

This NL is based on the legislative framework in force as at 2 April 2020. However, the competent bodies of the State are expected to approve and publish the regulations that put into effect the measures to contain the spread of the new Coronavirus that is responsible for the COVID-19 pandemic (see article 4 of Law 1/2020 which ratified the Declaration of the State of Emergency, appearing in Presidential Decree 11/2020 of 30 March). Therefore, TTA will update this NL as and when necessary.

## MOZAMBIQUE

Global Vision, Local Experience.

13 APRIL 2020

# CORONAVIRUS: RESOLVING DISPUTES QUICKLY AND EFFICIENTLY

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The current situation is generating tensions in contractual relationships between companies. These can arise at the level of suppliers, customers, landlords, tenants, contractors, developers, and financial institutions, etc.

If not resolved, the tensions may escalate into conflicts which, in turn, could lead to judicial or arbitral litigation. In any dispute, regardless of the merits of the positions of the parties, the likelihood is that resolving the problem through court litigation is too slow for the speed businesses desire. It is also too costly for businesses with fragile liquidity and will create additional problems, in particular, breakdowns in contractual relationships, many of which are intended to continue over time.

In these exceptional circumstances, companies are faced with three factors that are fundamental in dispute resolution:

- **Time.** Whatever the solution, the urgency of resolving tension or a conflict is crucial to ensuring the impact is as small as possible. Urgency is not compatible with the average time of two years for a court decision at first instance and, moreover, measures have been adopted that only allow courts to deal with urgent matters. This will mean the average time will be even longer. As a rule, under normal conditions, the estimated time needed for alternative dispute resolution ("ADR") mechanisms is very much less than for court proceedings. Nevertheless, taking into account the current circumstances, the average time may be substantially lower than the periods mentioned below.
- **Cost.** In a scenario of lower liquidity in the short or medium term, it is crucial for disputes to be resolved in the least costly way possible. This circumstance is not consistent with the relatively fixed and comparatively higher costs of judicial proceedings, which involve the payment of court fees whose amount are determined on the basis of criteria that are not clear.

**■ Maintaining commercial relationships.**

Most companies are facing problems that result from the current circumstances and they do not want to put at risk the commercial relationships they will need to pursue their activity when things go back to normal.

The solution that takes into account these three factors is the use of ADR mechanisms. These mechanisms are voluntary in nature and their result can be founded on (i) creativity and consensus, that is, an agreement between the parties involved, or (ii) adjudication, that is, a decision or determination by a third party, which may or may not be binding.

There are several ADR mechanisms available that can respond to the pressing needs of businesses. They have already been tested to certain extent in Mozambique, but are widely used at the international level. The most significant are (I) mediation, (III) conciliation, and (IV) arbitration.

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What these ADR mechanisms have in common is that they are voluntary in nature, because their use as an alternative to the traditional method (the courts) depends on the express agreement of the parties.

However, their outcome can depend on agreement between the parties, in a consensual solution, or it can depend on a determination or decision of a third party, where the parties give the third party the power to resolve the dispute.

These forms of ADR have been actively promoted and developed at the international, European and national levels. As a consequence, today the result obtained through these ADR mechanisms may constitute an enforceable title (a legal basis to bring an enforcement action). For this reason, they are a real alternative to the courts.

**I. MEDIATION**

Mediation is a negotiation procedure conducted by a neutral third party, the mediator. The mediator introduces a new dynamic that is often decisive to overcoming deadlocks and finding solutions to the dispute. Although it is informal, the mediation procedure follows a set of rules laid down in the law and, if applicable, in national or international mediation regulations.

Mediation can be facilitative. In this case, the mediator helps to clarify the positions of each of the parties involved, both in joint sessions and in private sessions (caucus) with each party, seeking to identify their interests and the ZOPA (Zone of Possible Agreement).

In this type of mediation, the mediator rarely gives an opinion, and much less so an opinion on the result.

Mediation can also be evaluative. In this case, the focus is more on the outcome and less on the interests of the parties as the mediation seeks to produce a possible forecast of how the conflict would be resolved in an adversarial scenario. Hearing the parties jointly or separately, the mediator will evaluate how the dispute would probably be decided by a court.

The aim of mediation, whether facilitative or evaluative, is for the parties to reach an agreement and these agreements can amount to an enforcement title.

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**II. EXPERT DETERMINATION**

The expert determination is, essentially, an informed opinion given an expert, college or panel of experts, appointed by the parties or by whoever they designate to do so. This determination may be binding on the parties or not.

The procedure for the expert determination may be more or less formal, depending on the use of international regulations and administration by arbitration centres.

It has the advantage of resolving technical matters and it (i) avoids the hostility of a dispute, which usually ends up introducing more subjective matters, and (ii) reduces the risk of a wrong decision on a complex technical issue which an arbitral tribunal or court would not be as well prepared to decide.

One of the most widely used formats for expert determinations is the "dispute board". This is a panel of experts set up to monitor the performance of a contract of continuing duration (contrato de duração continuada - a contract for the continuous provision of works or services for a specific period). The panel intervenes whenever a technical dispute arises in the execution of the works. It has the advantage of allowing the work to continue normally. The decision (whether binding or not) is issued by a panel of experts who are familiar with the contract and the parties.

### III. ARBITRATION

With its well-known flexibility, arbitration allows for more rapid resolution of disputes, when compared to judicial proceedings. Arbitration offers relatively faster procedures and this provides a response for disputes whose urgency is not consistent with the normal duration of judicial proceedings.

Arbitration awards are equivalent to a court judgment and enforceable as such. As a rule, arbitrations are decided by one or three arbitrators, the procedural periods are shorter, evidence is essentially documentary (so there may be no need for a hearing), and there is a short period for arbitral award to be issued.

Under the law, arbitral tribunals may, at the request of one of the parties, order any provisional measures that prove necessary in relation to the subject matter of the dispute. In the context of these provisional measures, they may also require any of the parties to provide a guarantee.

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### WHAT PRACTICAL ADVICE SHOULD BE FOLLOWED?

- Analysis of the factual and legal situation – it is crucial to identify the real interests underlying the positions of the parties.
- Identification of the most appropriate form of ADR.
- Encouraging the opposing party to agree to an ADR solution – without a prior or current agreement, it is not possible to use these voluntary dispute resolution mechanisms.
- Use the services of specialist institutions – Specialist institutions are normally quipped with the technological means to help resolve domestic and international disputes, which means that geographic factors are no longer an obstacle to a speedy solution.