NEWS
LEXTTER

TTA
SOCIEDADE DE ADVOGADOS

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.
06 APRIL 2020

CORONAVIRUS:
IMPACT ON WORKS CONTRACTS

The current situation may lead to tensions between developers and contractors. This is especially so regarding the consequences of any limitations or restrictions on performing the contract that this situation creates.

THE ALLEGATION OF FORCE MAJEURE AND A CHANGE CIRCUMSTANCES IN WORKS CONTRACTS

We are facing the growing and exponential spread of COVID-19 and a state of emergency throughout Mozambique was recently declared by Presidential Decree 11/20 of 30 March, which was ratified by Law 1/2020 of 32 March. Against this background, it is important to assess what impact this situation may have on the ability of parties to meet the obligations they have assumed under works contracts that are in progress.

Indeed, the current situation may lead to tensions between developers and contractors. This is especially so regarding the consequences of any limitations or restrictions on performing the contract that this situation creates, when the parties have opposing views on the measures necessary to mitigate any negative effects or to allocate the risks of the contract. In this context, stakeholders in the construction sector have raised a number of questions.

These include: (i) Should (or must) the works be suspended? (ii) Can the contractor request (or impose) an extension of the period originally established to complete the project? (Iii) Can the contractor request (or impose) a revision of the prices agreed. As a result, there is a pressing need to consider the legal rules applicable to these matters.

Besides the legal rules, it is always necessary to look first at the contract itself, as this could provide solutions that should be taken into consideration. Therefore, it is essential to analyse the terms and the nature and form of performance of each contract on a case-by-case basis. However, as many works contracts have similar provisions, we will also address the most common contractual solutions.

CAN THE COVID-19 PANDEMIC BE CLASSIFIED AS AN EVENT OF *FORCE MAJEURE*?

It is very common for works contracts to contain clauses that contain an illustrative or exhaustive list of the facts or circumstances which can be qualified as an "event of force majeure".

In those clauses, it is also customary for the parties to set out the consequences associated with the confirmation of an event of force majeure. These could include the suspension of the deadline to perform the contract while the event of force majeure lasts, the possibility of a price revision, or termination of the contract if the event of force majeure event lasts for longer than a certain period of time.

Force majeure clauses in works contracts often set out damage containment mechanisms in which the affected party undertakes to use its best endeavours to mitigate the impacts of the event of force majeure on the performance of the contract. This could oblige that party, in good faith, to remain bound by the contract and to comply with the obligations that can be complied with. For example, to do works not directly affected by the event of force majeure. It could also oblige that party to take steps to mitigate the effects of the force majeure event, for example, to adjust the work plan to bring forward tasks not affected by the force majeure event).

It is also common for works contracts to establish deadlines and procedures that must be complied with by the affected party if an event of force majeure is confirmed.

Therefore, the first step is to consult the contract signed between the parties, check whether there is a force majeure clause and analyse its terms, because, if this clause exists, it will prevail over the law that only applies where the contract is silent.

CAN THE COVID-19 PANDEMIC AMOUNT TO A SITUATION, ALBEIT TEMPORARY, OF IMPOSSIBILITY TO PERFORM THE CONTRACT AND THUS LEAD TO ITS SUSPENSION?

This question must be analysed on a case-by-case basis and the conclusions on this topic may vary, but, in principle, impossibility to perform requires that performance be actually and objectively impossible. As a rule, situations in which performance has simply become more difficult or costly cannot, as a rule, be classified as "cases of impossibility to perform". However, even though impossibility should not be confused with greater difficulty in performing, in certain cases, one could also consider whether the excessive burden of performance should be equated with impossibility.

Thus, if the contractor can demonstrate that it is in a situation of real and temporary impossibility to perform, it will be released from the obligation to perform while the impossibility lasts. In this situation, the contractor will not be liable for any delays in performing the contract, but the developer is under no obligation to pay the price.

If the contractor can demonstrate that it is in a situation of real and temporary impossibility to perform, it will be released from the obligation to perform while the impossibility lasts.

Works contracts are complex and the obligations assumed by the parties do not usually consist in a single act, but in doing a multiplicity of secondary or ancillary acts, all of which contribute to fulfilling the principal obligation.

As a result, when obligations are not temporarily impossible to fulfil, they must be fulfilled, and the parties must assess, in good faith, which obligations can be fulfilled and which are actually temporarily impossible to perform.

We note that, to date, the legal instruments mentioned above to declare a state of emergency have only determined the closure of commercial, entertainment and similar establishments, or a reduction in their activity or operation. Decree 12/2020 of 12 April approves the administrative measures to prevent and contain of the spread of the COVID-19 pandemic that will remain in force during the state of emergency. The closure of construction sites or the suspension of construction activities has not yet been ordered. These sites must operate using the system of rotation as provided for in the above-mentioned legal instruments. However, the reduction in the number of employees and the imposition of the rotation of workers could seriously restrict the ability of contractors to continue to do their work. If this does occur, it may even justify the interruption of the work.

The absence of an order of this kind makes it more difficult for any party (in principle, the contractor) wishing to invoke impossibility to perform to prove Objective and temporary impossibility.

CAN CHANGES TO THE CONTRACT BE DEMANDED OR IMPOSED DUE TO THE CURRENT STATE OF EMERGENCY?

It is not usual for contracts to address this issue. Nonetheless, law provides that, when there is an abnormal change in the circumstances on which the parties based their decision enter into the contract, the injured party has the right to (i) terminate the contract, or (ii) modify it based on equity. However, these things can only happen if demanding the performance obligations that party had assumed would seriously offend the principles of good faith and it is not covered by the risks inherent to the contract.

A state of emergency is currently in place in Mozambique and the Government and the health authorities have imposed exceptional measures. As a result of these special circumstances, there may be scope for the parties to claim there has been an abnormal change in the circumstances on which they based their decision to enter into the contract with the specific terms and conditions they agreed. This would open the door to a renegotiation of the terms and conditions to the extent strictly necessary to cope with the current circumstances in which the work is being done.

Some doubt exists, but it may be possible, in the abstract, for the change in circumstances on which the parties based their decision to contract to also justify a revision of the contractual conditions. This would depend on the contours of the specific case and the distribution of risks established in the contract.

If parties do invoke an abnormal change in circumstances, the question of a possible extension of the deadline to complete the work may arise. This could lead to the application of contractual fines and the possibility of the financial balancing of the contract.

COULD A SUSPENSION OF WORKS BE DECREED ON THE BASIS OF THE CURRENT STATE OF EMERGENCY?

As mentioned above, there is currently no express restriction on construction work.

Without prejudice to what is expressly provided for in the contract on this issue, the performance of works under the contract can only be suspended based on (i) an objective impossibility, albeit temporary, to perform (which may be due to an event of force majeure or a reduction in the number of workers), or (ii) a change in the circumstances on which the parties based their decision to enter into the contract that justifies the suspension of the work for a certain period.

In any case, the suspension of the work should, in principle, be the last resort, because it is the most serious and damaging for both parties. Moreover, if this decision is to be taken, it should be preceded by the necessary dialogue and, if possible, the agreement of the other party agrees, in order to avoid any future dispute.

The solutions should take into account the impacts of the suspension on meeting interim and overall deadlines under the contract, and the penalties that the developer can apply for any failure to meet the deadlines originally laid down.

With relevance to public works contracts, Decree 5/2016 of 8 March – which approves the Regulations on Procurement of Public Works Contracts, Supplies of Goods and Provision of Services to the State – provides for the possibility to suspend the execution of the contract on the grounds of a force majeure event. In addition, the Regulations also provide for the possibility to terminate the contract if this remains suspended for reasons of force majeure for a period exceeding one quarter of its duration.

In both public works contracts and private works contracts, the possibility to modify prices must be examined in light of what is expressly provided for in the contract itself.

IS IT POSSIBLE TO DEMAND A PRICE REDUCTION OR THE FINANCIAL REBALANCING OF THE CONTRACT BASED ON THE CURRENT STATE OF EMERGENCY?

In both public works contracts and private works contracts, the possibility to modify prices must be examined in light of what is expressly provided for in the contract itself.

In public works contracts, price revision is one of the mechanisms by which the financial balance of the contract can be repositioned. It exists alongside other mechanisms such as the extension of the periods to perform obligations, or the payment by the developer to the contractor of the amount corresponding to the increase in the costs originally established to complete the works. However, it is important to point out that the possibility of application of these mechanisms depends on the contract, which may provide a specific way to carry out any financial rebalancing. Moreover, the contractor will only be entitled to this rebalancing if it can demonstrate that (i) the current state of emergency has changed the assumptions on which the value of the work was based, and (ii) the public party was or should have been aware of these assumptions.

In any case, a simple price revision is unlikely to be enough to cover all the losses that will inevitably be caused by the state of emergency (reduced working efficiency and greater difficulty in executing the works, in addition to financial costs, and the costs of mobilisation and demobilisation).

In private works contracts too, contractors will see reduced working efficiency and greater difficulty in executing the works. However, the general rule is that the developer is only obliged to compensate damage that it has directly caused and, in general, this will not be the case.

The state of emergency was declared for a period of 30 days from 1 April 2020 and the pandemic is still ongoing. However, today, it is not possible to anticipate how long the state of emergency will last. As a result, it could be a particularly tough task to renegotiate all contractual terms at this time.

WHAT HAPPENS IN THE CASE OF OBLIGATIONS TO THIRD PARTIES THAT DEPEND ON THE WORK BEING COMPLETED ON TIME?

The developer may have made commitments to third parties on the assumption that the works would be completed by a specified date (for example, lease agreements, contracts for sale and purchase, use and agreements).

Sometimes, a party becomes aware in advance that it will not be able to comply with a given obligation within the contractual time limit. In this case, good faith in performing contracts requires that party to notify the other party of this situation in accordance with the legal or contractual provisions that specifically apply. Then, together with the other party, it must seek solutions to adapt the contract or any specific obligation to the current situation.

In complying with this duty of good faith, the party under an obligation to perform must be aware that this communication could amount to an advance declaration of non-compliance. Depending on the specific case, this could lead to the early maturity of the obligation to perform, to default, or even to definitive breach.

WHAT PRACTICAL ADVICE SHOULD BE FOLLOWED?

- Analyse of the works contract, in particular, the provisions on force majeure, suspension of performance, and resetting the contractual balance;
- Measure the works done up to the date of the declaration of a state of emergency to avoid any doubt about what work was done before and what work was done after that declaration;
- Gather evidence of delays in relation to the work plan prior to the declaration of a state of emergency, to avoid doubts about the delays attributable to each point in time;
- Gather evidence of the orders for raw materials already made or in transit;
- Record information on the human and mechanical resources at work on the occasion of the declaration of a state of emergency.