

International Comparative Legal Guides



Mergers & Acquisitions 2020

A practical cross-border insight into mergers and acquisitions

14th Edition

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and Counsellors
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Walalangi & Partners (in association with
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Walkers
WBW Weremczuk Bobet & Partners Attorneys
at Law
White & Case LLP
Zhong Lun Law Firm

ICLG.com



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United Kingdom

+44 207 367 0720

info@glgroup.co.uk

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Group Publisher

Rory Smith

Senior Editors

Suzie Levy

Rachel Williams

Sub Editor

Jenna Feasey

Creative Director

Fraser Allan

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Mergers & Acquisitions **2020**

14th Edition

Contributing Editors:

Lorenzo Corte & Scott C. Hopkins

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

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Mozambique

Vieira de Almeida



Guilherme Daniel



Paulo Trindade Costa

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&A transactions in Mozambique are governed by Mozambican civil and commercial law. Pursuant to the principle of contractual freedom established in the Civil Code, the 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 the following:

- 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 general Mozambican civil law rules.
- b) The Mozambican Commercial Companies Code, enacted by Decree-Law no. 2/2005, of 27 December 2005, as amended from time to time ("MCC"), which sets out a thorough regime that applies 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 2009 ("*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 company 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 Insurance Supervisory Institute of Mozambique ("*Instituto de Supervisão de Seguros de Moçambique*" or "ISSM"), the Ministry of Energy and Mineral Resources, the Tax Authority 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 is governed by a different specific 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.

The requirements, formalities and authorisations to complete an M&A transaction usually depend on the type of companies involved.

For instance, mergers involving credit institutions or financial and insurance companies require approval of the Ministry of Finance, the Bank of Mozambique and the Insurance Supervisory Institute of Mozambique, as applicable.

In transactions in the oil & gas and mining sector implying the transmission of rights and obligations, the sale and purchase of shares is also subject to the approval of the Ministry of Energy and Mineral Resources.

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 (e.g. exploration of natural resources, private security companies and construction companies).

By way of example, in the case of private security companies, the majority of the share capital must be held by Mozambican nationals and the members of the Board of Directors must be mostly 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 the following transactions:
 - an entity's intention to reach or exceed, whether directly or indirectly, the following thresholds of the share capital or voting rights of a 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; and
 - an entity's intention to decrease its shareholding below a certain threshold as well as completion of the relevant sale and/or purchase transactions. Below the 10% threshold, the Bank of Mozambique must be 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/selling entity.
- In the insurance sector, the Ministry of Finance and the ISSM must be notified in advance and approve of:
 - 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 given company; and
- an entity's intention to decrease its shareholding below a certain threshold as well as completion of the relevant sale and/or purchase transactions. These rules apply irrespective of the nationality of the acquiring/selling 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) liability arising from failure to comply with the specific procedures or duties applicable to regulated sectors.

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 company, the risks associated with the transaction and potential liabilities. The most common means of acquisition are:

- (i) share deals, whether direct or indirect, which may take different forms and be subject to different requirements and procedures depending on whether the transaction has sector-specific implications;
- (ii) 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
- (iii) 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 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 company, 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 to M&A transactions in Mozambique are the following:

- i) poor quality and difficult access to corporate information provided by the seller, which often hinders the buyer's

ability 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 and lack of digitalisation of publicly available information among public entities, which may aggravate certain processes (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 conditions (including the consideration of the transaction), as per the principle of contractual freedom.

Exceptions to this general principle exist, for instance, 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:

- (i) if consideration is in cash, the financial intermediary must either ensure that the consideration is deposited for the exclusive purposes of the public offering or issue a bank guarantee of payment;
- (ii) if consideration is in issued shares or bonds, the financial intermediary must ensure that the relevant shares or bonds are either deposited and blocked or registered for the exclusive purposes of the public offering; and
- (iii) if consideration is in shares or bonds that are yet to be issued, and:
 - (a) the relevant shares or bonds (albeit provisional) are to be issued in titles, these must be ready for exchange no later than 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, as per the general terms of the law; and
 - (b) the relevant shares or bonds (albeit provisional) are in book-entry form, the financial intermediary 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, holidays and leave days, as well as other imperative labour rules.

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

Employees organised in trade unions usually play a relevant role in M&A transactions that may result in a change of control of the target company, as the law requires that trade union bodies of the target company be informed and consulted in respect of these transactions.

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) commercial certificates of the parties; and
- (iv) copy of the share register book in the case of limited liability companies by shares (*sociedades anónimas*).

Additional documentation may be requested, considering the type of transaction:

- Merger processes require specific mandatory documentation including:
 - a. merger project;
 - b. statutory auditor's reports;
 - c. registration of the merger project and the information required in the MCC before the Commercial Registry Office;
 - d. approval of the merger project by the shareholders of each company;
 - e. public deed of the merger;
 - f. final registration of the merger; and
 - g. publication of the transaction in the Official Gazette.
- Share deals within a public takeover procedure require additional documentation including the preliminary announcement and the prospectus of the envisaged transaction, which must be prepared in accordance with the specific rules provided for in the CMVM.
- Asset deals may require different types of documentation considering 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 relevant 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.

In particular, in the case of public offerings, information cannot be disclosed prior to it being launched.

2.13 What are the key costs?

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

2.14 What consents are needed?

If the target company is a limited liability company by quotas ("*sociedade 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 this type of companies to grant pre-emption rights to other shareholders in their articles of association, in relation to transfers 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 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 in the offer the date on which the payment will be made.

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?

Generally, no rules exist regarding the approach to a target company.

However, in the case of public acquisition offers, these are carried out by an intermediary and management is always informed of the envisaged 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 company to provide information to a potential buyer. Buyers may rely on publicly available information, such as the commercial certificate of the company and the by-laws of the target company.

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 securities. This information usually relates to corporate, financial, labour, contractual, real estate, and intellectual and industrial property 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 the case of public offerings, individuals, who become aware of the preparation of a public acquisition offer due to them holding private or public office, 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 envisaged merger must be published in at least one of the most widely published newspapers in Mozambique.

In addition, the following documents shall be available for consultation at the headquarters of the relevant company by shareholders and creditors free of charge:

- (i) merger project, including appendixes;
- (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 in any way amended, the offeror may alter the offer.

After the publication of the announcement, the offeror may modify the nature and amount of the consideration, provided that a period not greater than two-thirds of the offer period has elapsed.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

In typical M&A transactions, there are no legal general restrictions in this respect.

In public takeovers regarding which the CMVM states that, from the date of publication of the preliminary announcement until the calculation of the result of the offer, the offeror (as well as related individuals or entities) must:

- (i) 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 (following an opinion issued by the target company); and
- (ii) inform the CMVM, on a daily basis, of the 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?

There are no legal general restrictions in this respect, although derivatives can be bought through OTC (over the counter) market.

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 by applying the relevant contractual provisions and/or the liability provisions of the MCC.

In addition, in private transactions, the 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 this does not undermine the business of the companies involved and that directors strictly act in accordance with the interest of the companies involved.

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

Yes, provided that:

- (i) 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) attending the Shareholders' General Meeting to approve the transaction; and
- (ii) approving the transaction by voting favourably. The obligation to vote favourably 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?

The 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 company 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 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 to limited liability companies by quotas and to limited liability companies by shares:

- the MCC establishes that the acquisition of a stake greater than 90% of the share capital of a company triggers squeezing out of the remaining shareholders; and
- in the case of listed companies, the MCC states that any person that, following the launch of a general takeover bid over a listed company, acquires a stake granting at least 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 acquire the remaining shares for a fair consideration in cash in the subsequent three months.

8 Target Defences

8.1 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.

8.2 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 ban a 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 and conduction of a structured due diligence; and
- (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 resort to the general rules of the Civil Code and 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.

Decree-Law no. 1/2018, of 4 May 2018, partially amended the MCC to adapt it to the economic reality of Mozambique, increase flexibility and simplify procedures in the incorporation of companies.

The main amendments to the MCC provided by this Decree-Law include:

- shareholders' signatures included in the deed of incorporation may be notarised without the shareholders having to sign in person in front of a notary (in other words, shareholders' signatures may be notarised by resemblance);
- special rights of shareholders in a company may be created in the by-laws and by the General Meeting;
- regulations applicable to minority shareholders are clarified, as well as the regulations applicable to abuse of this position;
- the competences of the General Meeting are included in the MCC, as well as representatives of the shareholders in the General Meeting;
- new duties of directors of companies are created; and
- the possibility of any interested party to obtain a copy of balance sheets and annual accounts of the company is included in the MCC.

In June 2019, an OPA of 686,887,315 shares representing 2.5% of the share capital of HCB Power Plant (*Hidroeléctrica de Cahora Bassa*) was launched. HCB Power Plant is a limited liability company by shares incorporated in 1975 with headquarters in Songo, Tete Province, and one of the largest national companies in the energy sector. This transaction was carried out in the Mozambique Stock Exchange under the supervision of the capital market regulator, the Bank of Mozambique and the relevant intermediary financial institutions (i.e. BCI and BIG). This transaction was exclusively addressed to Mozambican nationals, who could purchase shares of HCB Power Plant. This transaction is the first of an envisaged total sale of 7.5% of the share capital of HCB Power Plant.

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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 / Email: bdm@vda.pt

Lorna joined Guilherme Daniel & Associados in 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 21 498 770/2 / Email: lag@guilhermedaniel.com



Guilherme Daniel is Founder of Guilherme Daniel & Associados. In such capacity, he is actively involved in several matters, mainly 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.

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



Paulo Trindade Costa 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.

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

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