

Arbitration and Oil & Gas investments in Mozambique

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Mozambique has been witnessing a number of high-profile investments instrumental to the development of the country's very significant natural resources, particularly coal and natural gas. The Nacala Corridor Railway and Port Project, sponsored by Brazilian mining company Vale to export coal from the Moatize coal mines, and the Liquefied Natural Gas (LNG) Projects in the Rovuma Basin in the north of the country, by Anadarko and Eni/Exxon Mobil, deserve a special mention, even if at different stages of execution.

Big and complex projects such as these inevitably give rise to disputes and arbitration is the preferred dispute resolution mechanism.

The crucial question, then, is: how does arbitration work generally in Mozambique particularly in respect of disputes arising in the context of investments in the oil and gas sectors?

Generally speaking, Mozambique's legal environment is largely favorable to arbitration. On one hand, Mozambique is a party to key international treaties, including the [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#), the [Convention on the Settlement of Investment Disputes between States and Nationals of Other States \(ICSID\)](#) and [more than 20 bilateral investment treaties \(BITs\)](#). On the other hand, at the domestic level, Mozambican laws are supportive of arbitration. In particular, [Law no. 11/99, of July 8](#), the Mozambican Law of Arbitration, Conciliation and Mediation, (Mozambican Arbitration Law) is mostly in line with the Model Law on International Commercial Arbitration (Model Law) of the United Nations Commission on International Trade Law (Uncitral) and adopts many of the solutions generally accepted as best practices.

In spite of Mozambique's positive approach to arbitration, it must be noted that the legal framework specifically applicable to major investments is particularly complex, notably due to the plurality of existing sources, sometimes with overlapping scopes of application and conflicting rules.

Indeed, as regards disputes arising in the context of investments in the oil and gas sectors, and without considering the international law regime regarding the protection of foreign investment, one must consider not only the Mozambican Arbitration Law, but also a number of other specific laws, of which I

will highlight five.

First, in respect of certain contracts with the State and other State entities, the Law of the Administrative Procedure (Law no. 7/2014, of February 28) contains a general rule authorizing the Mozambican State to enter into arbitration agreements and contains certain provisions regarding the proceedings that are not entirely coincident with those of the Mozambican Arbitration Law.

Second, with regard to private-public partnerships, including the so-called “Big Dimension Projects”, Law no. 15/2011, of August 10, and Decree-Law no. 16/2012, of June 4, specifically provide that public-private partnership agreements may contain arbitration agreements.

Third, the Petroleum Law (Law no. 21/2014, of August 18) confirms that concession agreements may provide for arbitration, in accordance with either the Mozambican Arbitration Law, the ICSID Convention (or the ICSID Additional Facility) or the rules of other international institutions of recognized reputation (a possibility that would arguably already result from the Mozambican Arbitration Law), provided that certain conditions are met.

Specifically with regard to the key Rovuma Basin Projects, the Petroleum Law is superseded by yet another set of specific laws.

Law no. 25/2014, of September 23, authorized the Government to approve a specific legal and contractual regime for the Rovuma Basin Projects, including the permission to ensure that public sector entities may be subject to international arbitration.

In execution of this legislative authorization, the Government approved Decree-Law no. 2/2014, of December 2, which contains the specific regime applicable to the Rovuma Basin Project. It provides, in particular, that disputes not amicably settled within 90 days shall be submitted to arbitration in accordance with the dispute settlement mechanisms provided for in the relevant concession agreements.

Finally, by Resolution no. 25/2016, of October 3, the Mozambican Government approved and published a Model Concession Agreement and a Model Joint Operation Agreement, both containing arbitration agreements.

The Model Concession Agreement provides for *ad hoc* arbitration in accordance with the Uncitral Arbitration Rules and with the Permanent Court of Arbitration acting as appointing authority. The seat of

arbitration is Geneva, the applicable substantive law is Mozambican Law and the language of the arbitration is English. It is also established that the arbitrators cannot have the nationality of any of the parties, which necessarily excludes Mozambican arbitrators. The arbitration agreement further provides for a wide waiver of sovereign immunity and, in terms that are not entirely clear, of the right to seek the annulment of arbitral awards.

The particular structure of the Model Concession Agreement may raise certain difficulties in the event of disputes, particularly in view of the fact that Concession Agreements are to be entered into by the Mozambican State, on one side, and, on the other side, by *ENH – Empresa Nacional de Hidrocarbonetos E.P. (ENH)*, the national oil company, together with the relevant private company, whereas the arbitration agreement treats the concessionaires as a single party, including *ENH*, opposed to the Mozambican State as the other party.

In its turn, the Model Joint Operation Agreement, to be entered into by *ENH* and the relevant private company, provides for a different solution: ICSID arbitration, with the designation of *ENH* as a constituent subdivision or agency of Mozambique for the purposes of the ICSID Convention. Like the Model Concession Agreement, the seat of arbitration is Geneva, the applicable substantive law is Mozambican Law and the language of the arbitration is English.

With the above legal framework in mind, one can certainly draw some conclusions: while Mozambican Law is supportive of arbitration, there is also some uncertainty arising from the plurality of sources. In all likelihood, this is precisely what caused the enactment of a very specific regime for the Rovuma Basin Projects. Mining projects, however, do not yet benefit from such a regime. In any case, and as an overall conclusion, uncertainty is manageable, and arbitration, as an efficient, effective, impartial and independent dispute resolution mechanism, can effectively be used in Mozambique as an important tool to mitigate legal risk, especially in what concerns the major investments that the country needs to unlock its wealth for the benefit of its population.

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