Luanda, Angola | André Silva

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN ANGOLA AND MOZAMBIQUE

By Raquel Ferreira Vieira

- **Introduction to the economic context and the reasons for choosing arbitration**

It is widely recognized that both Angola and Mozambique are two of the most important destinations in terms of foreign direct investment within the sub-Saharan African region. Given its economic potential, lack of infrastructures and richness of mineral resources, foreign investors have always looked for opportunities in these two countries in various industry sectors: oil & gas, minerals, finance, telecommunications, tourism, transport, etc.

When structuring the contracts underlying such investments, usually one of the main concerns lies upon the jurisdiction clause and the governing law applicable to the contracts. Usually, if this is a contract where at least one of the parties is foreigner, that party would most likely seek to include an arbitration clause, and have the contract subject to a foreign law; on the other hand, the seat of arbitration tends to be neutral place to the Parties, usually outside the country where the contracts seek to produce effects.

In this context, more recently, Lisbon became a popular choice for hosting international arbitrations involving disputes between foreign investors; In fact, given its strategic location (halfway through three continents) and historic relationship and strong cultural ties between Portugal and its former colonies, there is no doubt that this could be an interesting option, especially where local courts are not seen as an option.

The question is, whether international arbitration, can be viewed as a valid choice for settlement of disputes in the event parties need to recognize and enforce the awards in any of those two African countries.

This is particularly relevant now that Angola (likewise Mozambique) has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated 10 June 1958 ("NY Convention"), which in theory makes such recognition and enforceability straightforward.

- **A brief overview on the Angolan and Mozambican arbitration laws and the concept of foreign arbitration award**

The concept of foreign arbitration award is usually determined by following one of two relevant criteria: the place where the arbitration has taken place (principle of territory) or the law chosen by the parties (principle of autonomy of the parties).

Angola has a voluntary arbitration law since 2003, (Law no. 16/03, dated of 25 July), which defines international arbitration "(…) *as the one which puts at stake interests of the international commerce, namely (…) when the parties on an Arbitration Convention have its registered offices in different countries, by reference to the specific moment where such agreement is concluded*.".

Furthermore, Angolan arbitration law provides that parties are free to choose the applicable law on the merits of the case and the proceedings; in the absence of such choice, the Angolan voluntary arbitration shall apply.

The same rationale is followed in terms of choosing the seat of arbitration; basically, parties can choose the place of arbitration, without prejudice to the arbitration court being able to meet in any place which it deems appropriate.

In turn, Mozambique, approved the Arbitration, Conciliation and Mediation Law ("LACM") through Law no. 11/99, dated of July 8, 1999, which is widely inspired on the Model-Law of UNCITRAL.

LACM adopted a broad concept of arbitration, and according to article 68, it applies to every arbitration which takes place in the Mozambique territory; against this background, it should be noted that parties are free to choose the seat of arbitration, despite the possibility of meeting in a place different from the seat.

We therefore conclude that both Angola and Mozambique have adopted the principle of autonomy of the parties for purposes of determining the nationality of the arbitration, which means that foreign arbitrations shall be deemed to be those which do not have their seat, respectively, in Angola or Mozambique territories.

- **Recognition and enforcement of foreign arbitration awards under the NY Convention**

In the preceding section, we have reviewed the concept of foreign arbitration under the domestic laws of the two countries; it is now important to assess whether such countries have ratified the New York Convention on the recognition and enforcement of foreign arbitration awards.

It is worth noting that, among a total of 158 countries, both Portugal, Angola and Mozambique have ratified it, however in different moments of time. While Portugal have ratified the NY Convention in 1994 and Mozambique in 1998, Angola was more reluctant to do, since only in 2017 has said country agreed to ratify the Convention, after a long-wait by everyone.

Furthermore, all the three countries have ratified the NY Convention based on reciprocity, which means that the NY Convention shall only apply to the recognition and enforcement of awards made in the territory of another contracting state.

Pursuant to article III, "(…) *Each contracting state recognize arbitral awards as binding and enforce according to the rules of procedure of procedure where the award is relied upon, under the conditions laid down in the following articles."* In addition to that, "(…) *There shall not be imposed substantially more onerous conditions or higher fees or charges to the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards."*

To obtain recognition and enforcement of a foreign arbitral award, the requesting party shall enclose to its application copies of the following documents:

- the original or a copy of the arbitral award duly certified and legalised;

- the original of the arbitration convention / arbitration clause inserted in the contract, or a copy of the same, also duly certified and legalised.

If the arbitral award or the agreement is not made in the language of the country in which the arbitral award is relied upon, a certified translation executed by an official or sworn translator or by a diplomatic or consular agent shall be also required.

On the other hand, recognition and enforcement of a foreign arbitral award can only be challenged based upon very few reasons, upon request of the Party against whom it is invoked, and only if that party provides evidence of the following:

- lack of capacity of the parties for the conclusion of the arbitration agreement or the agreement is not valid under the law chosen by the parties or, in the absence of such choice, according to the law in force in the country where the arbitral award was issued;

- lack of notification of the party against whom the arbitral award is invoked, or of the appointment of the arbitrator or of the arbitrator proceedings or if the party was unable to present his case;

- if the arbitral award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission of the arbitration;

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- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the arbitral award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that arbitral award was made.

The merits of the Convention rely upon the fact that an arbitral award issued in a Contracting State can be recognized and enforced in another contracting state (provided that the above referred procedures were met), without the need to follow the recognition and enforcement procedures provided in the laws of the country where such recognition is intended to take place. In other words, regardless the seat of the arbitration or the nationality of the parties involved, any foreign arbitral award may be recognized and enforced in Angola or Mozambique, without being subject to their domestic procedural rules.

- **The process of recognition of foreign arbitral awards prior to the NY Convention**

Until Angola and Mozambique became contracting states of the NY Convention, the recognition and enforcement of foreign arbitration awards issued in another contracting state was exclusively dependent on the verification of the specific conditions set forth in article 1096 of their Civil Procedure Codes, which provided the need to comply with the following requirements:

- There should be no doubts on the authenticity of the arbitral award nor on the intelligibility of the decision;

- The foreign arbitral award must be final and binding (i.e. not subject to any kind of appeal) according to the laws of the country of its issuance;

- The foreign arbitral award must have been rendered by a competent court under the conflict of laws rules applicable in Angola or Mozambique;

- There is no *lis pendens* or *res iudicata* exception based on a judicial claim attributed to an Angolan / Mozambican court, unless it has been the foreign court to prevent the jurisdiction;

- The defendant was duly summoned, except if there is the case of a claim for which Angolan law waived the previous summons; and, if the defendant has been immediately condemned due to the lack of opposition to the respective claim brought against him, and thus, which summons has been made on his person;

- The foreign arbitral award is not contrary to the public policy principles of the Angolan / Mozambique state;

- The foreign arbitral award issued against an Angolan / Mozambican national, does not offend the Angolan / Mozambican private law provisions; when the matter under decision should be settled according to the Angolan / Mozambican conflict-of-law rules.

It is worth noting that most of the requirements foreseen in the Civil Procedure Codes of Angola and Mozambique (which were profoundly inspired by the Portuguese one) relate to formal aspects of the award and do not require the domestic courts to review the merits of the case.

Nonetheless, some legal authors and court cases have already expressed their concern about article 1096, paragraph g), as it could imply a review on the merits of the case, where tarbitral he award intends to be recognized and enforced against a national of any of the two countries.

- **Current scenario and practical constrains**

However, there are practical constrains that still exist for choosing arbitration or when a party seeks to recognize and enforce an arbitral award in these two countries, especially in Angola, where the ratification process took place afterwards.

Arbitration is still not very popular in Angola and Mozambique as there is still a lack of knowledge and suspicious by the business community about their advantages; there is a general idea that arbitration is an expensive jurisdictional method of dispute resolution when compared to judicial courts.

Indeed, a few reforms have been implemented which seek to encourage the use of alternative dispute resolution means, as follows:

- Currently, Angola has two Arbitration Centers – the Alternative Dispute Resolution Center (CREL) belonging to the Angolan Ministry of Justice and the Arbitration Center of Industrial Association of Angola (CAAIA), launched on the beginning of April 2019;

- On the other hand, Mozambique congregates two arbitrations institutions: Mediation and Arbitration Labor Center (COMAL, created by the Government, with seat in each province and the Arbitration, Conciliation and Mediation Center (CACM), with private nature, created by CTA – Confederation of Mozambique's Economic Associations, with its head office in Maputo.

Notwithstanding, it should be noted that Angola has witnessed, in recent years, some of the largest arbitration cases of Subarian Africa, being in 2018 one of the five countries in the region with the biggest number of international arbitration cases. Even so, it is important to say that the number of arbitrations which occurs in this part of the globe constitutes less than 6% of the total number of international arbitrations over the world, by reference to 2018.

One of the major challenges that Angola and Mozambique still face gives respect to availability and level of skills and knowledge of the arbitrators. In this respect, it should be noted that CREL, has launched and coordinated a training course for arbitrators, in order to increase the number of arbitrators and improve their capacity and knowledge.

In turn, CACM, in Mozambique, develops an essential role regarding the dissemination of the additional means of conflicts resolution, arbitrations training and provision of logistic and administrative support during all the phases of the arbitral process, thus guarantying more organization, credibility and transparency to the national arbitration systems.

In view of the increasing complexity of the proceedings it is important to bring the contribution of specialists and experts with expertise in these specific subjects, in order to ensure a greater robustness and support of the proceedings.

One of the major struggles related with arbitration, especially in Angola, is related with the excessive influence of the civil procedure system when choosing the rules of procedure to the arbitration and with the recognition and enforcement of arbitral awards. This is probably because the mindset of the arbitrators is still very linked to their lawyers' practice.

According to our experience, even nowadays, the Supreme Court of Angola tends to subordinate the recognition and enforcement of a foreign arbitral award upon the verification of the requirements set forth in article 1096 of the Civil Procedure Code, including situations where the arbitral award was rendered in another contracting state of the NY Convention.

All these referred constraints probably explain the reason why solely 9 (nine) foreign arbitral awards have been presented before the Supreme Court of Angola, which is the competent authority to assess these questions, as per article 1095 of the Angolan Procedure Code. And from that universe, only 5 (five) have been homologated.

According to the information provided by the Technician of the Civil and Administrative Chamber of the Angolan Supreme Court, due to the complexity of such awards, the average time for reviewing such cases is not different, at all, of the average time spent on reviewing a normal judicial procedure.

Of course, this may cause a great level of uncertainty within foreign investors, especially when they naturally expect that the process of recognition and enforcement should be straightforward.

Additionally, such weak expression of the special procedure to the recognition and enforcement of such arbitral foreign awards may be also related with the lack of dissemination of such alternative mean for disputes resolution in the media.

Considering the above, we may conclude that it is necessary to pursue an additional effort in order to introduce some changes in both Angolan and Mozambican legal systems, with a view to harmonize some provisions contained in their respective arbitration laws and the provisions of the Civil Procedure Codes.

Basically, those changes should seek to encourage predictability and celerity on the recognition and enforcement of foreign arbitral awards, which, in our view, would help to promote Angola and Mozambique as attractive destinations for foreign private investment and businesses.

In a nutshell, we may conclude that both Angolan and Mozambican legal orders are making progresses towards a modern and fairly legal system, friendlier to alternative dispute resolution means, specially arbitration but there is still a long way to go.

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