


FILLING *the* VOID



Litigation is not getting the job done for Africa's biggest Portuguese-speaking nations. As investors seek a cheaper and quicker alternative, the pieces are in place for arbitration to step up and meet the demand, **Andrew Mizner** reports

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lthough not often placed among sub-Saharan Africa's growing economic powerhouses, such as South Africa and Ghana, the continent's two largest Portuguese-speaking (Lusophone) nations, Mozambique and Angola, are significant locations for overseas investment, particularly in the natural

resources and energy sectors.

Angola, Africa's second largest oil producer, had a GDP of USD 130 billion in 2014, while gold discoveries have combined with Mozambique's growing natural gas industry, making it increasingly interesting to overseas investors.

While both countries are closed to foreign law firms, they are open to international arbitration, and with ever-increasing levels of foreign investment coming into slow civil justice systems, the push towards arbitration is well underway.

Civil disputes in Angola and Mozambique have much in common. Litigation in both is slow and expensive. Many Angolan cases are subject to a 10% judicial tax on the value of the dispute, and the World Bank estimates that legal costs account for 44% of the value of its cases. Meanwhile a 2014 *Clifford Chance* report estimated that a breach of contract dispute in Mozambique would take two years to reach a judgment.

Álvaro Telles da Sylva Pinto Basto, a litigation partner with *Couto, Graça e Associados* in Maputo, Mozambique tells *CDR* that there is a busy domestic disputes market, mainly civil and commercial matters, many of which relate to debt collection, but also criminal cases, including insurance fraud.

Pinto Basto says litigation is still the preferred method of dispute resolution, and that "for Africa, it works quite well", but "arbitration is now rising in selected markets, mainly for the big projects and big companies".

"Demand has been raised in the last five years, as the government, and especially industry, have encouraged arbitration clauses to be included in their contracts."

Antonio Judice Moreira, senior arbitration associate with Portuguese firm *PLMJ*, agrees that in Mozambique, "the market for commercial disputes is a very active one", adding: "Most commercial disputes are resolved through the judicial courts, only a small part is submitted to arbitration. However, the number of arbitration agreements in commercial contracts is growing."

Moreira says the most popular disputes for *PLMJ* relate to "the breach of loan agreements, real estate purchase agreements and works contracts", while shareholders' disputes and breach of contract disputes are on the rise.

Conversely in Angola, despite having a bigger economy, the legal sector has not been able to cope with demand, meaning that the litigation sector remains quiet.

Pedro Metello de Nápoles, arbitration partner and head of the Angola desk at *PLMJ*, says: "One cannot say the market is very busy. State courts have a structure partially inherited from colonial times and a procedural law that is outdated; on the top of that the number of disputes has been increasing and the courts are not able to keep the pace."

As a result, despite an ongoing court restructuring, "commercial disputes tend to be solved by other means, notably negotiation, courts being seen as a last recourse".

This includes arbitration: "Government entities and, in particular, the Ministry of Justice have been paying much attention to arbitration, either by sponsoring arbitral institutions or by convincing public institutions to include arbitral clauses in their contracts."

De Nápoles adds that, as in Mozambique, debt and credit collection are the major source of disputes. ►

► The arbitration landscape

With the slow civil justice systems creating an appetite for arbitration in both countries, especially for foreign companies, both have domestic arbitration laws: Angola's 2003 Voluntary Arbitration Law and Mozambique's 1999 Law on Arbitration, Conciliation and Mediation are based on the UNCITRAL model, although in Angola, some matters, including insolvency, land, employment and some non-commercial disputes, are not arbitrable.

Both countries enforce awards as they do court judgments, while non-compliance can be tackled through the courts, which so far has been largely supportive of arbitration and the enforcement of foreign awards. In Angola particularly, courts can issue interim proceedings during arbitrations, and assist with enforcement.

Both countries allow arbitration under foreign laws and/or arbitral rules, which is encouraging for international investors, however all the machinery is not quite in place. Neither country is a member of the Organization for the Harmonization of Business Law in Africa (OHADA), so its arbitration mechanism is not available.

More significantly, despite the size of its economy, Angola is not yet a signatory to the New York Convention or the ICSID Convention, although the government is working towards both. In the meantime, foreign awards are not automatically recognised, and must go to the Angolan Supreme Court for consideration. That includes awards against the

Angolan state, although the state has a good track record of complying with such awards.

However, Mozambique has the edge in this area, as a member of ICSID since 1995 and the New York Convention since 1998.

Looking to the future

Although foreign lawyers can circumvent the ban on foreign firms by taking the local exams and registering with the Mozambique Bar Association, Pinto Basto says this "is very difficult", and does not foresee any opening up of the legal market: "Mozambique is a very young country, it does not want

to have foreigners, especially foreign law firms, integrated into the Mozambique Bar Association".

However, local firms have affiliations with international, mostly Portuguese counterparts. CGA is associated with Iberian firm *Cuatrecasas Gonçalves Pereira & Associados* and is part of African law firm network *Lex Africa*.

Moreira says the Mozambique disputes market will continue to grow: "The number of commercial disputes will grow in number and diversification. We also expect the number of disputes submitted to arbitration to grow, given the increasing delay of decisions from the judicial courts against the relative promptness of arbitration decisions."

Pinto Basto expects it to continue to evolve too, thanks to new projects in the natural resource industries of coal, gas and oil, while gold mining has rapidly increased in the last six years, and this will drive change:

"Multinationals are now drilling in Mozambique. They will come with totally different ideas and will implement arbitrations, especially over oil drilling, contracts on gas drilling, contracts and the transport and distribution of oil and gas."

"It will be always international arbitration and it is one of the prerogatives that Mozambique must deal with in the near future. In terms of dispute resolution, with these big mega projects, Mozambique has to face a new reality."

Angola's relatively undeveloped disputes sector leaves much room for future development, and "commercial disputes will certainly increase", de Nápoles says.

"The number of contracts executed by Angolan players has grown exponentially in the last decade and thus it is inevitable that more and more disputes will arise."

He says disputes will arise from the 2014 global oil price drop which had a major impact on Angola's economy, and remains pessimistic about the civil justice system's ability to cope, but sees a window for arbitration to fill the gap:

"State courts will not be able, at least in a near future, to answer to an increased demand and therefore it may be a good opportunity for arbitration to appear as a solid alternative dispute resolution method in Angola." ■



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