

# Dispute Resolution in Mozambique: The Rise of Arbitration

Alongside its entry into relevant international conventions and treaties such as the New York Convention and a number of Bilateral Investment Treaties (BITs), Mozambique has embraced arbitration as a means of dispute resolution. In this briefing, we summarise the key considerations of dispute resolution and the enforcement of arbitral awards in Mozambique.

## The Mozambican Court System and Legislative Framework

Mozambique has a civil legal system based on its Constitutions of 1975, 1990 and 2004. For historical reasons, Mozambique's civil framework is largely based upon Portuguese-Roman law.

The Mozambican Companies Code (*Código Comercial Moçambicano*, Decree-Law 2/2005 of December 27 as amended by Decree 2/2009 of April 24) is the primary legislation regulating corporate dealings in Mozambique. It should be noted that Mozambique is not a Member State of The Organization for the Harmonization of Business Law in Africa (OHADA) such that the option of arbitration under the OHADA Uniform Act on Arbitration will not be available.

The legal system in Mozambique is made up of the Administrative Court, the Constitutional Council and the Judicial Courts.

The Administrative Court is responsible for reviewing the legality

of administrative acts and public spending.

The Constitutional Council is responsible for ensuring the constitutionality of Mozambican legislation and considers the constitutionality and legality of the actions of the Mozambican Executive.

The Judicial Courts are comprised of the "Superior Courts" and the "Lower Courts". The Superior Courts consist of the Supreme Court and the Appeal Regional Courts. The Lower Courts consist of the District Court of 1st Class, the District Court of 2nd Class and the Courts of the Province. The District Courts of 1st and 2nd Class have jurisdiction to hear both criminal and civil matters. In relation to civil matters, the size of the claim dictates which court will consider the dispute. Claims for larger amounts (i.e. where the sum in dispute is greater than 100 times the minimum wage in Mozambique) will be heard in the Courts of the Province. As such, claims above approximately US\$ 15,000 will be usually heard in the Mozambican Courts of the Province.

## Key issues

- The Mozambican Court System and Legislative Framework
- Arbitration in Mozambique
- Investment Protection
- Enforcement of Arbitral Awards
- Conclusion

Generally, bringing civil claims in the Mozambican judicial system can be a lengthy and expensive process. For example, a dispute regarding a breach of contract often will require over two years before a judgement is obtained from the Mozambican courts. As such, arbitration may be a speedier and, in principle, a less costly alternative to litigation in Mozambique.

That said, the likely overall costs of bringing arbitration proceedings will of course depend heavily upon the nature and complexity of the case. Further, as arbitration in Mozambique is a relatively recent development, the expected costs of enforcing arbitral

Awards in Mozambique is somewhat uncertain.

## Arbitration in Mozambique

In terms of domestic legislation, the primary law governing arbitration in Mozambique is the Law on Arbitration, Conciliation and Mediation (Law no. 11/99 dated 8 July 1999) (the "Arbitration Law"). The Arbitration Law is largely based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and provides that any interested parties may refer disputes to arbitration, provided that they have entered into an agreement which includes an arbitration clause or an arbitration agreement which is express, valid and enforceable. Any Award rendered in any such arbitration proceedings will be treated and enforced in the same manner as a judgement of the Mozambican courts. The Arbitration Law additionally confirms that, if expressly agreed between the parties, arbitration proceedings seated or taking place in Mozambique may be governed by the laws of States other than Mozambique, for example a contractual dispute regarding breach of an agreement governed by the English law. Mozambique therefore offers a neutral location for disputes that have no connection with Mozambique itself.

The Centre for Commercial Arbitration, Conciliation and Mediation ("CACM") is Mozambique's only arbitral institution. CACM is based in Maputo and has a delegation in Beira.

Although the Arbitration Law provides the possibility for private entities to establish arbitration bodies in Mozambique, at present, no

arbitration bodies (other than CACM) have been established.

## Investment Protection

Mozambique has entered into Bilateral Investment Treaties ("BITs") with 24 different countries, 19 of which are currently in force, including those with Belgium, Luxembourg, Denmark, Germany, the Netherlands, Mauritius, the United Kingdom and the United States.

BITs are short treaties, often of no more than ten or so pages, entered into between two States. BITs provide for the mutual promotion and protection of investments made by investors of the two States by prescribing certain minimum standards of protection to such investments. "Investment" for these purposes generally refers to any kind of asset with economic value, such as physical assets or equity interests in a company. These standards of protection commonly include protection against government interference, fair and equitable treatment, and compensation in the event of an expropriation. However, the formulation and wording of such standards vary from BIT to BIT and their interpretation continues to undergo a constant process of development through international case law.

The 1993 Mozambique Investment Law (Law no. 3/93 dated 24 June 1993) also further strengthens the protections available to investors in Mozambique by providing an additional basis of investment guarantees and government incentives, including equality of treatment for foreign investors, protection of certain property rights,

and the ability to repatriate funds abroad.

As Mozambique is signatory to the ICSID Convention, which entered into force in Mozambique on 7 June 1995, foreign investors may choose to refer disputes arising out of contracts entered into with Mozambican State entities to ICSID arbitration.

## Enforcement of Arbitral Awards

The Arbitration Law expressly provides that arbitral Awards rendered in Mozambique pursuant to the Arbitration Law should be treated and enforced in the same manner as a judgement of the Mozambican courts. In cases of non-compliance of any arbitral Award, enforcement proceedings must be commenced in the Mozambican courts.

Further, as Mozambique ratified the New York Convention on 11 June 1998 (subject to reciprocity), which entered into force on 9 September 1998, the Mozambican courts are *prima facie* required to give effect to an arbitration agreement and recognise and enforce arbitral Awards made in other New York Convention States against the assets of a party located in Mozambique.

That said, the enforcement of any foreign arbitral Awards in Mozambique is subject to the subsequent consideration and recognition of the Mozambican Supreme Court. This review and recognition process does not, however, entail a review of the merits of the arbitral Award itself.

We note that certain BITs entered into by Mozambique contain provisions which deem any arbitral Awards

awarded pursuant to the BIT as a decision of the Mozambican national court and, as such, may be enforced accordingly. Those arbitral Awards awarded pursuant to a BIT which does not include such provisions are subject to the same enforcement regime as foreign arbitral Awards rendered in commercial arbitration proceedings (as outlined above).

Although the Arbitration Law is silent in relation to Mozambique's sovereign immunity, in practice, it is recognised that Mozambique may waive its immunity by entering into BITs or commercial agreements with binding dispute resolution provisions or arbitration clauses.

Nevertheless, the Mozambican Civil Procedure Code (Decree-Law n.º 44129) provides that judgements and arbitral Awards may not be enforced against certain State-owned assets of a public nature.

## Conclusion

Mozambique has a developed judicial system which includes modern arbitration law largely based upon the UNCITRAL Model Law. As such, foreign investors in Mozambique have access to a neutral form of in-country dispute resolution which is likely to be speedier and less costly than litigation before the Mozambican courts, and which, in most cases, can be kept confidential.

Foreign arbitral Awards may be enforceable against assets in Mozambique, provided that the requisite procedure of obtaining confirmation of enforcement from the Mozambican court has been complied with (with the exception of certain Investment Treaty Awards, as noted above). Unfortunately, decisions as to the enforcement of foreign arbitral Awards in Mozambique are not regularly published. Nevertheless,

those decisions which have been published to date suggest that the Mozambican Supreme Court is generally supportive of the arbitration process as a whole and of the enforcement of foreign arbitral Awards. They also confirm that the review and recognition process should not entail a review of the merits of the Award. However, please note that the Supreme Court may be more hesitant to allow enforcement against State assets or entities on the grounds of public policy.

Investors in Mozambique should therefore give careful consideration to the structuring of their investments, in particular the seat of arbitration, when considering the enforceability of any potential arbitral Awards in Mozambique.

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