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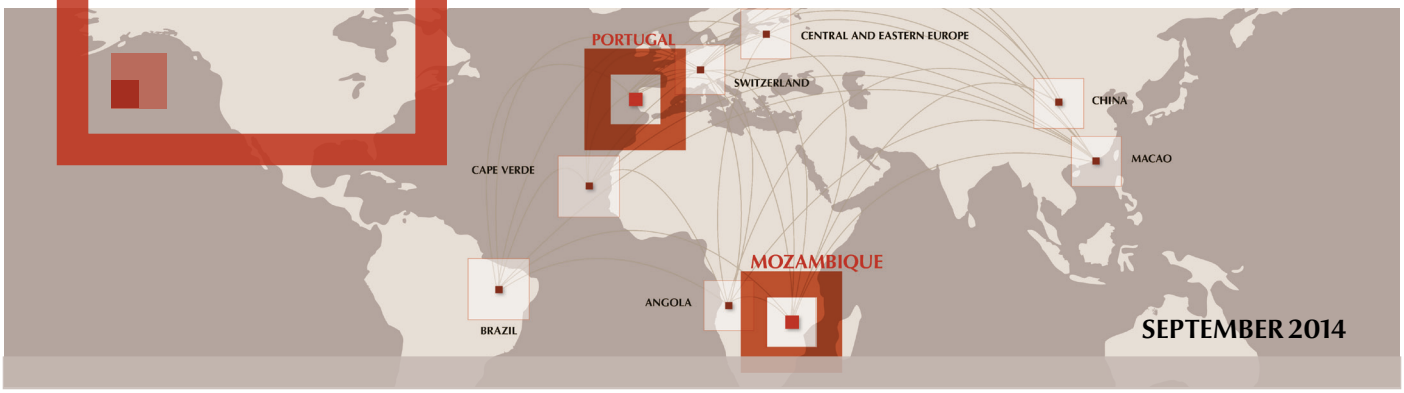

ARBITRATION IN MOZAMBIQUE IN THE OIL AND MINES SECTORS

1. INTRODUCTION

Mozambique is a country with great economic potential and natural resources and the country's economic growth and foreign investment are having a significant impact on the extractive sector. The enactment of the new laws on the mining and oil sectors (Law 20/2014, the "Mines Law" and Law 21/2014, the "Oil Law"), create a new legal framework for these sectors with important consequences for those who work in these areas.

Any investment can generate disputes. In Mozambique, dispute resolution through arbitration is available to investors and it has had a stable legislative framework since the enactment of Law 11/99, of July 12 (Law of Arbitration, Conciliation and Mediation - LAV). The LAV offers legislative guarantees that are relevant to foreign investors and complements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention), both ratified by Mozambique.

The enactment of the Mines Law and of the Oil Law justifies a look at the essential features of investment protection arbitration, specifically in the mining and oil sector.

2. THE LEGISLATIVE FRAMEWORK FOR ARBITRATION IN MOZAMBIQUE: THE LAW OF ARBITRATION, CONCILIATION AND MEDIATION (LAV) AND THE LAW OF ADMINISTRATIVE LITIGATION PROCEDURE.

The LAV establishes the framework for arbitration in Mozambique, it follows best international practices and its text is broadly inspired by the "Model Law" of the United Nations Commission for International Trade Law (UNCITRAL).

The LAV establishes a broad criterion of objective arbitrability, determining its scope by exclusion: only disputes that a specific law assigns to the jurisdiction of the State courts or that concern undisposable rights or rights that cannot be settled by the parties are not arbitrable.[1] In turn, with reference to subjective arbitrability, the LAV provides that disputes arising from a relationship in which the State or a public entity is a party, maintaining its position as jus imperium, are non-arbitrable unless the State or the public entity is authorised to do so by special law.[2]

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1 Article 5(2) of Law 11/99.
2 Article 6(1) of Law 11/99.

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For the purposes of subjective arbitrability of disputes between private investors and Mozambican public entities in the oil and mine sector, it is important to highlight a special law: Law 7/2014, (Law on administrative litigation procedure). This law establishes that an arbitral tribunal can be constituted to decide cases where the subject matter is: i) administrative contracts; and ii) contractual and non-contractual liability of the Public Administration or its members, employees and agents for losses resulting from acts of public management.[3]

3. RULES ON DISPUTE RESOLUTION IN THE OIL SECTOR: THE NEW OIL LAW.

From the legislation referred to above, it is safe to conclude that, to a great degree, Mozambican law allows the settlement of disputes through arbitration, including by introducing an arbitration agreement into an administrative contract. However, in the case of disputes with Mozambican public entities, a number of other laws applicable to the relations between private investors and Mozambican public entities are equally relevant.[4]

In the specific case of investments in the oil sector, the new Oil Law essentially maintains the same rules already established in the previous Law 3/2001 (previous Oil Law), asserting a preference for disputes arising from concession agreements to be settled through negotiation. However, a virtue of the new Oil Law is that it clarifies the content of article 27(2) of the former Law[5], making it clear that, if the dispute cannot be settled by negotiation, it can be decided through arbitration or by the competent judicial authorities, under the terms and conditions established by the concession agreement or, if there is no arbitration clause in the concession agreement, by the competent judicial authorities.[6]

The Oil Law also establishes the rules that must be followed in the arbitral proceedings. It provides that any arbitration between foreign investors and the Mozambican State must follow: i) the "law that governs arbitration, conciliation and mediation"[7]; ii) the rules of the International Centre for Settlement of Investment Disputes (ICSID); iii) the ICSID Additional Facility Rules; or iv) rules of other reputable international entities with a well-established reputation in accordance with the contractual agreement between the parties, provided that the parties have expressly specified the conditions for its implementation, including the way that the arbitrators are appointed and the time limit for the final award.[8]

The Oil Law is a special law for the purposes of the provisions of the Public-private Partnerships Law (Law 15/2011, of August 10), which establishes special rules for public-private partnerships, compared with the general rules of arbitration and, therefore, the Oil Law prevails over the latter. In the case of the Mines Law, where no such special rule exists, the rules appearing in the Investment Law[9] and the Public-private Partnerships Law[10] - also allowing for arbitration - continue to apply, apart from those mentioned in the following chapter, if applicable.

4. INTERNATIONAL CONVENTIONS ON THE ENFORCEMENT OF ARBITRAL AWARDS: THE WASHINGTON CONVENTION AND THE NEW YORK CONVENTION.

Recourse to aribitration is of great relevance as a mean of protecting investments. It should be noted that Mozambique signed the Washington Convention on April 4, 1995 and it came into force on 7 July of the same year. Mozambique also ratified the New York Convention on 11 July 1998. Together,

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3 Article 202 of Law 7/2014.

4 Law 3/93 ("Investment Law") should be highlighted. Its article 25 establishes that disputes between the State and foreign investors, which cannot be settled through negotiation, may be resolved through arbitration under the Washington Convention, the ICSID Additional Facility Rules and the ICC rules, if both parties expressly agree to this.

5 The former Law provided unclearly that "if the dispute cannot be settled through agreement, the issue can be settled through arbitration or by the competent judicial authorities".

6 This apparent limitation is not total, given the legal framework that arises from bilateral (or multilateral) investment treaty (BITs), as is the case of the Washington Convention, which allows recourse to international arbitration in specific circumstances, even when the contract does not provide for it.

7 The wording of this rule [article 69(3) a)] allows us to conclude that is not necessarily referring to the Mozambican "Law on Arbitration, Mediation and Conciliation", since this law is not specifically identified as others are. For this reason, it is prudent that contracts clarify the parties' intentions. If the seat of the arbitration is not in Mozambique, the applicable arbitral law will never be the LAV, especially if this was not the applicable arbitration law expressly determined by the parties. On the contrary, if the intention of the parties is not made clear, this could lead to difficulties in respect of the exequatur since it is possible to argue that the Mozambican LAV did not govern the arbitration, and interpreting this rule as demanding that the Mozambican LAV is followed during the arbitral proceedings.

8 Article 69 (3) of the Law 21/2014.

9 Article 25 of the Law 3/93.

10 Article 39 of the Law 15/2011.

The essential objective of the 1965 Washington Convention is to increase international investment, guaranteeing the possibility, where there is an agreement between an investor and the State, of settling their disputes through ICSID arbitration. With special relevance, the Washington Convention establishes rules on the recognition and enforcement of ICSID awards in its articles 53, 54 and 55. ICSID awards are treated as final, unappealable decisions for the purposes of their enforcement. It is not, therefore, necessary to apply for exequatur from the judicial courts to ensure enforcement of the award.

the two conventions form the cornerstone which guarantees that arbitral proceedings brought by an investor have effective results.

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In turn, the aim of New York Convention of 1958 was to make the rules on the recognition and enforcement of arbitral awards more uniform, making it possible for a party to an international arbitration to enforce the award after it is made. Unlike the Washington Convention, the New York Convention does not treat the foreign arbitral award as a domestic final judicial award. However, article V the New York Convention does establish a very limited set of grounds for the non-recognition and enforcement of foreign arbitral awards.

5. CONCLUSION

The protection of investment in the oil and mine sector in Mozambique is today embodied in a set of national legislation and international conventions that allows investors to resort to independent and effective means of dispute resolution in order to guarantee the protection of their investments.

The choice of the type of arbitration that is most appropriate for a specific dispute or to be used in a concession agreement will, however, depend on the specific circumstances of the investment, including whether or not there is a bilateral investment treaty between Mozambique and the investor's country of origin[11], the character and volume of the intended investment and the applicability of the international conventions, in particular, the Washington Convention, to the particular case. It is therefore of the utmost importance that a lawyer with experience in arbitration participates in the negotiations of contracts related to the oil and mine sectors.

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11 Mozambique has signed 25 bilateral investment treaties, in particular with Portugal, Germany, United States of America, United Kingdom, South Africa and China, and 19 of these treaties are currently in force.