



ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

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Aabø-Evensen & Co Advokatfirma

Advokatfirman Törngren Magnell

Alexander & Partner Rechtsanwalte mbB

Ashurst Hong Kong

Atanaskovic Hartnell

Bär & Karrer Ltd.

BBA

Bech-Bruun

D. MOUKOURI AND PARTNERS

Debarliev Dameski & Kelesoska

Attorneys at Law

Dittmar & Indrenius

E&G Economides LLC

ENSafrica

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Gjika & Associates

GSK Stockmann

HAVEL & PARTNERS s.r.o.

Houthoff

Kelobang Godisang Attorneys

Kiliç Law & Consulting

Law firm Vukić and Partners

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Moravčević Vojnović and Partners

in cooperation with Schoenherr

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Nobles

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SZA Schilling, Zutt & Anschutz
Rechtsanwaltsgesellschaft mbH

Vieira de Almeida

Villey Girard Grolleaud

Wachtell, Lipton, Rosen & Katz

Walangi & Partners

(in association with Nishimura & Asahi)

WBW Weremczuk Bobeł & Partners
Attorneys at Law

WH Partners

White & Case LLP

Zhong Lun Law Firm



Contributing Editors
Scott Hopkins and Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom (UK) LLP

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Toni Hayward

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Caroline Collingwood
Rachel Williams

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

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Fax: +44 20 7407 5255
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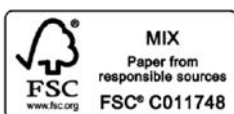
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EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Mozambique

Guilherme Daniel



Paulo Trindade Costa



Vieira de Almeida

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&A transactions in Mozambique follow the general principles of Mozambican civil and commercial law. Pursuant to the principle of contractual freedom, parties may freely agree on clauses, covenants and conditions provided that they do not violate legal provisions and/or public order.

The most relevant legislation governing M&A in Mozambique is:

- a) The Mozambican Civil Code, enacted by Decree-Law no. 47 344, of 25 November 1966, as amended from time to time (“Civil Code”), which contains the general Mozambican civil law rules.
- b) The Mozambican Commercial Companies Code, enacted by Decree-Law no. 2/2005, of 27 December (“MCC”), which sets out a thorough regime applicable to companies in Mozambique and specific rules for different types of companies.
- c) The Mozambican Securities Market Code, enacted by Decree-Law no. 4/2009, of 24 July (“*Código do Mercado dos Valores Mobiliários*” or “CMVM”), which regulates the main aspects of public takeover bids, as well as the requirements concerning the transfer of a company’s shares.

The most relevant authorities in M&A processes include the Stock Exchange Market (“*Bolsa de Valores*”), the Bank of Mozambique, the Ministry of Finance, the Tax Administration and several entities of the Registry and Notary.

1.2 Are there different rules for different types of company?

Yes. There are two main types of companies involved in M&A transactions in Mozambique: (i) limited liability companies by *quotas* (“*sociedades por quotas*”); and (ii) limited liability companies by *shares* (“*sociedades anónimas*”).

Each type of company follows a different set of rules, especially as regards the relationship between shareholders and the company, the relationship among shareholders and the type of organisation and duties of corporate bodies.

In M&A transactions, the types of requirements, formalities and authorisations needed to complete a transaction usually depend on the type of companies involved. In addition, certain transactions (such as mergers involving companies qualifying as credit

institutions or financial and insurance companies) require approval by the Ministry of Finance. In the case of transactions involving credit institutions, the consent of the Bank of Mozambique is also required.

1.3 Are there special rules for foreign buyers?

In general terms, no special rules apply to foreign buyers.

However, certain limitations on shareholding and local content provisions may apply to the acquisition of shareholdings in companies engaged in strategic economic activities in Mozambique (such as exploration of natural resources and private security companies). By way of example, in the case of private security companies, the majority of the share capital must be held by Mozambican nationals.

1.4 Are there any special sector-related rules?

Yes, the relevant sector-related rules are the following:

- In the banking sector, the Bank of Mozambique must be notified in advance of and approve:
 - An entity’s intention to reach or exceed, whether directly or indirectly, the following thresholds of the share capital or voting rights of the regulated company: 10%, 20%, 33% or 50%.
 - An entity’s intention to acquire a stake that will grant it a significant management influence in a company.
 - An entity’s intention to decrease its shareholding below a certain threshold as well as completion of the relevant acquiring and disposing transactions. Below the 10% threshold, the Bank of Mozambique must be subsequently notified (within 15 days as from completion of the transaction) by the entity that directly or indirectly reaches or exceeds the threshold of 5% of the share capital or voting rights of the relevant company. These rules apply irrespective of the nationality of the acquiring/disposing entity.
- In the insurance sector, the Ministry of Finance and the *Instituto de Supervisão de Seguros de Moçambique* (“ISSM”) must be notified in advance of and approve:
 - An entity’s intention to reach or exceed, whether directly or indirectly, the following thresholds of the share capital or voting rights of the issuer: 10%, 20%, 33% or 50%.
 - An entity’s intention to acquire a stake that will grant it a significant management influence in a company.

- An entity's intention to decrease its shareholding below a certain threshold as well as completion of the relevant acquiring and disposing transactions. These rules apply irrespective of the nationality of the acquiring/disposing entity.

1.5 What are the principal sources of liability?

The principal sources of liability are (i) pre-contractual liability, (ii) contractual liability (e.g. breach of agreement, including representations and warranties), (iii) tax liability, (iv) labour liability, and (v) in regulated sectors, failure to comply with the specific procedures or duties.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The means to structure an acquisition in Mozambique depend on the target, risks and potential liabilities. The most common means of acquisition are:

- share deals, whether direct or indirect, which may take different forms and be subject to different requirements and procedures depending on whether or not the transaction has sector-specific implications;
- asset deals, including transfers of businesses as an ongoing concern, whereby the assets and elements of the relevant business are globally transferred to a buyer; and
- joint ventures, privatisations and public acquisition offers ("OPAs").

2.2 What advisers do the parties need?

Typically, the parties involve legal, financial and tax advisors. Depending on the nature of the transaction, specialised advisors may be required to assess regulatory, technical or operational matters.

2.3 How long does it take?

Simple transactions may take as short as one month to complete (notwithstanding preparatory work and due diligence processes), while more complex transactions may take longer. There is no legal deadline for the completion of transactions.

The duration of an M&A transaction is therefore difficult to predict, and is typically subject to multiple variables (e.g. sector-specific requirements, features of the target, the scope of the due diligence process, and the type of conditions precedent needed for completion).

2.4 What are the main hurdles?

The main hurdles are: (i) poor quality and difficult access to corporate information provided by the seller, which often does not allow the buyer to gain adequate knowledge of the target company and delays due diligence processes; (ii) bureaucratic access to information from public authorities, which leads to time-consuming tasks (e.g. verifying a list of assets in the context of a transaction); and (iii) decentralisation of publicly available information among public entities, which makes some processes especially complex (e.g. accessing property or commercial certificates).

2.5 How much flexibility is there over deal terms and price?

The parties enjoy great flexibility in private transactions when it comes to setting the relevant terms and the price, pursuant to the principle of contractual freedom.

Exceptions to this general principle exist in Stock Exchange Market transactions, where the parties must follow the rules set out in the CMVM. In public takeovers, consideration may only consist of cash or securities that have been or will be issued.

2.6 What differences are there between offering cash and other consideration?

The parties are generally free to choose the type of consideration. Payments made in contributions other than cash are assessed in their cash equivalent to calculate the applicable tax.

The CMVM sets out the following rules regarding considerations of public offerings:

- If the consideration is in cash, the financial intermediary organiser must ensure that the consideration is deposited for the exclusive purposes of the public offering or must issue a bank guarantee of payment.
- If the consideration is in issued shares or bonds, the financial intermediary organiser must ensure that the relevant shares or bonds are either deposited and blocked, or registered for the exclusive purpose of the public offering.
- If the consideration is in shares or bonds that are still to be issued, the relevant shares or bonds, albeit provisional, must be ready for exchange no later than 45 days from the close of the public offering. If this deadline is not met, the Bank of Mozambique will declare the offer ineffective and the offeror liable, in accordance with the general terms of the law. If the consideration is in shares or bonds that are still to be issued, but in book-entry form, the financial intermediary organiser must ensure the creation of the issuance registration account within 45 days from the date of closing of the public offering. If this deadline is not met, the Bank of Mozambique will declare the offer ineffective and the offeror liable pursuant to the general terms of the law.

2.7 Do the same terms have to be offered to all shareholders?

In general, parties are free to negotiate and offer different terms to different shareholders of a target company.

However, exceptions to this general rule may result from the target company's articles of association and/or the relevant shareholders' agreement.

In public takeovers and Stock Exchange Market transactions, the offeror is bound to submit a proposal with identical terms and conditions to all potential buyers. Furthermore, in Stock Exchange Market transactions, the offer must include the information listed in article 136 of the CMVM.

2.8 Are there obligations to purchase other classes of target securities?

No, unless this obligation arises from the target's articles of association or the relevant shareholders' agreement.

2.9 Are there any limits on agreeing terms with employees?

All agreements with employees must take into consideration non-waivable rights set out in labour legislation and local content rules. By way of example, the terms of an employment agreement cannot negatively impact the remuneration, the limits of working hours, holiday leave and other imperative labour rules.

2.10 What role do employees, pension trustees and other stakeholders play?

Generally, employees organised in trade unions play a relevant role, insofar as the law requires that trade union bodies of companies be informed and consulted whenever there is an M&A transaction that may result in a change of control of the company.

2.11 What documentation is needed?

The following documents are generally requested in an M&A transaction: (i) transaction agreements (e.g. SPA or joint venture agreements); (ii) resolutions of each party approving the transaction; (iii) the parties' commercial certificates; and (iv) a copy of the share register book in the case of limited companies.

Additional documentation may be requested, taking into account the type of transaction:

- Merger processes require specific mandatory documentation including (i) the merger project, (ii) the statutory auditor's reports, (iii) the registration of the merger project and the information required in the MCC with the Commercial Registry Office, (iv) the approval of the merger project by the shareholders of each company, (v) the public deed of the merger, and (vi) the final registration of the merger.
- Share deals within a public takeover procedure require additional documentation including the preliminary announcement and the prospectus, which must be prepared in accordance with the specific rules provided for in the CMVM.
- Asset deals may require different types of documentation as a function of the asset at stake and the legal regime applicable to the asset. In general, a transfer of assets agreement must identify all the assets to be transferred and comply with all requirements, formalities and authorisations regarding the assets.

2.12 Are there any special disclosure requirements?

In general, there are no specific disclosure requirements. In fact, parties usually enter into a non-disclosure agreement prior to the transaction.

However, in public offerings, information cannot be disclosed prior to it being launched.

2.13 What are the key costs?

The key costs are taxes, consultant fees, public deeds (when applicable) and registrations.

2.14 What consents are needed?

If the target company is a limited liability company by *quotas*

(“*sociedades por quotas*”), the transfer of *quotas* is subject to the consent of the company (to be granted by the Shareholders' General Meeting). It is common for companies of this type to include a pre-emption right of the other shareholders in their articles of association, in relation to transfer of *quotas* to third parties.

If the target company is a limited liability company by *shares* (“*sociedade anónima*”), the general principle concerning the transfer of shares is that shares are freely transferable. The relevant company's articles of association and shareholders' agreements may, without excluding transferability of shares, establish certain restrictions (e.g. pre-emption rights of shareholders and/or the company).

In merger processes, the consent of certain shareholders might be needed if the merger: (i) increases the obligations and liabilities of some or all the shareholders; (ii) affects the special rights of some shareholders; or (iii) changes the proportion of the shareholdings in the company.

Additional consents may be needed pursuant to sector-specific rules (please see the answer to question 1.4).

2.15 What levels of approval or acceptance are needed?

Consent is usually needed at the level of the Shareholders' General Meeting.

2.16 When does cash consideration need to be committed and available?

In private transactions, the parties are free to set out the terms and timings regarding cash consideration. In public offerings, the offeror must indicate the date on which the payment shall be made in the offer.

3 Friendly or Hostile

3.1 Is there a choice?

Mozambican law does not distinguish between friendly and hostile takeovers. However, this distinction is sometimes made considering the origin of the takeovers (e.g. a contractual provision that requires a shareholder to sell its shares in case of breach of contractual obligations) or other non-legal principles (e.g. a takeover may be considered friendly or hostile based on the response of the target's board of directors and/or of the relevant shareholders).

3.2 Are there rules about an approach to the target?

No, except in case of a public acquisition offer, as these are carried out by an intermediary and management is always informed of the transaction.

3.3 How relevant is the target board?

In general, the relevance of the target board depends on the type of company or transaction at stake, as well as the relationship between the relevant shareholders and the board of the target.

3.4 Does the choice affect process?

This is not applicable (see question 3.1).

4 Information

4.1 What information is available to a buyer?

In private transactions, there is no obligation for the target to provide information to a potential buyer. Buyers may rely on publicly available information.

In the case of companies listed in the Stock Exchange Market, the information to be provided is regulated by the CMVM. Listed companies must publish a prospectus in the official Stock Exchange Market bulletin as a condition for admission of their securities to the listing market. This prospectus must include all necessary information for investors to gain reasonable knowledge of the assets, financial position, results and prospects of the issuer, as well as the rights attached to such securities. This information usually relates to corporate, financial, labour, contractual, intellectual and industrial property, and real estate matters.

4.2 Is negotiation confidential and is access restricted?

Negotiations between private parties are usually confidential and it is common for parties to enter into non-disclosure agreements. However, there is no legal obligation in this respect.

In public offerings, individuals who, due to their official post (whether private or public) become aware of the preparation of a public acquisition offer must keep all information regarding the transaction confidential until the offering is announced. Breach of this confidentiality obligation implies liability towards the offeror and the shareholders of the offeree company.

4.3 When is an announcement required and what will become public?

Except in cases regulated by the CMVM, there is no legal obligation to publish announcements.

In the case of mergers, the merging companies must jointly prepare a merger project. The merger project must be registered with the Commercial Registry Office and the proposed merger must be published in at least one of the most widely published newspapers in Mozambique.

In addition, the following documents may be consulted at the headquarters of the relevant company by its shareholders and creditors free of charge:

- (i) the merger project and its schedules;
- (ii) reports and opinions prepared by the supervisory bodies or auditing company; and
- (iii) accounts, management reports and resolutions of Shareholders' General Meetings regarding these accounts during the last three financial years.

4.4 What if the information is wrong or changes?

If the information is wrong or there are any changes to it, the offeror may alter the offer.

In particular, after the publication of the announcement, the offeror may modify the nature and amount of the consideration, provided that two-thirds of the offer period have not yet elapsed.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

In typical M&A transactions, there is no legal general restriction in this respect.

We consider public takeovers, regarding which the CMVM states that as from the publication of the preliminary announcement and up to the calculation of the offer's result, the offeror (as well as related individuals or entities) (i) must not negotiate, outside the Stock Exchange Market, any securities of the same category as those that comprise the offer or the consideration, except if authorised by the CMVM (further to an opinion by the target company), and (ii) must inform the CMVM on a daily basis regarding transactions carried out relating to the securities issued by the target company or the category of the securities comprised in the consideration.

5.2 Can derivatives be bought outside the offer process?

Please see question 5.1, which also applies to derivatives.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Please see question 5.1 regarding the duty to inform the CMVM.

5.4 What are the limitations and consequences?

During the offer process, the offeror may not acquire shares in the target company under penalty of being barred from exercising the rights inherent to those shares.

6 Deal Protection

6.1 Are break fees available?

As most companies in Mozambique have a controlling shareholder or a well-established blocking-control, there are relatively few precedents of disputes involving break fees.

In the absence of legal provisions regarding break fees, disputes are resolved applying the relevant contractual provisions and/or the liability provisions of the MCC.

In addition, in private transactions, parties usually include penalty clauses in promissory SPAs.

6.2 Can the target agree not to shop the company or its assets?

Yes, provided that the target does not undermine the business of the companies involved, as the directors must act strictly in accordance with the interest of the company.

6.3 Can the target agree to issue shares or sell assets?

Yes, provided that (i) the prior approval of the board of directors

and/or the Shareholders' General Meeting is obtained, and (ii) directors act strictly in accordance with the interest of the company they represent.

6.4 What commitments are available to tie up a deal?

It is possible to execute a binding agreement with the shareholder(s), whereby the shareholders commit to (i) attend the Shareholders General Meeting to approve the transaction, and (ii) approve the transaction by voting in favour. This type of agreed favourable vote may be challenged in court by other shareholders if the transaction is considered to harm the company's interests and diminish the value of the minority shares.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Parties are generally free to agree on binding conditions precedent and/or subsequent, such as obtaining approvals and licenses.

7.2 What control does the bidder have over the target during the process?

The control of the bidder over the target will depend on the terms agreed by the parties.

In the case of OPAs, from the moment of reception of the offering until the moment of publishing the result of the offering, the board of directors or the management of the offeree company may not, unless specifically authorised by the Shareholders' General Meeting, perform any acts outside the normal course of business of the company.

7.3 When does control pass to the bidder?

In private acquisitions, the bidder takes control at the time agreed by the parties. In general, control is gained by the bidder after the execution of the final SPA and once the composition of the corporate bodies of the target company is altered, allowing for effective control by the bidder.

7.4 How can the bidder get 100% control?

Mozambican legislation contains squeeze-out mechanisms that apply both to limited liability companies by *quotas* and to limited liability companies by shares. The MCC establishes that the acquisition of a stake in excess of 90% of the share capital of other company enables the squeezing out of the remaining shareholders.

In relation to listed companies, the PSC states that any person that, following the launch of a general takeover bid over a listed company, achieves or exceeds 90% of the voting rights corresponding to the share capital up to the determination of the outcome of the bid and 90% of the voting rights covered by the bid may, in the subsequent three months, acquire the remaining shares for a fair consideration in cash.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Except in the case of public offerings, the board of directors of the target company is not required to disclose negotiations with bidders.

In the case of public offerings, on the date on which the offering is communicated to the board of directors of the target, the board of directors shall send to the Bank of Mozambique and the Stock Exchange Market an informative notice regarding the launch of the public offering acquisition, including its most relevant terms and conditions.

8.2 What can the target do to resist change of control?

In Mozambique, there are no specific legal anti-takeover provisions. However, the target may resist change of control through contractual provisions or other regulations.

The most common anti-takeover measures include: (i) exercise of special rights by the shareholders; (ii) issuance of preferential shares; and (iii) restructuring of assets and liabilities by way of shareholders' agreements or joint ventures.

8.3 Is it a fair fight?

Most transactions involving change of control in Mozambique occur in private negotiations between the acquirer and the controlling shareholders.

There are few examples of (known) hostile takeovers.

Current legislation states that a change of control is a decision of the shareholder and, therefore, the management of the target company may not be able to ban change of control.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

- (i) The ability to plan and structure in advance the different stages of the transaction.
- (ii) The knowledge of the target company, including the ability to establish a constructive negotiation with shareholders and directors of the target.
- (iii) The commercial terms and conditions of the offer.
- (iv) The choice of knowledgeable advisors.
- (v) The acquirer's knowledge of the market, its position in the market and its relations with the relevant public institutions.

9.2 What happens if it fails?

There are no specific rules regarding the failure to complete a transaction. However, the parties may agree on the consequences of non-compliance with contractual or pre-contractual obligations.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

The Mozambican Commercial Code was enacted in 2005 and the CMVM was enacted in 2009. Since then, there have not been notable changes in this sector. Most of the recent M&A transactions in Mozambique have been concluded through private negotiation, outside the Stock Exchange Market.

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Berta joined Vieira de Almeida in 2018. She is a Senior Associate in the M&A and Corporate Finance areas of practice, where she has been actively involved in several transactions namely in the energy sector (including renewable energy). She has been admitted to the Portuguese Bar Association and the Spanish Bar Association.

Tel: +351 21 311 3400 / Fax: +351 21 311 3406

Email: bdm@vda.pt

Lorna joined Guilherme Daniel & Associados in November 2016, as an Associate. Between 2014 and 2015, she was seconded at Vieira de Almeida in the Lisbon Office, where she joined the practice areas of Projects – Infrastructures, Energy & Natural Resources, Telecoms & Media, Tax, Labour and Corporate Governance. Lorna has been admitted to the Mozambique Bar Association and is an Industrial Property Official Agent. She is also a member of the Portuguese Association of Intellectual Property Law.

Tel.: +258 84 048 5979

Email: lag@guilhermedaniel.com



Guilherme Daniel

Guilherme Daniel
Torres Rani, Av. Tenente Osvaldo
Tazama/Marginal, Torre 1, Piso 02
Fracção 05, Maputo
Mozambique

Tel: +258 82 312 48 60
Email: gdd@guilhermedaniel.com
URL: www.vda.pt

Founder of Guilherme Daniel & Associados in 2016. In such capacity, he is actively involved in several matters mainly in Corporate, Energy & Natural Resources (particularly Oil & Gas) and Infrastructure.

Guilherme has provided support to the Ministry of Energy and participated in the drafting of key legal instruments in the downstream petroleum sector regulation since 2006. He works actively with IGEPE on several Corporate and Corporate Governance matters. Guilherme holds several national and international training certificates in the areas of Oil & Gas, Law and Management. He has been admitted to the Mozambique Bar Association and is also an Industrial Property Agent.



Paulo Trindade Costa

Vieira de Almeida
Rua Dom Luis I, 28
1200-151 Lisbon
Portugal

Tel: +351 21 311 3516
Fax: +351 21 311 3406
Email: ptc@vda.pt
URL: www.vda.pt

Paulo is a Partner in the M&A practice area, where he has been involved in several transactions, in Portugal and international markets, namely in M&A, Restructurings and Corporate Finance transactions. He has advised several clients in sectors such as telecommunications, industry, retail, real estate, energy, banking and construction. Paulo was admitted to the Portuguese Bar Association and admitted as a tax specialist to the Portuguese Bar Association. He is a member of the board of directors of the Portuguese-Dutch Chamber of Commerce and member of the board of the Portuguese Section of AIDA – Insurance Law International Association.



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59 Tanner Street, London SE1 3PL, United Kingdom

Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255

Email: info@glgroup.co.uk