



The Middle Eastern and African Arbitration Review 2021

Published by Global Arbitration Review in association with

ALC Advogados
Al Tamimi & Compan
Bryan Cave Leighton Paisner LLP
Clifford Chance
Coşar Avukatlık Bürosu
DLA Piper
FTI Consulting
HRA Advogados

Matouk Bassiouny & Hennawy
Morais Leitao
NERA Economic Consulting
Obeid Law Firm
Saudi Center for Commercial Arbitration (SCCA)
CRCIC
Udo Udoma & Belo-Osagie

The Middle Eastern and African Arbitration Review 2021

A Global Arbitration Review Special Report

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2021
For further information please contact Natalie.Clarke@lbresearch.com



The Middle Eastern and African Arbitration Review 2021

Head of insight Mahnaz Arta

Account manager J'neal-Louise Wright

Production editor Katie Adams

Chief subeditor Jonathan Allen

Subeditor Simon Tyrie

Head of content production Simon Busby

Senior content coordinator Gracie Ford

Publisher David Samuels

Cover image credit ismagilov/iStock/Thinkstock

Subscription details

To subscribe please contact:

Global Arbitration Review

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL

United Kingdom

Tel: +44 20 3780 4134

Fax: +44 20 7229 6910

subscriptions@globalarbitrationreview.com

No photocopying. CLA and other agency licensing systems do not apply.

For an authorised copy, contact gemma.chalk@globalarbitrationreview.com.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at April 2021, be advised that this is a developing area.

ISBN: 978-1-83862-579-5

© 2021 Law Business Research Limited

Printed and distributed by Encompass Print Solutions

Tel: 0844 2480 112

The Middle Eastern and African Arbitration Review 2021

A Global Arbitration Review Special Report

Published in association with:

ALC Advogados

Al Tamimi & Compan

Bryan Cave Leighton Paisner LLP

Clifford Chance

Coşar Avukatlık Bürosu

DLA Piper

FTI Consulting

HRA Advogados

Matouk Bassiouny & Hennawy

Morais Leitao

NERA Economic Consulting

Obeid Law Firm

Saudi Center for Commercial Arbitration (SCCA)

CRCIC

Udo Udoma & Belo-Osagie

Prefacevi

Overviews

Damages in the Middle East and Africa: Trends from Recent Cases and Some Challenges 1

Fabrizio Hernández, Timothy McKenna and Ralph Meghames

NERA Economic Consulting

Energy Arbitrations in the Middle East 9

Thomas R Snider, Khushboo Shahdadpuri and Aishwarya Suresh Nair

Al Tamimi & Company

Investment Arbitration in Africa 22

Théobald Naud, Ben Sanderson and Maxime Desplats

DLA Piper

Mining Arbitrations in Africa 33

Audley Sheppard QC, Amanda Murphy and Karolina Rozycka

Clifford Chance

Remote Hearings and the Use of Technology in Arbitration 42

Mohamed Hafez

CRCICA

The Covid-19 Factor: the Impact of Covid-19 on Damages Assessments 51

James Church-Morley and Ting Ting Liew

FTI Consulting

Country chapters

Angola 55

Filipe Vaz Pinto, Ricardo do Nascimento Ferreira and Frederico de Távora Pedro

Morais Leitão, Galvão Teles, Soares da Silva & Associados and ALC Advogados

Egypt 62

Amr Abbas and John Matouk

Matouk Bassiouny & Hennawy

Lebanon 77

Nayla Comair-Obeid

Obeid Law Firm

Mozambique 84

Filipe Vaz Pinto, Joana Galvão Teles and Paula Duarte Rocha

Morais Leitão, Galvão Teles, Soares da Silva & Associados and HRA Advogados

Nigeria 92

Uzoma Azikiwe and Festus Onyia

Udo Udoma & Belo-Osagie

Saudi Arabia 98

Hamed Hassan Merah and James MacPherson

Saudi Center for Commercial Arbitration (SCCA)

Turkey 109

Utku Coşar, İpek Sumbas Çorakçı and Hakan Yakışık

Coşar Avukatlık Bürosu

United Arab Emirates 117

Charles Lilley and Richard Dupay

Bryan Cave Leighton Paisner LLP

Welcome to *The Middle Eastern and African Arbitration Review 2021*, one of *Global Arbitration Review's* annual, yearbook-style reports.

Global Arbitration Review, for those not in the know, is the online home for international arbitration specialists everywhere. We tell them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live and GAR Connect banners) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into the regional picture than the exigencies of journalism allow. *The Middle Eastern and African Arbitration Review*, which you are reading, is part of that series. It recaps the recent past and provides insight on what these developments may mean, from the pen of pre-eminent practitioners who work regularly in the region.

All contributors are vetted for their standing before being invited to take part. Together they provide you the reader with an invaluable retrospective. Across 128 pages they capture and interpret the most substantial recent international arbitration developments, complete with footnotes and relevant statistics. Where there is less recent news, they provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Angola, Egypt, Lebanon, Mozambique, Nigeria, Qatar, Saudi Arabia, Turkey and the UAE, and has overviews on energy arbitration, investment arbitration, mining arbitration, damages (from two perspectives) and virtual hearings.

Among the nuggets you will encounter as you read:

- a helpful chart setting out the largest awards affecting Africa and the Middle East, recently;
- the admonition to expect a wave of restructurings of energy projects locally, and even formal insolvency proceedings;
- a data-led breakdown of investor-state disputes in Africa starting from 2013;
- the revelation that a number of Africa-related mining disputes-opted to pause proceedings rather than attempt virtual hearings when the pandemic struck;
- a brisk summary of the extra considerations that covid-19 has introduced into damages calculation;
- an in-depth analysis of Angola's BITs and the modernisation of BITs in the region more generally; and
- a clear-eyed commentary on recent Nigerian court decisions, some of which are 'not entirely satisfactory'.

Plus, much much more.

We hope you enjoy the review. I would like to thank the many colleagues who helped us to put it together, and all the authors for their time. If you have any suggestions for future editions, or want to take part in this annual project, GAR would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels

Publisher

May 2021

Mozambique

Filipe Vaz Pinto, Joana Galvão Teles and Paula Duarte Rocha

Morais Leitão, Galvão Teles, Soares da Silva & Associados and HRA Advogados

In summary

This article describes the main legal framework of international and domestic arbitration, as well as the specific sectoral rules on arbitration regarding relevant business sectors in Mozambique, such as rules applicable to public–private partnerships, large-scale projects and business concessions, investment law, mining law and the special framework of the Rovuma Basin Project. From this analysis, it arises that Mozambique has followed the international trends on the development of arbitration and is party in the main international conventions, which facilitates foreign and national investment in the country.

Discussion points

- The situation and main sectors of foreign direct investment in Mozambique
- Identification of some difficulties or crisis suffered in Mozambique with economic impact
- The plurality of legal sources of arbitration
- Specific investments in certain sectorial projects

Referenced in this article

- *Oded Besserglik v Mozambique* award
- 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)
- 1981 Agreement on Promotion, Protection and Guarantee of Investments Amongst the Member States of the Organization of the Islamic Conference (the OIC Investment Agreement)
- Mozambican Arbitration, Conciliation and Mediation Law
- 2004 Constitution of the Republic of Mozambique;
- Mozambican Code of Civil Procedure
- Law No. 15/2011 of 10 August 2011
- The Investment Law (Law No. 3/93 of June 24 1993, regulated by Decree-Law No. 43/2009 of August 21 2009 and as amended by Decree-Law No. 48/2013 of September 13 2013)
- Law 7/2014 of 28 February 2014
- Mining Law (Law No. 20/2014 of 18 August 2014)
- Petroleum Law (Law No. 21/2014 of 18 August 2014);
- Law No. 25/2014 of 23 September 2014
- Decree-Law No. 2/2014, of 2 December 2014.

Year	Foreign direct investment, net inflows
(Current balance of payments, US dollar)	Table text
2010	1.258 billion
2011	3.664 billion
Year	Foreign direct investment, net inflows
2012	5.635 billion
2013	6.697 billion
2014	4.999 billion
2015	3.868 billion
2016	3.128 billion
2017	2.319 billion
2018	2.892 billion
2019	5.7 billion

Since 2010 and especially 2013, foreign direct investment has increased in Mozambique. According to the statistics released by World Bank, the net foreign direct investment in Mozambique corresponded to the following amounts.

Mozambique has attracted investment in several industries besides the main sectors of coal, oil, and natural gas, such as real estate, transportation, wood products, food and tobacco, metals, communications, building and construction materials, alternative and renewable energy, financial services and industrial machinery, equipment and tools.

However, the economic and fiscal pressure of the past several years, together with known setbacks in the relationship with the International Monetary Fund, donors and international creditors, has created certain difficulties with regard to increasing foreign investment and economic growth.

In any case, according to African Economic Outlook 2020, Africa's general economic performance continues to improve, with gross domestic product growth reaching an estimated 3.4 per cent in 2019. Looking forward, African economic growth is projected to accelerate to 3.9 per cent in 2020 and to 4.1 per cent in 2021. Mozambique will hopefully follow this trend.

In 2019, the economic performance of Mozambique was significantly and negatively affected by the two climate cyclones, Iдай and Kenneth, in March and April, and resulted in a reduction in agricultural and electricity production by collection and infrastructure activities, including the port of Beira, one of the major ports for exports of raw materials.

The government of Mozambique and investors have been working to improve the country's financial and economic landscape and to take advantage from the country's very significant natural resources, particularly coal and natural gas, with some

high-profile investments. The Nacala Corridor Railway and Port Project, to export coal from the Moatize coal mines, and the liquefied natural gas projects in the Rovuma Basin in the north of the country, deserve a special mention. Even at different stages of execution, they are expected to be game changers for the country.

The contribution of mega-projects in the extractive industry sector in Mozambique reached 14,440 million meticaais in 2019, corresponding to 6.8 per cent of the total revenue collected by the state in 2018 (211.9 billion meticaais) and a decrease of 62.4 per cent, compared to the 2017 record.

The low performance was owing to the negative performance of projects in the field of energy production, oil exploration and mineral resources, which registered decreases of contribution in the order of 40.2 per cent, 78.4 per cent and 23.1 per cent, respectively.

The major energy projects injected 3.4 billion meticaais into the public coffers, against 5.6 billion meticaais from mining and 4.1 billion meticaais from mineral resources.

The opposite behaviour was observed in the remaining groups in this sector of economic activity, which had a positive variation in their contribution to state revenues, between 2017 and 2018 (grew by 27.1 per cent).

The extractive industry mega-projects in Mozambique reached about 73.3 billion meticaais in 2019, an increase in collection more than five times than in the year 2018. The Mozambican state invested more than 276 billion meticaais in revenue in the mega-projects.

The collection of capital gains revenue in the amount of 54.1 billion meticaais – resulting from the sale of the assets of the oil company Anadarko, in the Rovuma Basin Area, in favour of the French company Total – contributed most to the increase in the contribution of mega-projects in the period under review.

Another major investment project for 2020 is the petrochemical company Sasol, which is expected to produce 20,000 tonnes of cooking gas in the province of Inhambane to supply the Mozambican market. The project, valued at US\$600 million, includes the exploration of light oil and natural gas in discovered hydrocarbon wells.

Although the development indexes will increase in 2020, the World Bank guarantees an increasing reduction in investment in rural areas.

The consultancy EXX Africa classified Mozambique as the best investment destination in sub-Saharan Africa in 2020 – with large foreign investments in the natural gas industry and possible support from the International Monetary Fund, improved performance in the banking sector and as a result of international legal processes in the face of scandals over hidden debts.

The Mozambican state will be able to allocate US\$300 million per year to the Coral Sul liquefied natural gas project, which will start in 2022. During the 25 years of the concession, the state will be able to invest US\$19 billion. After being extracted at Rovuma, the gas will undergo the transformation process and will be stored on this platform with a capacity of 238 thousand cubic meters, for later sale, entirely to BP.

In 2020–2021, the international situation of pandemic also has been negatively affected the Mozambican economic situation. On 22 October 2020, the World Bank approved a US\$100 million grant from the International Development Association (IDA) in support of the government of Mozambique's covid-19 (coronavirus) response programme.

The social and economic development of Mozambique, as well as the intent of maintaining and increasing these levels of

foreign direct investment has required the promotion and development of arbitration as a preferred dispute resolution mechanism.

Investors in these relevant projects seek to mitigate the risks, namely the legal risk. In addition to the proper structuring of the investment to benefit from the protection of investment treaties, one possible route is the inclusion of arbitration clauses in key contracts, allowing the resolution of disputes likely arising from the contracts to be more efficient, quick and effective. For that purpose, several factors have been crucial such as the openness of the Mozambican state to include arbitration clauses in important contracts, even with the place of arbitration outside of Mozambique, alongside a relatively modern dispute resolution framework and a progressive familiarity and supportive attitude of judicial courts to arbitration.

The legal framework of arbitration in Mozambique: the plurality of legal sources

Mozambique has a civil law legal system that, for historical reasons, is largely based upon Portuguese Law, particularly in the field of private and commercial law.

Arbitral tribunals are expressly foreseen in the 2004 Constitution of the Republic of Mozambique as being side-by-side with administrative courts, labour courts, tax courts, customs courts, admiralty courts and community courts (article 222(2)).

In 2018, the Assembly of the Republic passed the constitutional review law. The constitutional review law is modern and reflects greater administrative decentralisation in Mozambique.

As in other countries favourable to arbitration, on the one hand, Mozambique is party to key international treaties and, on the other hand, there are several internal sources of legislation regulating the possibility of choosing arbitration, either domestic or international and adopting many of the solutions generally accepted as best practices.

International legal sources of arbitration

Mozambique is a party to the most important international treaties relevant to arbitration.

First, on 11 June 1998, Mozambique ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force on 9 September 1998.

Mozambique's position as a party to the New York Convention entails two different important consequences.

On the one hand, Mozambican courts must recognise and enforce arbitration agreements that meet the necessary requirements under article II of the New York Convention. If legal proceedings concerning a matter subject to such an arbitration agreement are brought before Mozambican courts, the court, at the request of one of the parties, shall decline jurisdiction, unless it finds, on a prima facie judgment, that the arbitration agreement is null and void, inoperative or incapable of being performed. This 'negative effect' of the arbitration agreement is also reflected, in similar terms, in article 12 of the Mozambican Arbitration, Conciliation and Mediation Law (Law No. 11/99 of 8 July 1999, the Mozambican Arbitration Law).

On the other hand, subject to the conditions laid down in the New York Convention, Mozambican courts must recognise and enforce arbitral awards rendered in other New York Convention contracting states and, conversely, arbitral awards rendered in Mozambique may also be enforced in other New York Convention contracting states. In this respect, it should be noted that Mozambique, under the terms permitted by the New

York Convention, made a reciprocity reservation, in the sense that it reserves the right to apply the Convention only when arbitral awards have been rendered in the territory of another contracting state.

The enforcement of foreign arbitral awards rendered in New York Convention contracting states requires prior recognition proceedings subject to the New York Convention rules and limits and also to article 1094 of the Mozambican Code of Civil Procedure (approved by Decree-Law No. 44.129 of 28 December 1961, as amended by Decree-Law No. 1/2009 of 24 April 2009). These proceedings take place before the Supreme Court and, at least in accordance with the law, are very expedited.

Second, and in respect of international investment protection law, Mozambique is a party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and has signed 27 bilateral investment treaties (BITs), 20 of which are currently in force.

As a consequence of Mozambique being a party to the ICSID Convention, it may be possible for qualified foreign investors to submit to ICSID arbitration certain disputes, provided that there is consent by the Mozambican state, among other requisites.

In general terms, such consent may arise either from:

- one of the 20 BITs in force;
- an arbitration agreement contained in contracts with the Mozambican state (or with other state entities, subject to additional requirements under the ICSID Convention); or
- Mozambican internal law, especially Investment Law (Law No. 3/93 of June 24 1993, regulated by Decree-Law No. 43/2009 of August 21 2009 and as amended by Decree-Law No. 48/2013 of September 13 2013), discussed below.

Mozambique's network of BITs in force covers most of the states from where major investment flows come, directly or indirectly, including, in particular, the United States, China, India, United Kingdom, France, Germany, Italy, Mauritius, Netherlands and Portugal. Investors may consider the structuring of their investments in Mozambique so as to attract and maximise the protection afforded by these treaties.

Most of these BITs contain, with slight variations, the usual standards of protection, including fair and equitable treatment, compensation for expropriation, national and most favoured nation treatment and non-discrimination. The treaties also generally include Mozambique's consent to arbitrate investment disputes with protected investors arising out of the treaties typically offering the alternative between ICSID arbitration or ad hoc arbitration (frequently under the UNCITRAL Rules of Arbitration).

In the recently rendered *Oded Besserglik v Mozambique* award, a case brought by a South African national, Mr Besserglik, against Mozambique regarding an investment in a couple of entities in Mozambique and from which he had been allegedly unlawfully deprived, a tribunal accepted a motion to dismiss and declined jurisdiction over the dispute for the relevant treaty executed between Mozambique and South Africa that was never entered into force. The decision was criticised specially for lack of transparency and legitimacy, given that the tribunal took five years, and significant costs, to conclude that the treaty invoked by the investor was not in force.

It is noteworthy that Mozambique is also a party to the 1981 Agreement on Promotion, Protection and Guarantee of Investments Amongst the Member States of the Organization of the Islamic Conference (the OIC Investment Agreement). The

OIC Investment Agreement is a multilateral treaty concluded under the auspices of the Organization of the Islamic Conference and, although it has not attracted much attention until recently, it provides a number of investment protections, including, with some differences to usual standards found in traditional BITs, protection against expropriation and national and most favoured nation treatment. Most importantly, article 17 of the OIC Investment Agreement arguably contains a consent from the contracting states to investor-state arbitration. Among many others, contracting states to the OIC Investment Agreement include Algeria, Bahrain, Egypt, Indonesia, Morocco, Nigeria, Qatar, Saudi Arabia, Turkey, United Arab Emirates and Tanzania.

Internal legal sources of arbitration: multiple, general and sectoral legislation on arbitration

Internal sources of legislation regarding arbitration are multiple and sometimes conflicting: there are general and sectoral laws, as well as private and administrative laws.

The Mozambican Arbitration Law

The central piece of the Mozambican arbitration legal framework is the Mozambican Arbitration Law, which allows for the possibility of choosing arbitration as a dispute resolution mechanism and sets forth the main general rules applicable to arbitrations located in Mozambique (article 68).

The Mozambican Arbitration Law is mostly in line with the Model Law on International Commercial Arbitration (Model Law) of UNCITRAL and adopts many of the solutions generally accepted as best practices. The law is peculiar in the sense that it not only regulates arbitration but also conciliation and mediation.

According to the Mozambican Arbitration Law, there are some general principles applicable to all alternative dispute resolution mechanisms, such as the principles of liberty, flexibility, privacy, reputation, celerity, equality and due process. These principles should be respected and conform by the rules regarding arbitration.

In line with other modern arbitration laws, the Mozambican Arbitration Law contains general rules covering

- the object and scope of arbitration, the matter of arbitrability, the competence of competence of the arbitral tribunal and the exceptional intervention of judicial courts in arbitrations (Chapter I);
- rules applicable to the arbitration agreement (Chapter II);
- rules regarding arbitrators and the arbitral tribunal (Chapter III);
- rules related to arbitral proceedings and the conduct of arbitration (Chapter IV);
- rules applicable to the arbitral award (Chapter V);
- rules regarding the challenge of the arbitral award (Chapter VI);
- rules related to enforcement of the arbitral award (Chapter VII); and
- rules applicable to international commercial arbitration (Chapter VIII).

The Mozambican Arbitration Law distinguishes two main types of arbitration: domestic arbitration and international commercial arbitration, the latter being governed by special rules (articles 52 to 59 of the Mozambican Arbitration Law) and, in the absence of special rules, by the provisions governing domestic arbitration (article 53 of the Mozambican Arbitration Law).

Pursuant to the terms of article 52, international commercial arbitration is applicable if 'interests of international trade are at stake' and, notably, when:

- parties to an arbitration agreement are domiciled in two different countries at the entering into the arbitration agreement;
- one of the following places is outside the country where parties are domiciled:
- the place of arbitration, if such a place is set out or is capable of being determined in the arbitration agreement; or
- any place where a substantial part of the obligations resulting from commercial relations or the place in which the object of litigation is found to be closely connected; and
- the parties have expressly agreed that the scope of the arbitration convention has connections with more than one jurisdiction.

Therefore, the parties may expressly characterise an arbitration as international, either by agreement between them or by choosing a place of arbitration located outside of Mozambique.

On the matter of arbitrability, article 5 of the Mozambican Arbitration Law provides for two general restrictions on the validity of arbitration agreements regarding the object of the arbitration:

- disputes involving non-disposable or non-negotiable rights; and
- disputes that are exclusively subject by special law to the jurisdiction of a judicial court or a special arbitration law. The Mozambican Arbitration Law is applicable in a subsidiary way to arbitrations subject to special legal frameworks (article 5(3)).

According to article 6(1) of the Mozambican Arbitration Law, the state and other legal persons governed by public law may enter into arbitration agreements only in cases regarding disputes related to 'private law or contractual relations' or if there is an 'authorisation by a legislative act'. Therefore, from the perspective of Mozambican law, if the dispute refers to public law matters, the state and other legal persons governed by public law may only validly submit disputes to arbitration if there is a special legislative authorisation.

The arbitral tribunal may be composed by a sole or several arbitrators, provided that they are in an odd number. Should the parties fail to agree on the number of arbitrators, the arbitral tribunal is composed by three arbitrators (article 16). The parties may choose the arbitrators or the method for their appointment. As a general rule, the appointment of the arbitrators is made by the parties and the arbitrators appointed by the parties designate the remaining arbitrator to complete the constitution of the arbitral tribunal. Whenever the designation of an arbitrator or arbitrators fails, the appointment should be made by the president of the arbitral institution chosen by the parties or by someone in whom the president delegates this power and, in the absence of an agreement in relation to the choice of an arbitral institution, by the judicial court. There is no appeal of this decision (article 18).

The parties may freely choose the procedural rules applicable to the proceedings, as well as the place of arbitration, within the general main principles applicable to arbitration mentioned above. In the absence of the choice of the parties, the arbitral tribunal has the power to decide these matters (article 27).

Unless the parties agree otherwise, the deadline for an arbitral award to be issued is six months from the constitution of the arbitral tribunal (article 35(1) to (3)). In certain circumstances, the deadline may be extended for equal period of time (article 35(4)).

After being deposited in the secretary of the judicial court of the place of arbitration under the terms of article 42 of the Mozambican Arbitration Law, arbitral awards have the same effects of judicial decisions and are final and enforceable under the terms of the Mozambican Code of Civil Procedure.

Arbitral awards may be challenged before judicial courts only on the basis specific grounds laid down in the law, particularly in the case of manifest disregard of procedures with impact on the exercise of the rights of defence and due process and on the basis of the breach of the Mozambican state's public policy (in accordance with articles 44 to 47). It is possible, however, to directly challenge the merits of the award.

Judicial court intervention is required, or may be necessary, in several circumstances set forth in the Mozambican Arbitration Law. First, after the issuance of an arbitral award, in the stage of enforcement or of setting aside of the decision. Second, according to article 12(4), the parties may request state courts to order interim measures in relation to a dispute covered by an arbitration agreement. Finally, state court intervention may be required during the arbitral proceedings either to appoint one or more arbitrators (if needed), or to assist in taking of evidence. These aspects are crucial and should be considered by the parties when they are choosing the place of arbitration and, consequently, the law applicable to the arbitration.

Regarding the enforcement of foreign arbitral awards, the applicable regime depends on whether the award was rendered in a state party to the New York Convention. If so, the New York Convention applies, supplemented by article 1094 and the Mozambican Code of Civil Procedure, which, as noted above, provides for a recognition procedure before the Supreme Court. If the award was rendered in a state that is not a party to the New York Convention, recognition is subject to the same procedure provided under article 1094, but the grounds that allow the refusal of recognition are wider. For example, if the award to be recognised was rendered against a Mozambican national, recognition is denied if the award breaches Mozambican private law, to the extent that, under Mozambican private international law, the dispute should be governed by Mozambican law.

The Administrative Arbitration Rules

Regarding administrative arbitration, that is, arbitration involving certain state entities acting in that capacity, there is a special legal framework set out in Chapter X of Law 7/2014 of 28 February 2014 (Law No. 7/2014), which, subject to certain conditions, allows the state and other public legal entities to enter into arbitration agreements.

In accordance with article 202 of Law No. 7/2014, an arbitral tribunal may be created to decide on the following matters:

- administrative contracts; and
- contractual liability and torts of the public administration.

The rules established in Law No. 7/2014 are similar to the ones found in the Mozambican Arbitration Law regarding domestic arbitrations, with some differences that arise from the administrative nature of the claims, such as:

- the inexistence of provisions on choice of law for the merits of the claim;
- the possibility of extending the deadline for the arbitral award is limited to half of its initial duration; and
- in case of annulment of the decision of the arbitral tribunal, the power of the administrative court of reviewing the merits of the claim.

The Investment Law

Independent of the protection conferred by the ICSID Convention and by BITs, the Investment Law (Law No. 3/93 of 24 June 1993, regulated by Decree-Law No. 43/2009 of 21 August 2009 and as

amended by Decree-Law No. 48/2013 of 13 September 2013) expressly provides a certain number of protections and safeguards and foresees a special mechanism for resolution of disputes in relation to certain disputes between the Mozambican state and foreign investors regarding investments authorised and executed in the country. This special mechanism for resolution of disputes applies to disputes connected in the interpretation and application of the mentioned law and that could not be solved by the competent judicial authorities in accordance with the Mozambican legislation.

In particular, the Investment Law, subject to the conditions laid down thereto, provides for the possibility of investor-state arbitration under the ICSID Convention or under the International Chamber of Commerce Rules of Arbitration.

Importantly, the Investment Law expressly does not apply to oil, gas and mining sectors, which are governed by specific rules.

The level of protection granted by the Investment Law is, generally, lower than the protection granted by a typical BIT. The major advantage of the first one is that it applies to all the investors that meet the conditions of the Investment Law, even when they are not covered by the protection of a BIT (for example, because they are not nationals of a contracting state).

The law applicable to public-private partnerships, large-scale projects and business concessions

Law No. 15/2011 of 10 August 2011 (Law No. 15/2011, regulated by Decree No. 16/2012 of 4 June 2012) establishes the guiding rules for the process of contracting, implementing and monitoring undertakings of public-private partnerships (PPP), large-scale projects (LSP) and business concessions (BC). Article 39 of the Law No. 15/2011 expressly recognises the possibility of arbitration in PPP, LSP and BC. In fact, article 39(2) of this law foresees that:

[I]n order to accelerate the resolution of disputes and preserve the dynamics of business economic life, especially for the satisfaction of collective needs, PPP, LSP and BC contracts may privilege the resolution of disputes arising therefrom by resorting to mediation and arbitration under the terms of the law.

The Mining Law

Regarding the mining sector, the Mining Law (Law No. 20/2014 of 18 August 2014) establishes the general principles applicable to the exercise of rights and duties regarding the use and exploitation of mineral resources, including mineral water. The Mining Law does not foresee a special rule applicable to dispute resolution. Consequently, it seems that the rules set forth by the other laws such as Law No. 15/2011 are applicable.

Furthermore, Decree No. 88/2017 approved the Regulation of Radioactive Minerals, Resolution No. 5/2016 approved the Organic Statute of the National Institute of Minas Gerais and Decree No. 22/2015 defined the attributions, competences and organics of the National Institute of Mines.

The Petroleum Law

The Petroleum Law (Law No. 21/2014 of 18 August 2014) confirms the possibility of entering into arbitration agreements, admitting several options.

The Petroleum Law provides that disputes arising from the agreements foreseen in the mentioned law be preferably solved by negotiation. If the dispute is not solved by agreement, it may be submitted to arbitration, to the competent judicial authorities

under the terms and conditions set forth in the concession agreement or, if there is no arbitration clause in the concession agreement, to the competent judicial authorities.

Arbitration between the Mozambican state and foreign investors subject to the Petroleum Law may be governed by the following laws:

- the Mozambican Arbitration Law;
- the ICSID Convention and Rules;
- the rules fixed in the Regulation on Additional Facility approved on 27 September 1978 by the ICSID, if the foreign entity does not fulfil the conditions of nationality foreseen in article 26 of the ICSID Convention; and
- the rules of other international instances of recognised reputation in accordance with the agreement of the parties in the concession agreements foreseen in the Petroleum Law. In this case, it is necessary for an express specification of the conditions for its implementation, including the way of appointing the arbitrators and the deadline to issue an award.

As these rules set forth in the Petroleum Law are special in relation to the rules foreseen in the Law No. 15/2011 of 10 August 2011, the former should prevail over the latter.

The Rovuma Basin Project framework

In the specific case of the Rovuma Basin Project, Law No. 25/2014 of 23 September 2014, authorised the government to approve a specific legal and contractual framework for the Rovuma Basin Projects, including express permission to ensure that public sector entities may be subject to international arbitration.

In execution of this legislative authorisation, the government approved Decree-Law No. 2/2014, of 2 December 2014, which contains the specific regime applicable to the Rovuma Basin Project.

According to article 25 of Decree-Law No. 2/2014, 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.

These legal texts support the autonomy of the parties to choose a foreign law to be applicable to the merits of the contracts and the possibility of choosing international arbitration (article 3(1)(j) of the Law No. 25/2014 and article 25 of Decree-Law No. 2/2014).

Finally, by Resolution No. 25/2016 of 3 October 2016, the Mozambican government approved and published a Model Concession Agreement to Exploration and Production of Petroleum and a Model Joint Operation Agreement, both containing arbitration agreements.

In accordance with article 26, disputes between the parties should be solved by negotiation of the parties. Should the parties not solve the dispute amicably, 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. 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.

In its turn, the Model Joint Operation Agreement provides for a different solution (article 19.2): ICSID arbitration, with the designation of the Mozambican National Oil company as a constituent

subdivision or agency of Mozambique for the purposes of consent for 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.

Conclusion

Mozambique has developed arbitration as the preferred dispute resolution mechanism, following other modern arbitral legislation and opening the possibility of choosing this alternative dispute resolution mechanism.

A notable sign of this openness by Mozambique towards arbitration was the ratification of the most significant international conventions regarding arbitration, the 1958 New York Convention and the 1965 ICSID Convention, and the adoption of specific domestic regimes favourable to arbitration.

As demonstrated above, Mozambique's legal environment and framework is largely favourable to arbitration. The Mozambican state has opened the option to investors of mitigating legal risks by choosing arbitration as preferred dispute resolution mechanism and as a means to promote investment and growth.

At the same time, the legal framework specifically applicable to major investments and to arbitration is particularly complex, notably due to the plurality of existing sources, sometimes with overlapping scopes of application and conflicting rules. On the one hand, in certain cases, the plurality of sources of legislation

may be considered a challenge to be overcome by interpretation. On the other hand, in relation to the mining sector, there are no specific provisions regarding arbitration such as the provisions set forth in the Petroleum Law.

Considering that foreign investment will continue to play a very significant role in the development and expansion of Mozambique, there are several goals that would be determinant for it and for the future of arbitration in Mozambique, such as the management of political conflicts, the sectorial growth and economic stabilisation, as well as the improvement of the legal framework and its practical promotion and the increasing of active participation and role of the Mozambican arbitral community in the wider arbitration community. The main arbitral institution in Mozambique is the Arbitration, Conciliation and Mediation Centre (CACM). At this stage, CACM has administered mainly domestic arbitrations. In April 2018, CACM organised its first congress with the presence of Mozambican and Portuguese speakers. More recently, there have been some calls for a modernisation of the Mozambican Arbitration Law and there are reports that this reform may occur in the near future, strengthening Mozambique's pro-arbitration attitude.

With special thanks to Vanessa de Almeida Pires and Alice Otero Morgado, for their collaboration researching and updating this chapter.


Filipe Vaz Pinto

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Filipe Vaz Pinto has been a partner of Morais Leitão since 2014. He co-heads the Morais Leitão litigation and arbitration department and focuses his practice on arbitration, particularly international arbitration.

He acts as counsel in domestic and international arbitrations in a variety of industry sectors, including aviation, banking, construction, defence, energy, food and beverage, infrastructures, insurance, media and advertising, mining, public-private partnerships, transfers of technology and trusts.

He is also regularly appointed as arbitrator.

Until recently, Filipe Vaz Pinto was a vice president of the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry and is now a board member of the Portuguese Arbitration Association and of the International Chamber of Commerce (ICC) Arbitration Commission, as well as the Executive Commission of the Portuguese Committee of ICC.

He regularly participates as a lecturer in postgraduate courses on arbitration and as a speaker at seminars and conferences.

He is listed by *Who's Who Legal: Arbitration* as a 'Future Leader (Partner)'. In 2015, Filipe Vaz Pinto was honoured in the 'Forty under 40 awards', organised by *Iberian Lawyer*, which distinguishes 40 lawyers under the age of 40 in Portugal and Spain.


Joana Galvão Teles

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Joana Galvão Teles is a managing associate and a member of the dispute resolution team, working in litigation and, essentially, in arbitration, including international arbitration, and acting in a variety of industry sectors, including banking, construction, energy, infrastructures, insurance, public-private partnerships, transfers of technology, among others. Joana is also attending the PHD programme at Nova School of Law.

She participates as counsel and as co-counsel with other foreign teams in several international and national, institutional and ad hoc arbitrations (ICC, the Arbitration Centre of the Portuguese Chamber of Commerce and Industry and several ad hoc international and national arbitrations) for international and national clients.

Joana is a member of Morais Leitão's Africa team, actively participating in international arbitrations and also in the negotiation and inclusion of arbitration clauses in Mozambique and in Angola, acting for international clients.

She regularly participates as a lecturer in postgraduate courses on arbitration and as a speaker at seminars and conferences in the field of arbitration.

She is listed by *Who's Who Legal: Arbitration* as a 'Future Leader (Non-Partner)'.

M MORAIS LEITÃO
L GALVÃO TELES, SOARES DA SILVA
 & ASSOCIADOS

Rua Castilho 165
 1070-050 Lisbon
 Portugal
 Tel +351 213 817 400
 Fax +351 213 817 499

Filipe Vaz Pinto
 fvpinto@mlgts.pt

Joana Galvão Teles
 joanagteles@mlgts.pt

www.mlgts.pt

Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão) is a leading full-service law firm in Portugal, with a solid back-ground of decades of experience. Broadly recognised, Morais Leitão works in several branches and sectors of the law on national and international level. The firm's reputation among both peers and clients stems from the excellence of the legal services provided.

With a team comprising over 250 lawyers at a client's disposal, Morais Leitão is headquartered in Lisbon, with additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Hong Kong and Macau (MdME Lawyers) and Mozambique (HRA Advogados).

The Morais Leitão international arbitration team focuses on arbitration connected to Portuguese-speaking countries. Team members have strong and diversified academic and cultural backgrounds, in-depth knowledge of the relevant industry sectors and fluency in several languages, including English, Spanish, French, German and Portuguese.

Morais Leitão has a strong tradition in international arbitration that goes back more than 25 years and its members have been consistently recognised for the quality of their services.



Paula Duarte Rocha

HRA Advogados

Paula Duarte Rocha is a partner at HRA Advogados, the Mozambican member of the Morais Leitão Legal Circle.

Paula is highly experienced in the Mozambican market, having intervened in all areas of practice, advising both national and foreign investors, as well as national and foreign private companies.

Paula is a registered arbitrator with the Mozambican Centre for Arbitration, Conciliation and Mediation (since 2002) with relevant experience in commercial arbitration, as an arbitrator nominated by the parties and as chair of the arbitral tribunal, and she was the IBA Tax Reporter for Mozambique (2012–2014).

Paula was president of the Training and Bar Access Examination Committee of the Mozambique Bar Association (2014–2016) and is a member of the National Council of the Mozambique Bar Association (since 2016).

She is listed by *Who's Who Legal: Project Finance* as a 'Future Leader (Partner)'.

HRA

ADVOGADOS

Avenida Marginal, 141
Torres Rani, Torre de Escritórios, 8.º piso
Maputo
Mozambique
Tel +258 21 344 000
Fax +258 21 344 099

Paula Duarte Rocha
pdrocha@hrlegalcircle.com

www.hrlegalcircle.com

HRA Advogados is formed by lawyers with relevant experience in several practice areas. The firm is particularly experienced in business law practice, having assisted national and international clients in important and innovative projects in Mozambique. The office is a reference both to multinationals and law firms without a local office.

The firm's head office is in Maputo. However, as members of an international network of associations, the firm has a team of lawyers available in different jurisdictions across Portuguese-speaking countries. While working in close connection with the member firms of the Morais Leitão Legal Circle, the firm combines local knowledge with the international experience and support of the whole network, which enables it to maximise the resources available to clients, thus providing them with the best outcomes to their needs in various jurisdictions.

HRA Advogados is the exclusive member firm of the network Morais Leitão Legal Circle for Mozambique.

an **LBR** business