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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

In Mozambique, there is no standard type of construction contract. However, it is important to point out that that the applicable law and the form of the contract will depend on whether it is a public contract (executed between a private entity and the State and/or a public entity) or a private contract (executed between private parties).

When a construction contract is executed with a public entity, the Regulation for Contracting Public Works, Supply of Goods and Provision of Services to the State, Decree no. 79/2022, of 30 December (the "Regulation for Contracting Public Works") establishes the key features that any such contract is required to have.

On the other hand, pursuant to Mozambican civil and commercial legislation, in private contracts, the parties are free to agree on their terms and conditions, if there is no violation of the law. Common types of construction contracts are lump-sum, unit price, design-build contracts.

In addition, international forms of construction contracts are used for major projects such as FIDIC (Fédération Internationale de Ingénieures-Conseils), NEC (New Engineering Contract) and also JBCC (Joint Building Contracts Committee) which are commonly used in the South African construction industry.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

There is no collaborative contracting in Mozambique (at least none designated as such). In Mozambique, cooperation between contractors may be achieved either through a consortium or under a joint-venture agreements.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Please refer to question 1.1 above.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

As mentioned in question 1.1 above, the Regulation for Contracting Public Works establishes the key features that such contracts are required to have. Commonly, the public tender includes a draft of the contract, which is a model contract approved by authorities, with the necessary adjustments to suit the subject matter of the tendering procedure.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

In private law, and in accordance with the Mozambican Civil Code, a contract is formed when the will of two parties converge. It is necessary for the parties to consent of the parties and to have capacity to contract. It is also necessary to state the object of the contract, which is determined or remains to be determined, and this object must be legal. However, most construction contracts (besides domestic construction works) are put in writing.

In public law, formalities are stricter since a tendering process (as a rule a public tender) must be launched by the contracting authority. The interested parties have to submit a proposal and follow several formalities and stages in accordance with the law. The contract will then be awarded to the party which best meets the requirements of quality and price as specified in the tender documents. The execution of a written contract is mandatory.

Mozambican law also provides for other extraordinary procedures to award public works, with less stricter formalities, but in all of them it is mandatory to have an awarding statement and a written contract.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

In Mozambican law, the concept of "letter of intent" is well-known and commonly used. However, unlike common law, Mozambican law regulates "pre-contractual obligations". As a

result, the parties are bound to act in good faith even during the pre-negotiation of a contract. For this reason, although letters of intent may also be non-binding, such circumstance does not release the parties from liability to the other party for any loss or damage caused during contract formation if bad faith is proven. The existence of a letter of intent may constitute evidence in any litigation over loss or damage suffered during contract formation.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

It is mandatory for all contractors to take out a third-party liability insurance policy. Depending on the object of the contract, the parties can agree on different kinds of insurance that they consider necessary to perform the corresponding contract. It is also mandatory for any employer of workers (whether the employer or the contractor) to take out work accident insurance.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

There is no statutory requirement that it has to be stipulated directly in the construction contract. The statutory requirements that the parties must comply with are:

- Mozambican labour law and social security obligations.
- Mozambican law as regards foreign employees and in particular local content limitations.
- Mozambican laws and other statutes, such as the General Regulation of Urban Buildings, environmental law, concerning, *inter alia*, building permits, land use and environmental protection.
- Mozambican laws concerning reporting to the tax authorities.
- Mozambican laws concerning the work environment and other safety requirements.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The most relevant law as regards fire safety standards is the General Regulation of Urban Buildings (Legislative Act 1976 as amended from time to time). It is also important to consider Law 7/2021 of 30 December, which approves the legal framework for fire protection, but which requires further developments to be approved by Council of Ministers. Further to that, there are several Instructions by Municipalities and National Public Rescue Service (SENSAP) on the matter that must be followed.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

The employer is allowed to retain part of any amounts payable to the contractor, both in private and public construction contracts.

In the case of public contracts, the Regulation for Contracting Public Works, any employer that unilaterally terminates the contract has the right to retain and use the credits resulting from the contract, to compensate any losses caused to the contractor, up to the limit of the same.

In private construction contracts, the parties are free to agree as civil law provides for no restrictions and expressly foresees retention right. Commonly, contracts contain provisions allowing the retention of 5% to 10% of the amounts due.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

In public contracts, the Regulation for Contracting Public Works provides for three types of guarantees: (i) provisional; (ii) definitive; and (iii) advance payment. The definitive guarantee is provided after the award of the contract and before the signing of the contract. Its purpose is to ensure the proper and punctual fulfilment of the obligations arising from it and may not exceed 10% of the value of the contractor's proposal. Upon completion of the work, the contractor must submit a guarantee of five percent of the value of the work to cover defects during the works guarantee period.

The following are accepted: (i) bank guarantee; (ii) proof of deposit or bank transfer; (iii) certified cheque; (iv) public debt securities; (v) insurance-guarantee; and (vi) the contracting authority may also define other type of guarantee to be provided.

In private construction contracts, there is no legal limitation. Performance bonds are usually provided by the contractor in an amount between 5% and 15% of the contract price.

The execution of performance bonds may certainly be subject to interim injunctions, which will be granted if the following legal requirements are met: (i) serious probability of the existence of the right claimed; (ii) well-founded fear that someone else, before the suit is filed or while it is pending, will cause serious injury to that right, that is difficult to repair; (iii) the damage resulting from the injunction does not exceed the damage it is intended to avoid; and (iv) the non-existence of a specific injunction to protect the same right.

In the case of on demand performance bonds, however, the granting of interim injunctions is very unlikely, considering the nature of this type of bond. In Mozambique, to be effective it should be a first demand bank guarantee, allowing an immediate request for payment which financing entities (banks or insurance companies).

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

For public contracts in Mozambique, there are restrictions on the nature of the guarantees. However, provided it is compliant with the Regulation for Contracting Public Works, a parent company could be allowed to provide for the guarantee if it is made clear that there is no assignment.

In private construction contracts, there are no limitations, and it is very common and also allows joint and several liability. As such there are additional guarantees for the employer.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

If the employer does not comply with its payment obligations under the construction contact, the contractor is entitled to exercise a right of retention over the works, under article 754 of the Mozambican Civil Code. The right of retention consists of an *in rem* guarantee which prevails over mortgages, even if filed in advance.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Engineer is the name used in FIDIC contracts and it is not commonly used in other Mozambican construction contracts. In Mozambique, construction contracts are, as a general rule, supervised by a third party, who is commonly referred to as an inspector (Article 1209 of the Mozambican Civil Code). The inspector acts as a guardian of the proper performance of the contract. The inspector is responsible for monitoring and verifying exact compliance with the project, its alterations, and the work plan. The inspector is also responsible for checking on the payments due to the contractor.

In public works, it is mandatory to have a third party to act as an independent inspector (Article 175 of the Regulation for Contracting Public Works).

In performing its role, the inspector must act with impartiality, notwithstanding the fact that it was hired and is paid by the employer. In fact, the very nature of the inspector's work requires it to act impartially, because the inspector is the guarantor of the proper performance of the contract. Due to its nature, the duty of impartiality is absolute, except when extraordinary circumstances, such as *force majeure*, require a subjective assessment.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The "pay when paid" clause is commonly used as a payment condition for subcontractors, meaning that subcontractors will only be paid if the employer pays the contractor.

The "pay when paid" clause is not contrary to the provisions of Articles 280 and 281 of the Civil Code (if it is not limited to the application of the contractual object itself, the clause may be applied), provided it does not offend the law, is not legally impossible, indeterminable and does not offend public order or good customs. The clause is also in line with the provisions of Article 121(1), read together with Article 883(1), which allows the parties to determine the form for payment of the price.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Under Article 810 of the Mozambican Civil Code, the parties may agree in advance on a fixed amount that will be paid by the contractor to the employer in case of delay or breach of contract (which may be a fine in case of delay in completion of the works). The clause is referred to as a *penalty clause*.

It is important to note that by establishing such clause in a contract, as a rule, the consequence is to prevent the party that established that penalty clause from demanding compensation for any losses above the amount agreed (Article 811 of the Civil Code). As such, if the actual losses are greater than the penalty agreed in advance, the injured party may not demand compensation for the remainder. However, this is not absolute, since the parties may (if they expressly agree) provide that, although they are setting a specific amount in the penalty clause, if the actual losses are greater, this will not prevent the payment of the remaining amount.

In public works, the contracting authority may set a fixed amount to be paid in the event of breach of contract (for example, delay in the completion of the work), as set out in Article 191 of the Regulation for Contracting Public Works.

Regarding restrictions in public procurement, article 191.1 of the Regulation for Contracting Public Works establishes that a daily fine of 0.5% and 1% of the value of the awarded contract may be applied until the end of the contract or its termination. Hence, it may not exceed the legal limit.

Under Article 812 of the Civil Code, the courts may reduce the amount agreed as damages, if it is proven to be manifestly excessive.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Pursuant to the Regulation for Contracting Public Works, the contractor is obliged to accept, under the same contractual conditions, any additions or suppressions that are made to works, goods or services, up to 25% of the initial value of the contract. Any variation exceeding these limits depends on authorisation by the Minister of Finance.

In addition, the employer is also entitled to demand the execution of additional works (not included in the contract), which the contractor may only refuse if they exceed 25% of the initial value of the contract or the contractor proves not to have the means to perform the extra work, the type of which was not originally part of the contract.

As regards private construction contracts, the Mozambican Civil Code stipulates the employer's right to vary the works if the variation does not exceed 20% of the contract price in value and does not entail a modification in the nature of the works.

If the works are subject to variation, the contractor is entitled to a price increase, linked to the related rise in expenses and work, and to an extension of the contractual deadline.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Under the Regulation for Contracting Public Works Project omissions (and errors) of a project may occur. As such, after the works are assigned within the deadlines set in tender process, the contractor may claim the existence of such errors and omissions together with their costs. The employer will then have 30 days to decide on the claim and if the employer does not respond to the contractor, the claim is deemed to be accepted. Such errors or omissions in the project may also be identified during the execution of the works. If this happens, the contractor must immediately notify the employer. Both parties must seek to reach an agreement, failing which they may have recourse to independent arbitration to resolve any conflicts resulting from the interpretation and performance of the contract.

In private construction contracts and if not provided for in the contract, the parties may freely agree. Without prejudice to licensing and responsibilities for the execution of the works, any licensed contractor in Mozambique may be hired by the employer and will be able to execute the works.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

In the pre-contractual phase and during the performance of the contract, the parties are always bound by the principle of good faith. Furthermore, during the performance of the contract, the contractor is required, under the provisions of article 1208 of the Civil Code "to execute the works as agreed, without any defects that would exclude or reduce the value of the works or their fitness for their normal use or as provided for in the contract".

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

There is no specific legal rule regarding concurrent delays. Any concurrent events have to be assessed on a case-by-case basis, based on the principle of "adequate cause" as provided for in article 563 of the Mozambican Civil Code which states that "*the obligation to compensate only exists in relation to damage that the injured party would probably not have suffered had it not been for the injury*".

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Unless otherwise agreed, the statutory limit for a public works contract is five years. During this period, the contractor must, at its own expense, maintain and repair any damage that seem to result from defective execution of the contract. When the five-year warranty period ends, a final inspection takes place for the purpose of final acceptance of the work by the employer.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

If not stipulated in the contract, the time limits to bring a claim under a construction contract will be as soon as the breach is known, the obligation was due, or the defect became known. Common practice is that notices of breach/claims must be served in writing and properly grounded. Establishing contractual time limits to bring claims or waivers of such rights under construction contracts will not be considered valid before Courts if found unreasonable.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

The risk of unforeseen ground conditions will be borne by the employer – public or private – unless the event is caused due to bad execution by the contractor.

However, in private construction contracts the parties may freely allocate the risk between them, so it is common for the employer to take on this risk.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

As a general rule, the risk in a public construction contract is borne by the public authority (employer), because it is considered that the public administration must ensure a certain protection against changes in law.

However, in private contracts, in the absence of a contractual clause, the contractor usually bears the risk. Nevertheless, it is important to note that pursuant to the Mozambican Civil Code (article 437) there is the possibility to apply the regime of the abnormal change of circumstances. This gives the contractor the right to terminate or modify the contract on an equitable basis, provided the change in law meets the following requirements: (i) occurrence of a change in the circumstances on which the parties based their decision to enter into the contract; (ii) the change must abnormal, principally in the sense that it was unpredictable and extraordinary; (iii) existence of injury to one of the parties; (iv) the request for fulfilment of a contractual obligation seriously affecting principles of good faith; and (v) the risk of occurrence of the change in law not being covered by the risks inherent to the contract.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Architects and engineers who are responsible for the design of a property, specifically, usually own all related intellectual property.

Intellectual property rights may be assigned to the employer by their owner. However, the moral rights must remain the property of its author.

Moreover, architects legally have a moral right to prevent changes to the designed property. This means that employers may not, either during or after construction, introduce changes without prior consultation of the architect. In the absence of an agreement, the architect is entitled to repudiate ownership over

the designed work and the employer will be forbidden from using, in its own interest, the architects name in relation to the work.

3.10 Is the contractor ever entitled to suspend works?

The Regulation for Contracting Public Works specifically addresses suspension of works by the contractor, in full or in part, for a given period, when: (1) it is provided for in the work-plan; (2) it is authorised by the employer (contracting authority); (3) any amounts due for executed works, revisions and changes under terms of the contract are not paid; and (4) in the case of any other damaging fact imputable to the employer.

The contractor's right to suspend works is commonly provided for in private construction contracts and associated with breaches by employer. If not contractually regulated, the legal mechanism of "exception of non-performance" (article 428 of the Mozambican Civil Code) provides grounds for suspension of works when the employer fails to comply with payment obligations.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Under the Regulation for Contracting Public Works, public contracts may be terminated by: (i) full performance of the contract; (ii) agreement of the parties to terminate; or (iii) unilateral termination based on breach of contractual obligations, served in writing.

The employer of a public construction contract may unilaterally terminate for: (a) the contractor's breach of contractual clauses, specifications, projects or deadlines, including abandonment of the works; (b) delay for a period longer than 60 days in complying with contractual clauses, specifications, projects and execution deadlines, or for any shorter period established in the tender documents; (c) repeated defective compliance with contractual obligations; (d) systematic non-compliance by the contractor of the determinations of the authority designated to monitor and inspect the execution of the works; (e) changes in the legal structure of the contractor without the prior consent of the employer; (f) assignment of the contract or association (joint-venture, consortium, etc.) with another entity without prior consent of the employer; and (g) accrual by the contractor of fines up to 20% of the contract value, if another lower limit is not established in the contract.

The contractor of a public construction contract may unilaterally terminate: (a) for impossibility to access the area, place or object to execute the works within the contractual deadlines, or impossibility to access the sources of the materials specified in the contract or in the proposal, due to an act attributable to the employer (e.g., delay of 180 days in assigning the works); (b) for a delay of more than 60 days in payments, whether full or partial; (c) 60 days from receipt of the written order from the employer ordering the suspension of the execution of the works, for reasons not attributable to the contractor, except in case of *force majeure* or unforeseeable circumstances; and (d) for substantial changes in contracting circumstances, which hinder the execution of the contract and increase its charges and costs by more than 25% of the contract value.

The party that intends to unilaterally terminate the contract must give notice to the other party of its intention to terminate, specifying the cause and the grounds for the termination. The other party must, within 30 days, remedy the claims/breaches. If it does not do so, the claimant may terminate the contract.

Public contracts may also terminate automatically upon death or incapacity if the contractor is a natural person, or upon insolvency if it is a legal entity.

In private construction contracts, it is common for the parties to agree provisions conferring the right to immediate termination in certain events, such as: (i) abandonment; (ii) reaching of liquidated damages limits; (iii) reaching of limitation of liability caps; or (iv) failure to achieve provisional acceptance by a given date.

Civil law also grants the right to terminate a contract upon verification of a definitive breach of contract by one of the parties. A definitive breach occurs when: (i) the non-breaching party loses interest in the other party's performance, as a result of a delay; or (ii) if after performance is delayed, the breaching party does not resume compliance with its contractual obligations within a reasonable period granted by the non-breaching party.

Accordingly, the verification of definitive breach depends on the prior delivery of a notice granting a period to remedy the breach.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

In public contracts, the Regulation for Contracting Public Works provides a right of suspension for indefinite period, which leads to termination in the interest of the employer. The termination entails the payment of fair compensation, which must correspond to the payments due and compensation for actual loss or damage suffered.

For private construction contracts, article 1229 of the Mozambican Civil Code stipulates a right of withdrawal. This right may be exercised at any time by the employer against the payment to the contractor of compensation for all expenses and works done, and for the profit it could derive from the execution of the works.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept of *force majeure* is well known in Mozambican jurisdiction.

In the Regulation for Contracting Public Works, the responsibility of the contractor for any defect or delay in the execution of the contract ceases when the non-compliance results from of *force majeure*. In addition, any loss or damage caused by *force majeure* or any other event not attributable to the contractor will be borne by the employer (unless it refers to risks that are to be borne by the contractor). The contractor is entitled to be paid for all executed works. The inspector of the works plays an important role in *force majeure* events since it will have to check the executed works and the contractor's claims relating the costs of remedying any loss or damage.

In private construction contracts, the *force majeure* clause is commonly included as freely determined by parties.

For a contract which has become uneconomic, it is better to argue an abnormal change of circumstances, giving the contractor the right to terminate or modify the contract on an equitable basis (please see question 3.8 above) – article 217 of Regulation for Contracting Public Works and article 437 of Mozambican Civil Code.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

There was no legislation enacted specifically to provide relief to parties for delays, interruptions and/or financial losses caused by the COVID-19 pandemic. Nor are we aware of any judgments with such content. However, this does not necessarily mean that the interests of the parties were prejudiced.

Construction contracts can provide that extraordinary situations may be considered to justify the suspension, modification or termination of the contract. In this context, as it was an unforeseeable event beyond the control of the parties, the COVID-19 pandemic was considered for this purpose. For this contractual stipulation to be considered, it was necessary to assess the terms in which this event seriously affected the performance of the construction contract. Therefore, if the existence of a *force majeure* event was determined on a case-by-case basis, the construction contract could be suspended, extended, or terminated, depending on the gravity of the situation. This results from the application of articles 117(1), 187(6), 197(13), 212, 213, 240 and 290 of the Regulations for Contracting Public Works, Supply of Goods and Provision of Services of the State, approved by Decree No. 5/2016 of 8 March, in force during the period of COVID-19. These provisions are also applicable to private works contracts, by force of articles 437 (*termination or modification of the contract due to change of circumstances*) and 1227 (*impossibility of carrying out the works*), which orders the application of article 790 (*objective impossibility to comply*), all of Mozambican Civil Code.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Only parties to a contract are entitled under it. Therefore, as a rule, only the signatories may benefit, unless expressly agreed otherwise.

However, the Mozambican Civil Code establishes that, for five years form the handover of the works (buildings), the contractor remains responsible towards the employer for defects in the grounds or construction, modifications, or repairs and for serious defects or danger of collapse. As such, within this period, a subsequent owner would be make a claim against its seller who, in turn, could make a claim against the previous owner, down the line to employer who would then be able to claim against the contractor. The tight one-year period to submit a claim after the defect becomes known is very important.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In Mozambique, the use of direct agreements and collateral warranties is common, especially in major projects and project finance. This is mostly common in oil and gas projects and mining and energy projects, thus executed between the employer, the contractor, and the financing entities of the projects.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

The Mozambican Civil Code allows a set off between sums owed and sums due, which is known as debt compensation. Article 847 of Civil Code provides that set off may be effected by simple notice to the other party, provided the credit to be set off is judicially enforceable and both obligations have as their object fungible things of the same kind and quality, such as money. The limitations are provided for in article 853 of Civil Code.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Parties are subject to a duty of care. They are also bound to act in good faith towards all contracting parties. This is a core principle from which several ancillary obligations can be drawn. As construction contracts are usually performed over a long period, they require a duty of care, considering the parties are professionals performing a valid contract. They also require a relationship of trust between employer and contractor, and additional duties relating to disclosure of information, security and care of the works, and advice, among other things.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The Regulation for Contracting Public Works provides that any dispute arising out of the construction contract regarding its interpretation (or its execution) will be settled by court proceedings or arbitration.

Furthermore, Article 236 of the Mozambican Civil Code stipulates rules of interpretation intended to determine the will of the parties.

Construction contracts often include hierarchy and interpretation clauses, providing priority between contractual documents, or stipulating that the supervisor, if designated, has the power to decide the interpretation to be given to a certain clause until the conflict is definitively resolved by judicial courts or arbitration.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Terms and clauses which are contrary to the law or public order, or which offend good morals, are null and void, as stipulated in articles 280 and 281 of the Mozambican Civil Code.

This main principle is then reflected in Mozambican legislation. Some examples are: (i) limitations of liability, i.e., the complete exclusion of liability for breach; or (ii) the total exclusion of guarantee periods.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

If the designer is appointed by the employer, the designer is subject to contractual liability. Thus, designers will be liable for errors and omissions contained in the projects/plans prepared by them. Therefore, it is usual for employers to contractually stipulate indemnification obligations, which in any case are due by law.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

The concept of decennial liability does not exist in Mozambique.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In Mozambique, there are no specific courts that deal solely with construction contract disputes. Generally, these disputes are litigated in the common courts, or through arbitration, mediation, conciliation, or through dispute boards.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

There is no adjudication process in Mozambique. However, the parties are free to choose conciliation and/or mediation as an interim form of dispute resolution. References are also made to dispute boards for a decision or recommendation when a dispute arises from the contract or from the performance of the works that cannot be resolved amicably by the parties.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

In Mozambique, arbitration clauses are very common in public and private construction contracts, with both following the standards of the UNCITRAL Model Law of 1986. The arbitration proceedings are made up of introductory, instruction (e.g., evidence-gathering), judgment, and final decision phases. Arbitration decisions may not be appealed as to the merits of the case.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

In Mozambique, there are no legal limitations on the recognition and enforcement of international arbitral awards for private and public construction contracts. However, there is an exception for cases under the ICSID Convention 1965. In these cases, for the awards to be binding and enforceable, they must be reviewed and confirmed by the Supreme Court in accordance with the resolution of recognition and enforcement of foreign arbitral awards (New York Convention 1958). The awards must also comply with the specific rules of Mozambique, for the purposes of analysis of purely formal aspects and also relating to the international public order of Mozambique when one of the parties to the proceedings is Mozambican.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In Mozambique, court cases take at least three/four years to reach a judgment at first instance. After that, the losing party may file an ordinary appeal unless the value of the dispute is less than the minimum required by law. After the decision, the losing party can appeal once on matters of fact and twice on matters of law to the immediately higher court.

It may take more than 10 years from the first decision to the last judicial appeal.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

For the judgment of a foreign court to be enforced in Mozambique, it is subject to revision and confirmation as indicated in question 4.4 above, unless there is some international treaty or special legal provision exempting awards made in any state from this procedure.

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