. It should however be noted that in the case of travel to deal with urgent issues it is also difficult to comply with this simple formality.

It is our understanding that the transfer rules established bythe LL should not apply to travel or simple visits by company directors as a result of the nature of their activities. Because as a matter of fact it is not a transfer per se, but simply travel to attend to questions of an occasional nature derived from the employment contract, which itself has been duly approved by the labor authorities.

We are dealing with an extralegal barrier here, wherein some DPTESS demand the application of the transfer of employees' regime (with adaptations created by themselves) to visits of administrators, directors and other senior employees of the company.

The constraints and delays to the business that this extralegal barrier creates are those mentioned above with respect to transfers, with the aggravating element that as the visits are usually specific and/or urgent, this barrier hinders the employee's attention to this kind of issues, placing him in breach of his work obligations under the employment contract, including the non-fulfilment of his duty of diligence.[13]

In order to simplify the transfer process and the cases of visits, we believe that for transfers the authorities should accept that a copy of the protocol of the communication of transfer ensures that the employee is present on the site to which he was transferred on the dates indicated in the communication without having to wait for a decision. This procedure should be publicized in writing on the relevant notice boards.

And with regard to mere visits, we believe that no procedure whatsoever should be required, not even a simple letter, since the authorities should take into consideration the provisions in the employment contracts that were approved by themselves for the purpose of issuing theconfirmation document of communication of work,. For inspections it should be sufficient to present the employment contract, in which provisions are included for travel by the employee to the various company facilities in the country, on the basis of the position he occupies in the company or his functions.

2.1.2.6 Private employment agencies

In accordance with the LL, private employment agencies are all individual or corporate undertakings, governed by private law, whose purpose is to supply one or more employees temporarily to third parties, under temporary employment contracts and user contracts.[14]

Also, in accordance with article 1 of Decree 6/2001 of 20 February, which establishes the legal regime for the exercise of the activity of recruitment and placement of labor by private employment agencies ("D 6/01"), a Private Employment Agency is any sole proprietorship or partnership governed by private law providing one or more of the following services related to the labor market:

- Recruitment of labor for paid employment for third parties;
- Employment of employees with the objective to make them available to a third-party natural or legal person, who determines their tasks and supervises their work;

[13] LL, article 58, clause b) *in fine*
[14] *Ibid:* Article 79, paragraph 1.

- Any other services related to the supply of labor or of work for third parties.

However Circular 484/MITRAB/DTM/GD /211/2014 of 17 September 2014 issued by the Directorate of Migrant Labor, requires that Provincial Directorates of Labor shall with immediate effect refrain from handling processes for the employment of foreign labor submitted by private employment agencies, for the purpose of transfer of these employees to third parties.

In accordance with the above cited Circular, the labor recruitment and transfer activities carried out by private employment agencies can only target nationals, since article 3 of D 6/01 stipulates that this ''decree applies to all private employment agencies, irrespective of the categories of the national employees to be recruited or for whom employment is sought and of the branch of activity of the employers for whom theyare recruited or transferred to the labor market''. (The underlining is ours.)

Because the above-transcribed article only makes reference to national employees, the Circular referred to above interprets this as restricting the applicability of the scope of services provided by private agencies with respect to the transfer of foreign employees.

This restriction constitutes an extralegal barrier insofar as:

- It is an interpretation that contradicts the LL (the fundamental legal instrument regulating legal labor relations in Mozambique), which also regulates the regime for private employment agencies;
- Articles 79 and following of the LL do not exclude the employment of foreigners for the purpose of transfer to third parties;
- Article 2, paragraph 1 of the LL stipulates that the Labor Law applies to the legal labor relations established between national and foreign employers and employees, and therefore does not present any restriction to relations involving foreigners;
- Given the inconsistency between D6/01 and the LL, and bearing in mind that the LL is more recent and of a higher order than D6/01, the LL implicitly revokes D6/01;
- D6/01 itself does not restrict private employment agencies from recruiting foreigners for the purpose of transfer to third parties, based on the legal principle of that which the law does not prohibit, it permits;
- It is contrary to the *raison d'être* of private employment agencies, which are particularly designed to adapt their services to the gaps between labor supply and demand, thus contributing to the proper functioning of the labor market; and
- It is detrimental to the growth of the mining industry in Mozambique and international *praxis* as regards the employment of staff for mining or petroleum projects, insofar as the organization of mining and petroleum companies does not envisage the internal hiring of staff for projects, but the outsourcing of these services to specialized companies with specialized labor for specific project tasks. This is further affirmed by the underlying fact that for these projects employees work in rotating shifts.

This extralegal barrier causes among other things the following constraints:

- Private employment agencies registered in Mozambique are limited in their scope of operation:
- The mining industry no longer benefits from the contracting of employees in this way, which is one of the more flexible mechanisms and ensures that these companies have specialized employees at their service for short periods and with the necessary speed;

- Many Mozambicans, who were contracted by private employment agencies so as to allow them a larger quota available for the contracting of foreigners, no longer benefit from the income they had as a result of such employment;
- There is a reduction in the scope of operation of the labor market due to the limitation on the effective supply and demand for qualified and experienced foreign labor; and
- Since companies without a quota cannot use private employment agencies, they end up being cheated by service providers in the market that use corrupt mechanisms to obtainconfirmation documents of communication of work.

In relation to this last aspect, we note the examples of the appearance, both last year and this year, of falseconfirmation document of communication of work, in the capital and in some provinces.

From this perspective, the labor authorities should analyze the long-term macroeconomic benefits to the Mozambican economy brought by the liberalization of the transfer of foreign employees by private employment agencies, instead of limiting themselves to the perception that these agencies are mechanisms to place foreign employees in company positions that could be occupied by Mozambican citizens. Other measures could be used to manage the situation without restricting the transfer of foreign employees by private employment agencies, since the Mozambican legislation already creates specific conditions for appropriate employment controls.

2.2 The employment of foreigners in the scope of short-term work

2.2.1 Regime

D55/08 stipulates that one of the arrangements for the employment of foreigners takes the form of communication of short-term work, which is defined as work ''for periods not longer than thirty consecutive or interspersed days, in the same year, by foreign citizens including those already under contract to the parent company or its subsidiaries in other countries''.[15]

Short-term work is exempt from work authorization[16], does not fall within the quota system and is exempt from the payment of fees[17].

For the petroleum and mining sector, short-term work is considered to be work for periods not longer than 180 consecutive or interspersed days, in the same calendar year[18], is not subject to renewal and is subject to the payment of a fee corresponding to 10 minimum wages in effect in the mineral extractive industry sector.[19]

In accordance with paragraph 4 of article 12, in conjunction with article 7, of D55/08, as well as paragraph 4 of article 12, in conjunction with article 7, of D63/11, the conformity of a short-term communication shall be verified at the time it is presented and the respective confirmation document shall be issued immediately.

[15] D55/08, article 12, paragraph 1.
[16] *Ibid:* article 12, paragraph 2.
[17] *Ibid:* article 12, paragraph 4.
[18] D63/11, article 12.
[19] *Ibid:* article 19, paragraph 2.

2.2.2 Extralegal barriers

2.2.2.1 Delay in issuing, and subjection to approval by the labor authorities

In accordance with the foregoing, the conformity of a communication of short-term work shall be verified at the time it is presented and the respective confirmation document shall be issued immediately.

However, what we have seen in practice is non-compliance with the legal provisions on the part of the labor authorities, taking 15 calendar days, and sometimes even longer, to issue the respective confirmation documents. Cases have been reported in which confirmation documents are issued after the period requested for the short-term work assignment.

This constitutes an extralegal barrier, insofar as:

- The law is not being complied with according to the precise provisions laid down;
- The excessive delay violates the *ratio legis* of the very provision that intends to speed up the communication of short-term work procedure;
- The delay in issuing contradicts the occasional, unpredictable and specific nature of the work to be executed; and
- Short-term work is exempt from work authorization[20] and the obligation that the companies must wait for the issuing of a document therefore violates the *mens legis*.

This delay in the issuing of the confirmation documentsof the communication of short-term work leads to the following constraints for companies:

- Lack of timely execution of activities required for the productivity of the company;
- Increase in logistical and unforeseen expenses with accommodation and changes of dates of employees' air tickets;
- Creation of the perception that ''applications'' for short-term communications should be delivered several weeks before the start of the work (when it is often very difficult to predict the start date), with the company being involved in constant and repeated follow-ups for the confirmation or not of the issuing of the decisions; and
- Delays, sometimes considerable ones, in compliance with agreed deadlines for the execution of projects.

The delay in the issuing of short-term communications distorts their usefulness, since in principle short-term communications serve to cope with occasional, unpredictable or specific work. It is absolutely incomprehensible that based on current *praxis*, companies have to apply for a communication to execute urgent and occasional work and moreover to have to wait for a decision on the authorization, when the law itself stipulates that it is merely a communication that should be made to the competent entities.

Furthermore, it should be emphasized that delays in the issuing of decisions fosters corruption, insofar as companies, driven by the need to obtain the respective documents, may bribe civil

[20] D63/11, article 12, paragraph 2, and D55/08, article 12, paragraph 2.

servants or are bribed by them, in the expectation of having the documentsissued without further delay.

2.2.2.2 The frequent "refusals"

Under article 12, paragraph 4, in conjunction with article 7, of D55/08 as well as D63/11 *the conformity of the communication of short-term work shall be verified at the time it is presented, and a document confirming its receipt shall be drawn up immediately.* Paragraph 2 of article 12 of both decrees goes further by stating that *short-term work does not require work authorization; [for the purpose,] communication shall suffice*.

The foregoing amounts to saying that, in the case of a first short-term communication, the company only has the obligation to communicate to the labor authorities that it has a foreign citizen who is a performing a short-term activity, indicating the period for which he will stay with the company, and that, in the case of an extension and where D55/08 applies, this extension is subject to authorization by the competent entity.

However, there are refusals of short-term procedures, although this is done without a written decision, instead being communicated verbally by the authorities, which simply refuse to issue the confirmation documentupon the first application or subsequent renewals, on the following grounds:

i) The company should already have national employees among its staff filling the vacancies for which requests for short-term work by foreign employees are being made; and
ii) The activities that will be executed by the foreign citizen do not satisfy the requirement of being ocasional, unpredictable and specific, in accordance with D63/11, which regulates the employment of foreign labor for the mining and petroleum sector.

In relation to these arguments presented by the DPTESS, there are the following counter-arguments:

i) The DPTESS should not interfere with the company's organization or judge what can be considered a temporary or a permanent position. In multinational companies, staff exchange is normal, and should allow these companies to make use of the short-term regime as long as the exchanges do not exceed the period permitted by law.
ii) The requirements imposed by paragraph 6 of article 3 of D63/11 (occasional, unpredictable and specific nature) are based on the activities carried out in the mining and petroleum sector and should not be extended as a ground for refusal for other sectors. For other sectors it is sufficient that the activity to be carried out is of a temporary nature.

The refusal of short-term permissions constitutes an extralegal barrier insofar as:

- It is *contra legis* for cases of first short-term communications by companies providing services in sectors of activity to which D63/11 is not applicable;

- It is *contra legis* for the petroleum and mining sector, since in accordance with their specific regime communications shall be issued and not subject to granting;
- It distorts the useful effect of short-term work, namely to attend to occasional, specific issues or of a temporary nature.
- It damages the company by depriving it of specialized staff contracted to deal with an occasional or specific need.

Delays around short-term permissions create, among other things, the following constraints for companies:

- Non-fulfilment/delays in activities, plans and programs, which affect the objectives set by the company;
- Lack of timely execution of activities needed for company productivity; and
- Delays, sometimes considerable, in meeting agreed deadlines for the execution of projects.

We believe that, when the formalities related to the supporting documents for communication are compliant, there is no reason for refusal in the following cases:

a) In the first communication for each foreign employee contracted by companies that perform activities unrelated to the mining and petroleum sector;
b) In any communications by the mining and petroleum sector, insofar as they cover the need to carry out activities requiring occasional or unforeseeable assistance.

Moreover, in the case of extension of short-term communications within the scope of D55/08, the DPTESS in question shall merely analyze the scope or the size of the company or the scope of the claimed need for contracting, and shall not refrain from the issue of the documents, alleging:

i. the abusive use of the short-term system, because the law does not limit or determine a number that each category of companies can submit annually; or
ii. lack of unpreditability, or of occasional or specific nature of the work when the short-term communication is not related to the mining or petroleum sector, because D55/08 does not determine this criterion, unlike D63/11, wherein the regime for the contracting of foreigners for the mining and petroleum sector stipulates that the short-term work regime is aimed at the contracting of foreigners for the performance of occasional, unpredictable and specific activities.

2.2.2.3 Short term work communications for visits by company partners and directors

The regimes for the contracting of foreigners are always based on the presupposition of the existence of a legal labor relationship between the persons regulated by the legal instruments, namely the foreigner and the employer.

Currently, the DPTESS understand that when foreign partners/administrators of the company which is a shareholder of a company registered in Mozambique, visit its facilities, simply because they enter its facilities, they must have a confirmation document of ashort-term communication issued by the labor authorities.

It should be noted that this understanding extends to non-resident foreign partners (individual persons), who visit the company's facilities, for the purpose of participating in a General Assembly.

The requirement of short-term communications for these cases constitutes an extralegal barrier for, among others, the following reasons:

- The short-term regime is designed to cover periods of temporary work, even if interpolated, so that simple visits for discrete periods in a short space of time do not justify an application for a short-term communication, with all current procedural constraints; and
- It makes travel by investors to company facilities for mere visits dependent on the issuing of a confirmation documentof a short-term communication, which is not always issued in good time, thus frustrating the investors, who feel barred from visiting the company.

Therefore, the companies:

- Spend time preparing, submitting and following up short-term communications at the DPTESS so as to comply with the DPTESS's requirements;
- Are obliged to change the investors' travel plans when the short-term permissions are not issued in good time; and
- Must pay the equivalent of 10 minimum wages, in the case of companies in the mining or petroleum sector, for simple visits, which represents a burden for the company and demotivates investors from continuing with their aspirations.[21]

There are cases reported of refused or suspended procedures pursuant to the argument that where the company is a shareholder in a Mozambican company, the administrators or directors of the first company should have work communications or work authorizations and not communications of short-term work, due to the position they occupy. This is not acceptable, since they do not work at the Mozambican company, but at a distinct legal entity that is its shareholder.

It should be noted that, though paragraph 1 of article 12 of D55/08 sets out that short-term work is considered to be work carried out by foreign citizens, including those already under contract to the parent company or its subsidiaries in other countries, in the cases under examination we are not dealing with work to be carried out in Mozambique, but with occasional visits, for which the procedure of a of communication of short-term work is neither in keeping with the occasional nature of the activity, nor with the nature of the activity itself, which in effect is not work to be provided.

It should however be noted that there are cases reported of some DPTESS which, sharing the same understanding that visits by investors should not fall within the short-term regime, propose to companies other ways of dealing with these visits, which simply involve the submission of a letter containing:

i) the specific indication of the positions held by the foreign citizens in the shareholding company (directors, partners or administrators);

[21] In accordance with Ministerial Order 70/2015 of 20 May, the minimum wage for sector 3 – Industry and Mineral Extraction –for employees working at large companies is 5,643.34 MT, so that the value corresponding to 10 minimum wages is 56,433.40 MT.

ii) the dates of their stay in Mozambique and the likely period of the visits to the facilities; and
iii) the date of return to the country of origin.

This procedure created by some DPTESS means that the duly registered submission of the above-mentioned letter was sufficient, for the due purposes.

2.2.2.4 Short-term work in various provinces

In accordance with paragraph 3 of article 12 of D55/08 and paragraph 3 of article 12 of D63/11, a communication of short-term work must be delivered in the province where the foreigner will perform his activity.

However, it happens that at times the work to be carried out by a foreign citizen:

i) starts in one province and ends in another province in which the company has an office; or
ii) is carried out offshore and, although starting on the coast of one province, may often include the performance of activities on the coast of other provinces.

Companies have consulted the DPTESS in such cases, but have not received clear information.

In relation to point i) above, some DPTESS recommend the submission of a short-term communication in each province where the foreign citizen will provide his services. However, because such a procedure becomes costly for companies in the mining and petroleum sector, which have to pay a fee of 10 minimum wages per submission, there are DPTESS which accept the submission of the documents by the employer at the DPTESS in the first province in which the foreigner will provide his services. The employer will then simply inform the DPTESS in the other province in which the foreigner will also provide services. To this end it is sufficient to register a letter of communication in the last province, only annexing a copy of the confirmation document of communication of short-term work and a copy of the passport, without any need to pay 10 minimum wages each time.

In the case of offshore work: i) there are DPTESS which advise that the short-term communication must be submitted in the province in which the work will start and the other DPTESS should only be informed; ii) on the other hand, there are other provinces which advise that short-term communications must be submitted in the province where the company has its head office and then be reported in the other provinces; iii) and finally, there have been cases of DPTESS which required that the company submit the communication in all provinces in which the employee will provide his services.

This lack of coherence between the information conveyed by the DPTESS with regard to work done by foreign employees in various provinces, or rather the lack of a coherent treatment of this matter, constitutes an extralegal barrier insofar as:

- It results in insecurity and a lack of legal certainty for the company (employer) of the foreign employee in question;

- It requires constant follow up with the DPTESS about the rules they are creating to regulate these cases, as a result of the regular changes in understanding by the DPTESS, and arising from the company's fear of being punished and having its employees suspended.

As a result, the lack of uniform treatment of this matter constitutes extralegal barriers that are also constraints for investors, insofar as this situation produces legal uncertainty and represents loss of time for the company, with constant changes in procedures in each province in which the employee will be present.

2.3 Contracting under the work authorization regime

2.3.1 Regime

Work authorization is the contracting regime that must be used when a company has exhausted its quota, but its admission is only possible when:

- the foreign employee has the necessary academic or professional qualifications;
- there are no nationals with these qualifications; or
- there are nationals, but these are insufficient in number.[22]

The law also stipulates as a condition for using the regime of contracting outside the quota system, that employers must make every effort to create conditions in the company for the integration of Mozambican workers into positions of greater technical complexity and in management and administrative positions, and the work authorization is therefore conditional upon proof that the dispositions of D55/08 were complied with.

Contracting under the work authorization regime is done by means of an application to the Minister in charge of the labor sector, submitted along with the following documents:

- Three copies of the employment contract;
- Certificate of academic or technical/professional qualifications of the foreign citizen to be employed and a document proving his professional experience (note that for academic qualification certificates obtained abroad, the respective certificate of equivalence must be issued by the Ministry of Education[23]);
- Quittance certificate issued by the INSS;
- Quittance certificate issued by the entity in charge of the area of finance;
- Opinion of the union delegate, union committee or sectoral union; and
- Deposit slip proving the payment of a fee corresponding to ten times the minimum wage in force in the company's sector of activity.[24]

[22] D55/08, article 14, paragraph 2.
[23] *Ibid:* article 16, paragraph 4.
[24] *Ibid:* article 16, paragraph 1.

2.3.2 Extralegal barriers

2.3.2.1 Delay in the issue of work authorizations

Paragraph 2 of article 15 of D55/08 stipulates that the written reply shall be given within a maximum period of 15 days, counting from the date on which the application is received by the competent entity.[25]

In practice, the 15-day deadline is not complied with, in some cases a decision on the application is made known after more than a month and a half.

The work authorization procedures appear to be the most complex and time-consuming of the procedures for the employment of foreign labor, due to the requirements imposed, such as the above-mentioned quittances, the opinion of the union and above all due to the certificate of equivalence which *per si* represents a distinct and complex procedure.

To obtain a certificate of equivalence it is necessary to submit several documents, among which:

- Certified photocopy of the diploma and certificate from the course for which equivalence is applied for;
- Certified photocopy of the certificate of the subjects completed and of the syllabus of the course subjects, their duration and the results (marks) obtained in the course;
- Photocopy of the diploma for the level preceding the course for which equivalence is applied for;
- Photocopy of the certificate for the subjects taken in that course;
- Certified photocopy of the dissertation (thesis), in the case of a Masters or a PhD; and
- Official translations of the certificates/diplomas into Portuguese language, in case they have been issued in other language other than Portuguese.

The delay in issuing decisions on work authorizations constitutes an extralegal barrier for the same reasons mentioned with respect to the delay in the issue of confirmation documents of communications of work. We should however emphasize the following consequences suffered by the company:

- The impossibility of using required staff for the company's productivity, in good time and/or as envisaged in the company's program;
- Expenses with logistical costs related to the job offer to the employee;
- Loss of the employee, in cases where he is offered another opportunity to work on projects in another country, in spite of all the time and money spent by the company in the long procedure for obtaining a certificate of equivalence, for purposesthat does not then are acomplished; and
- Regularization of the stay of the foreign citizen, when his DIRE expires while the work authorization decision is being processed, due to the renewal of the contract between the parties, resulting in higher costs and a loss of time for the company.

Considering that the public administration has a duty of celerity, we believe that the MITESS should make an effort to issue work authorizations with the necessary brevity.

When an application for work authorization arises from the renewal of an employment contract, the Directorate of Labor should give special attention to the copy of the DIRE annexed to the

[25] *Ibid:* article 15, paragraph 2.

documents as regards its validity, and care should be taken to give the necessary priority in order to avoid creating constraints to the company with respect to the regularization of the stay of foreign employees in Mozambique.

2.3.2.2 Criteria for the refusal of applications for work authorization

As discussed above, the employment of foreigners under the work authorization regime is subject to authorization by the Minister in charge of the labor sector.

It should be noted that the admission of foreigners under this regime requires demonstration that the following conditions are met:

- The foreign employee has the necessary academic or professional qualifications;
- There are no nationals with these qualifications, or if such nationals exist, they are insufficient in number [26]; and
- The employers must prove that they make every effort to create conditions for the integration of Mozambican employees into positions of greater technical complexity and into management and administrative positions in the company.[27]

It should be noted that the MITESS has refused work authorizations alleging non-compliance with one of the conditions above. There is no clarity regarding the criteria used by the MITESS for refusing applications, or for concluding which of the above-mentioned conditions were not met.

Regarding the qualifications of the foreign employee, it is noted that these include the academic or professional qualifications of the respective citizen. However, we have observed that in its analysis, the MITESS only verifies the matter of academic qualifications, disregarding that D55/08 also refers to professional qualifications, which include experience and vocational competency, which is where the relevance of the employment of the respective foreign citizen often lies, especially for work in agriculture, where knowledge is sometimes acquired by *traditio* and not as a result of institutionalized learning.

As to the existence of nationals with the same qualifications, we must emphasize that the criteria used by the MITESS to reach the conclusion that there is national staff in Mozambique with the same competency, is often questioned. We believe that because of the lack of established criteria, the employment of foreigners is often refused while the number of nationals with the same qualifications is in fact insufficient to meet market demand. In fact, we do not know if the MITESS has at its disposal a database giving an overview of existing national professionals on the basis of which the respective analysis could be carried out to determine if the academic and vocational qualifications of the foreign citizens are present in nationals, and if they are, if they are sufficient to meet current demand.

Take the example of the case of refusals of geologists, two years ago. In a complaint to the former Minister of MITRAB a letter was annexed from the principal of a certain faculty referring to a number of only about fifty geologists trained by that faculty in a period of 4 years, thus proving the insufficiency of staff to deal with the mining industry's demand. There would not have been a need to complain if our Ministry were equipped with mechanisms providing all essential information to understand the insufficiency of existing national staff in the country per sector of

[26] *Ibid:* article 14, paragraph 2.
[27] *Ibid:* article 3, paragraph 1.

activity (Primary-Agriculture, Secondary-Industry and Tertiary-Commerce) in general, and more specifically in accordance with the Classifier of Economic Activity (CAE).

Besides, with respect to this issue it is important to emphasize an experience which we think is worth sharing. It is the case of Australia where the Department of Immigration publishes in each period a list of foreign professionals eligible to obtain documents allowing them to enter the country and work, called the Skilled Occupations List.[28]

The lack of objective and publicly available criteria for the refusal of work authorizations, as well as the lack of consideration of the vocational qualifications of the employee, result in the following:

- The MITESS refuses professionals who are relevant for company projects; and
- The companies lose opportunities to work with professionals who would constitute added value in terms of transfer of know-how to national staff, improving the company's productivity and consequently the income of national staff and thus the national economy, if we perceive transfer of know-how as an opportunity component in market analysis.

There is an urgent need for MITESSs to research the professional shortcomings of the working population and to prepare a publicly available table with descriptions of skills considered necessary for the development of the country, in order to:

i) avoid the taking of arbitrary decisions which at the end of the day turn away foreign investment and harm the national economy; and
ii) determine the most effective mechanisms for the transfer of knowledge, in a practical way, to national staff.

In relation to this aspect, we can share an interesting case from the Mozambican Medical Association (*Ordem dos Médicos*) which, as part of the process of registering foreign doctors in the Association, required the doctor in question to do pro bono work in the public health service for short periods each week, so as to reap an instant and direct benefit by providing service to the community, but also to ensure that the transfer of knowledge was directed to newly trained doctors carrying out surgical operations in those health units. This is the best protection to offer national staff: qualifying them, for their benefit and for the benefit of the country.

[28] In http://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists/SOL accessed on 12/10/2015.

3. INTRODUCTION TO THE LEGAL FRAMEWORK FOR THE ENTRY, STAY AND RESIDENCE OF FOREIGN CITIZENS

3.1 Regime

Decree 108/2014 of 31 December approved the new Regulation of Law 5/93 of 28 December, which establishes the Legal Regime Applicable to Foreign Citizens, Relative to their Entry, Stay and Departure from the Country ("D108/14").

This legal instrument resulted in substantial changes to the legal regime for foreigners in Mozambique, particularly the following positive aspects, among others:

i) It adds four new categories of visas, namely:

   a) the sports and cultural activities visa,
   b) the investment activity visa;
   c) the temporary stay visa; and
   d) the crew transfer visa.

ii) It stipulates that a work visa allows the holder to stay up to the end of the employment contract, thus dispensing with the obligation to apply for a DIRE.

iii) It introduces a specific visa for dependents of the holder of the work visa, namely the above-mentioned temporary stay visa. This visa entitles its holder to multiple entries and a stay of up to 1 year, subsequently renewable up to the end of the work visa holder's contract.

Among the negative aspects, the regulation withdrew the possibility to apply for a visa at the border by citizens from from countries with Mozambican diplomatic representations in their country of origin, through an additional payment of 25% of the overall fee, under the previous regulation approved by Decree 38/2006 of 27 September ("D38/06").

It should be noted that, although D108/04 has been approved, until today it has not yet been implemented.

3.2 Extralegal barriers

3.2.1 The requirement to have the work visa issued in the foreign citizen's country of origin or of last residence

In accordance with the provisions of paragraph 1 of article 19 of D108/14 a work visa is granted to a foreign citizen by the diplomatic and consular missions of the Republic of Mozambique.

The authorities have been requesting that the work visa be applied for in the foreign citizen's country of origin or of last residence, provided that he has obtained the resident status in that country.

In several cases we are faced with situations in which the citizen's country of origin does not have any Mozambican diplomatic representation. In these cases, the citizen is obliged to go to the nearest country with a Mozambican diplomatic representation, with all costs and inconveniences this brings, when in fact this is not a legal requirement, but rather a requirement imposed by the Immigration Services.

This practice represents an authentic extralegal barrier insofar as neither the previous Regulation, nor the new Regulation, nor even the Law which the Regulation regulates, determine the requirement that a work visa can only be issued in the foreign employee's country of origin or of last residence.

This requirement results in the requirement that the foreign citizen, often performing activities in another country, must travel to his last country of residence or of origin, simply to submit an application for a visa, and also results in logistical travel and accommodation costs, which become quite high and which must be borne by the contracting company.

As a consequence of this extralegal barrier, companies have wasted a lot of resources to cover the travel of foreign citizens to their country of origin in order to comply with this imposed obligation, in addition to the wasted time this implies, both for the employee and for the company.

We believe that foreign citizens should be free to apply for a work visa for their entry into Mozambique in any country in which Mozambique has diplomatic and consular missions.

3.2.2 The pre-approval of business visas

Article 6 of D108/14 determines that ''the granting of a visa by embassies and consulates is subject to prior consultation with the Immigration Services''.

Notwithstanding this Decree being clear with regard to the visas that are subject to pre-approval, such as the work visa[29], some consulates and embassies have demanded pre-approval of the business visa, so that the representative of the travelling party in Mozambique has to submit an application to the Immigration Services for the subsequent issuing of the business visa for the foreign citizen.

Nevertheless, note that the law does not clearly stipulate the mechanisms or procedures for how the pre-approval process should occur and it is therefore understood that the consultation referred to in article 6 of D108/14 above is an internal consultation between the embassies and consulates and the Immigration Services.

However, in practice the pre-approval process has meant the submission of an application to the Immigration Services in Mozambique and only after a decision by these authorities can the applicant submit the application for a visa to the Mozambican Consulate or Embassy abroad. This practice is required by some embassies and consulates and with respect to some nationalities.

The requirement of a pre-approval for business visas is an extralegal barrier, insofar as:

- its application is not established by law;
- the procedure that has been observed has been rather slow and, if we take into account the nature and purpose for which the business visa is applied for, it is not practical that

[29] D108/14, article 19, paragraph 5.

applicants must first pass through a pre-approval process, which in some cases may take a considerable amount of time, which can be up to 30 days.

The constraints and delays for business that the pre-approval procedure for business visas represents are, among others, the following:

- Legal instability which undermines the entry of foreigners and of foreign investment, due to: i) the lack of standardization of the procedures by the Immigration Services in the various provinces of Mozambique, with regard to the pre-approval of visas; ii) the lack of a legal act establishing it; and iii) the lack of standardization of the requirements for a business visa on the part of diplomatic missions;
- Occasional non-fulfilment of the requirement of attendance by the investor, his agent or someone else serving his interests; and
- Creation of a poor first impression about the insecurity and legal uncertainty arising from procedures related to the stay and employment of foreigners in Mozambique.

3.2.3 The non-application of D108/14

D108/14 was approved by the Council of Ministers on 16 December 2014 and published in the Government Gazette (*Boletim da República*) on 31 December of that year, in *Boletim da República*, I[st] Series, Issue 105.[30] In accordance with article 4 of its preamble, the Decree enters into force on the date of its publication.

However, this legal instrument is not being applied by the authorities, which causes severe constraints to the private sector. Business therefore cannot benefit from a regime which, among other positive aspects, introduces requirements that could facilitate the stay of foreign citizens for the purpose of work.

We therefore believe that the lack of application of this Decree constitutes an extralegal barrier, because:

- it should already have been implemented, since the Decree itself stipulates that it enters into force on the date of its publication;
- it introduces the investment activity visa[31], entitling its holder to multiple entries and a stay of up to two years, renewable for equal periods of time, as long as the reasons justifying its granting continue to exist;
- it exempts the holder of a work visa from requiring a DIRE, thus simplifying the procedures for his stay by virtue of an employment contract; and
- it allows the holder of an employment visa to stay up to the end of the employment contract.[32]

The non-implementation of D108/14 has the following consequences:

[30] The *Boletim da República* (BR), Issue 105, I[st] series (main) was published on 31 December 2014. However, due to the very limited number of pages allowed for the publication, parts of its contents were successively printed in Supplements 1 to 24. In this last Supplement Decree 108/2014 of 31 December was included, and was in fact printed by the *Imprensa Nacional de Moçambique* on 28 April 2015.
[31] *Ibid:* Article 17.
[32] *Ibid:* Article 19, paragraph 2.

- With respect to the stay of foreign employees, employers are obliged to apply for two documents: a work visa and a DIRE, in two different places, one abroad and the other one in Mozambique;
- The employee has to manage the validity of the police clearance for the two processes (work visa and DIRE) and sometimes when he is in the process of submitting the application for a DIRE, the police clearance is about to expire or has already expired, implying the application for a new one from his country of origin or last residence in the past two years[33]within the limited period of time allowed by the work visa;
- The employer is obliged to apply for a fiscal quittance certificate and/or to submit proof of the last tax payment made, depending on the Provincial Immigration Directorate, and sometimes there is significant delay in the issuing of the fiscal quittance certificate; and
- The employer is obliged to pay a fee for the issuing of a biometric DIRE, the high cost of which is not in line with its validity, namely 1 year, implying a requirement to renew it within the period of time in which the communication/authorization of work is still valid or even for a longer period of time.

We hope that this Decree will be implemented soon, that its application will be in accordance with the law, and that no additional requirements or formalities are added, becoming other extralegal barriers *per si.*

3.2.4 The updating of the DIRE when the employee is transferred to another province in the country

In its article 75, the LL allows an employer to transfer employees from their workplace. This transfer sometimes implies that the foreign employee has to travel from the company's head office to a branch of the company situated in another province of the country or vice-versa.

In its Circular 004/MITRAB/DTM/GD/211/2013 of 19 August, the Immigration Labor Directorate stipulates that ''*all communications of a transfer shall indicate their duration, and if it is temporary, it shall not exceed the period of its authorization*''.

From the LL and the Circular above we infer that there is an obligation to communicate the transfer of an employee to the labor authorities, and once the legal requirements for the transfer are met, it is granted by these authorities. Thus, the transfer of a foreign employee for the purpose of work is regulated.

For the purpose of residence, namely with regard to the DIRE, there are cases in which an employee, even when holding a valid DIRE, has been instructed by the immigration authorities to update his DIRE as a result of having been transferred from one province to another, to work in facilities belonging to the same employer.

This obligation imposed on foreign citizens arises from the interpretation of article 22 of L5/93, which stipulates that a change of domicile of a foreign employee resident in Mozambique must

[33] Please note that the requirement of the police report from the country of residence of the past two years is not a requirement established by law for the DIRE application, but for the Residence Visa under the Decree 38/2006 of 27 September which was revoked by D108/14, but is still being applied. Under Article 14 and article 26 of said revoked Decree, the police report issued by the country of origin or the last residence of the past two years is only requested for the Residence Visa and not for the DIRE.

be communicated to the immigration authorities, and a written annotation (*averbamento*) of the new domicile must be requested.

The request for updating the DIRE, because of the transfer of an employee from a workplace in one province to another one, constitutes an extralegal barrier insofar as:

- The DIRE is a biometric document and updating it can only occur by application for the issue of a new DIRE, implying the payment of the corresponding issuance fee[34];
- Clause a) of article 1 of D108/14 defines the residence permit as ''a document issued by the competent authority conferring on its holder the right to reside in Mozambique for the period indicated on it''. This precept does not limit the validity of a DIRE to one province of the country, from which it follows that it is valid at national level and is not geographically limited.
- The DIRE is a national document, just like the *BI* (ID document) for nationals, and the differentiated treatment of these documents violates the principle of universality and equality enshrined in the Constitution of the Republic of Mozambique;
- The transfer of an employee is not a factor leading to the termination of residence authorization, set forth in article 35 of the above-cited Decree, which leads to the conclusion that transfer does not constitute a cause for the termination of the DIRE, so that there is no reason to apply for a new DIRE, for the mere purpose of updating it;
- Clause b) of article 36 of D108/14 stipulates that a foreign citizen has the special obligation to communicate to the Immigration Services any change of nationality, civil status, profession, workplace, domicile or absence from the country beyond the period provided for in the law, so there is no reason for the issuing of a new DIRE on the occasion of the transfer of an employee from one province to another, for which the procedure is simply a communication to the immigration authorities about the change.

Due to this obligation, companies have suffered the following constraints:

- Bearing the costs of the issuing of a new DIRE, for the mere purpose of updating it, i.e., the payment of a fee corresponding to MT 19,200[35], when the validity of the current DIRE has not yet expired;
- Time wasted with the organization, submission and follow-up of the process of updating the DIRE; and
- Added frustration with the entire process of the regularization of the stay of a foreign employee, who is in possession of the proper communication/ authorization of work for this purpose.

Adding an annotation was only possible before the introduction of the biometric DIRE. With the introduction of the biometric DIRE, by Decree 12/2008 of 29 April, an annotation ceased to be possible, so that article 22 *in fine* of the above-cited Law was implicitly revoked by the new Regulation of the Law, which imposes the new reality.

Thus, we believe that the transfer of a foreign employee from one province to another, without any change of employer, does not oblige the holder of a DIRE to apply for a new one.

[34] Annex 1 of Ministerial Order 262/2010 of 24 December, which approves the new table of fees for the issue, renewal or replacement of a biometric passport, visa or DIRE that can be read electronically (''DM262/10'').
[35] Except for CPLP citizens for whom the value is MT 14,400, in accordance with DM262/10.

4. CONCLUSIONS AND RECOMMENDATIONS

This report has addressed several extralegal barriers that lead to insecurity and legal uncertainty and consequently to the contraction of foreign investment. However, it has not covered all of them. Seven years having passed since the approval of the Legal Framework for the employment of foreigners which is currently in force in Mozambique, we can therefore say that there are several extralegal barriers occurring in the procedures for the contracting and stay of foreigners, but it is not possible to address all of them.

However, without exhausting the range of suggestions that can be offered to the public sector for the removal of the extralegal barriers, the table below presents a summary of ways to eliminate the various extralegal barriers dealt with in this Report:

Item	Extralegal Barrier	Observation	Suggestion to the Public Sector
01	The obligation to submit the trading license and the simplified license	This is not one of the requirements contained in the law and its aim is only to confirm the company's sector of activity, for the purpose of determining the applicable fee. The licensing process follows the process of the establishment of the company and is time consuming, so that another document confirming the sector of activity could be requested by the authorities.	In the first communication, request the commercial registration certificate instead of the trading license or simplified license, for the purpose of confirming the company's sector of activity.
02	The requirement for start-up companies to present the nominal list	There is no legal obligation for start-up companies that have not yet contracted employees.	Request this list only after the issuing of a decision on the communication of work for the company's first employee and within the parameters stipulated iby law.
03	Delay in the issue of confirmation documents of work communications	They must be issued on the day the communications are submitted.	i) Delegation of power to employees of the service who can check the conformity of the documents, whenever the Director is absent or has an overloaded agenda; ii) Verification of the expiry date of the foreign employee's DIRE, giving priority in expediting communications when the DIRE is about to expire.

Item	Extralegal Barrier	Observation	Suggestion to the Public Sector
04	The transfer of foreign employees	Should be communicated to the labor authorities, but does not need authorization to enable the employees to start their activities in the company facilities to which they were transferred.	Display of a notice, informing the public that proof of submission of the letter communicating the transfer of an employee serves to validate the procedure.
05	The application of the transfer rules to visits by senior staff to company facilities in other provinces	It is incorrect.	Display of a notice, informing the public that no formality is required for these cases. It is sufficient that the employment contract envisages these visits.
06	Private employment agencies	The Circular prohibiting these agencies to transfer foreign employees to third parties has tacitly been revoked.	i) Explicit revocation of the Circular prohibiting these agencies to transfer foreign employees; ii) Oversight of the agencies, with regard to the rights of national employees, including in the first place the right to a fair salary in accordance with the position held; iii) Interaction with these agencies, investigating ways to transfer know-how from foreign employees to national employees.
07	Delay in the issue of confirmation documents ofof short-term communication	They must be issued on the day the communications are submitted.	Delegation of power to employees of the service who can check the conformity of the documents, whenever the Director is absent or has an overloaded agenda
08	Frequent ‘‘refusals’’ of short-term authorizations	These must be issued immediately upon the submission of the application for the mining and petroleum sector and upon the first	i) Execution of the law along the lines suggested in the middle column. ii) For cases of extension do not invoke ‘‘abusive use’’

Item	Extralegal Barrier	Observation	Suggestion to the Public Sector
		communication of the admission of an employee for short-term work for other sectors; only renewals (i.e., applications exceeding 30 days) are subject to the discretion of the authorities.	as an argument to refrain from processing the application, as the law does not limit to a specific number that can be issued annually per category of companies; iii) For cases of extension, pursue the cases in which the position to be occupied cannot be confirmed, the position is permanent or there are doubts about this. iv) Do not refuse cases that fall within the scope of D55/08, alleging the lack of contingency, unpredictability and discreteness of the tasks, as this criterion only applies to cases under the scope of D63/11.
09	Short-term work in several provinces	This is not dealt with in law. However, current *praxis* of the majority of DPTESS has been to submit the communication in the province in which the foreigner will start his activities and inform the other provinces, without a need to pay additional fees, in the case of the mining and petroleum sector.	This procedure must be published and displayed in the relevant public offices, emphasizing that it not only applies to the mining and petroleum sector but also to the others.
10	Short-term communications for visits by company partners and directors	This is not dealt with in law.	The requirement of merely a letter containing the dates or the likely period of the visit. Display of this information in the relevant public offices.
11	Delay in the issue of work authorizations.	Work authorizations should be issued within 15 working days.	i) Fulfilment of the Public Administration bodies' duty of celerity; ii) Verification of the expiry date of the foreign employee's DIRE,

Item	Extralegal Barrier	Observation	Suggestion to the Public Sector
			expediting applications when the DIRE is about to expire.
12	Criteria for the refusal of applications for work authorization	The law sets out the conditions to be observed for contracting outside the quota regime. The vocational qualifications shall also be taken into consideration in the decision, so that when there are foreigners with vocational qualifications and there is insufficient availability in the domestic market to meet demand, it must not be considered a reason for refusal.	i) Identify the shortcomings of the national labor market by sector of activity and seek mechanisms for the transfer of know- how; ii) Publish the table of criteria used to determine non-existent or insufficient skills on the market; iii) Consider the vocational qualifications of foreign employees, for the purpose of authorizations.
13	The requirement that a work visa be issued in the foreign employee's country of origin or of last residence.	Not established by law. Illegal.	Elimination of this procedure and display the relevant information in the relevant public offices.
14	The pre-approval of business visas.	Notestablished by law in the way it is practiced.	Coordination between the SENAMI, the Provincial Directorates and the Mozambican diplomatic missions abroad.
15	The non-application of D108/14	It should already have been implemented.	See suggestion 13 above.
16	The updating of the DIRE when the employee is transferred to another province in the country	Not applicable in accordance with the law.	Display information in the relevant public offices about the rights of a DIRE-holder and clarify that there is no obligation to issue a new DIRE because of a transfer, when the DIRE will still remain valid after the transfer.

These extralegal barriers result from the abuse of power on the part of the labor authorities, insofar as the requirements imposed do not derive from the law. These requirements end up deteriorating the business environment, since investors who intend to start their business activities see that these requirements delay the start or growth of their business and decrease the possibility of identifying other business opportunities in Mozambique, resulting in a feeling of insecurity and legal uncertainty transmitted by these barriers. In addition, investors share their experience with other potential investors, thus also inhibiting investment. Other investors end up being bribed by civil servants or vice versa, in order to have the documents issued in good time, with the expectation of not suffering losses due to the delayed start of their projects.

Transparency and performance in accordance with the Legal Framework are crucial in the fight against corruption. Respect for the standards set by the law is essential and this must be made clear by notices, circulars or information aimed at eliminating the extralegal barriers, instead of promoting them.

Another analysis that must be made in order to create public service celerity relates to decisions by the competent body to delegate its powers, not reserving exclusively for itself those powers that can be delegated, due to its specificity and legality or for the interest of the institution.

Regarding the principles governing the performance of the Public Administration, the PA must provide information about the progress of applications and procedures, and any difficulties, out of respect for the principle of collaboration between Public Administration and individual citizens, since the spirit of this principle requires that civil servants listen to citizens, welcome their suggestions and take decisions in good time.

The generalized idea that restrictions on the employment of foreign citizens are aimed at the protecting national employees, guaranteeing their employment, and the reservation of jobs for nationals should also be acknowledged and corrected. How this aim is meant to be achieved in accordance with the law and promotion of the improvement of the business environment, needs to be understood. Developing the business environment is not possible in the scope of a framework of extralegal barriers that slow down or decrease investment in Mozambique, with the consequent lack of job creation and/or job maintenance for nationals, which is contrary to the apparent aim of protectionism the labor authorities seek to achieve.

At this point and in light of the protectionism of national labor, the labor and immigration authorities should not create extralegal barriers for those who intend to work and stay legally in Mozambique. The Legal Framework for the contracting of foreigners already provides standards for protecting nationals and the extralegal barriers only create difficulties for entrepreneurs, and divert the attention of the authorities in detriment to what should really be fought, such as illegal employment and the illegal entry and stay of clandestine immigrants.

We can thus conclude that the extralegal barriers, because they are not provided for in the law or are contrary to the law, are in fact illegal and contribute both to the contraction of investment in Mozambique and to the promotion of corruption. The way to eliminate these barriers is through strict law enforcement.

The way in which the private sector can contribute to the elimination of the extralegal barriers at Government level – among various mechanisms offered by the law, such as recourse to the Administrative Court, to the Attorney-General of the Republic, and to the Ombudsman, among others – is through a complaint to the originator of an extralegal barrier, lodging an appeal, if necessary, to a higher-ranking body. It is through duly substantiated complaints that the authorities can be made aware of their illegality and take action.

Internally, the private sector should refrain from seeking services from providers other than law firms with properly qualified and licensed lawyers, trained in anticorruption practices, for the purpose of providing assistance to the contracting of foreigners. Insofar as this assistance is an act that is proper for lawyers and for law firms, because this is legal advice according to the Statutes of the Bar Association (*Ordem dos Advogados de Moçambique*), these lawyers are prepared to give the best advice to their clients to avoid bribes, and are also in a position to act, together with the Bar Association, in favor of the removal of the extralegal barriers, in accordance with the legal instruments offered by the law.

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