

# International Comparative Legal Guides



## Mergers & Acquisitions 2021

A practical cross-border insight into mergers and acquisitions

**15<sup>th</sup> Edition**

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# Mozambique



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## 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 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 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 2009 (“*Código do Mercado dos Valores Mobiliários*” or “CMVM”), which regulates the main aspects of public takeover bids, as well as the requirements applicable to the transfer of company shares.

The most relevant authorities involved in M&A processes include the Mozambican Stock Exchange (“*Bolsa de Valores*”), the Bank of Mozambique, the Ministry of Economy and Finance, the Insurance Supervisory Institute of Mozambique (“*Instituto de Supervisão de Seguros de Moçambique*” or “ISSM”), the Central Bank of Mozambique (“*Banco de Moçambique*” or “BoM”), the Ministry of Energy and Mineral Resources, the Tax Authority and several Registry and Notary entities.

### 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 set of rules, especially as regards the relationship between shareholders and the company, the relationship among shareholders, the type of organisation and the duties of its corporate bodies.

In addition to the specific requirements applicable to each type of company, the requirements, formalities and authorisations

to complete an M&A transaction also depend on the sector in which a company operates.

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

As for transactions in the oil & gas (including downstream) and mining sectors that imply 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 Mozambican nationals.

It should also be noted that M&A transactions involving foreigners are generally likely to qualify as foreign exchange transactions, subject to exchange control.

### 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 previously notified 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 granting it significant management influence in a given company; and
  - an entity’s intention to decrease its shareholding below a certain threshold, as well as the completion of the relevant sale and/or purchase transactions. Below the 10% threshold, the Bank of Mozambique must be notified within 15 days of the 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 Economy and Finance and the ISSM must be previously notified of and approve:
  - an entity's intention to reach or exceed, whether directly or indirectly, the following thresholds of the issuer's share capital or voting rights: 10%; 20%; 33%; or 50%;
  - an entity's intention to acquire a stake granting it significant management influence in a given company; and
  - an entity's intention to decrease its shareholding below a certain threshold, as well as the completion of the relevant sale and/or purchase transactions. These rules apply irrespective of the nationality of the acquiring/selling entity.
- In the oil & gas, mining and energy sectors, any transactions that may result in the transfer of any rights and obligations under a concession agreement are subject to prior approval by the Ministry of Energy and Mineral Resources.

### 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 a going 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 require the assistance of legal, financial and tax advisers. Depending on the nature of the transaction, specialised advisers may be required to assess technical or operational matters.

### 2.3 How long does it take?

Simple transactions may take as little 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) difficult access to and poor quality of the 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) complex bureaucratic process to access information from public authorities, which involves 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 make certain processes more burdensome (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 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 offered. 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 consideration in 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 pursuant to 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 transactions, the offeror is bound to submit a proposal with identical terms and conditions to all potential buyers. Furthermore, in Stock Exchange transactions the offer must also 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 the 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 remuneration, the limits of working hours, holidays or 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, seeing as the law requires that the target company's trade union bodies be informed and consulted in respect of such 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, depending on 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 Legal Entities 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 a 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 depending on 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 applicable to 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 the case of public offerings, information cannot be disclosed prior to the offer 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 company's consent (to be granted by the Shareholders' General Meeting). It is common for these types of companies to grant, in their articles of association, pre-emption rights to other shareholders 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 applicable to the transfer of shares is that shares are freely transferable. However, the relevant company's articles of association and shareholders' agreements may, without excluding the 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 may 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 the terms and timings of the 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 taking into account 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 OPA, 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 company's commercial certificate and its articles of association.

In the case of companies listed in the Mozambican Stock Exchange, the information to be provided is regulated by the CMVM. Listed companies must publish a prospectus in the official bulletin of the Stock Exchange as a condition for the admission of their securities to the listing market. This prospectus must include all information necessary for investors to gain reasonable knowledge of the assets, financial position, results and prospects of the issuer, as well as the rights attached to the 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 possible launch of an OPA, due to them holding private or public office, must keep all information regarding the transaction confidential until the offering is announced. Breach of this obligation of confidentiality 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 Legal Entities Registry Office and an announcement of 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 made available for consultation by shareholders and creditors, free of charge, at the headquarters of the relevant company:

- (i) merger project, including any appendices;
- (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 issued 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 no longer 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 general legal restrictions in this respect.

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

- (i) not negotiate, outside the Stock Exchange, any securities of the same category as those that make up 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 that make up the consideration.

### 5.2 Can derivatives be bought outside the offer process?

There are no general legal restrictions in this respect, although derivatives can be bought through the 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 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 act in strict accordance with the interests of these same companies.

### 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 in strict accordance with the interests 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 shareholder(s) commit to:

- (i) attending the Shareholders' General Meeting to approve the transaction; and
- (ii) approving the transaction by voting in favour of it. This obligation to vote in favour 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 the obtaining of approvals and licences.

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

The bidder's control over the target company will depend on the terms agreed by the parties.

In the case of OPAs, from the moment of receipt of the offering until the publication of its result, 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 company's normal course of business.

### 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 assumed by the bidder after the execution of the SPA and once the composition of the target company's corporate bodies has been altered, allowing for effective control by the bidder.

### 7.4 How can the bidder get 100% control?

The bidder will gain 100% control in cases where, after the bid, it is entitled to exercise (and does exercise) a squeeze-out right, thus purchasing the shares of minority shareholders.

## 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 buyer and the controlling shareholders.

There are few examples of (known) hostile takeovers.

Current legislation states that a change of control is the shareholders' decision and, therefore, the management of the target company may not forbid a change of control.

## 9 Other Useful Facts

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

The major influences on the success of an acquisition include:

- (i) the ability to plan and structure in advance the different stages of the transaction;
- (ii) proper knowledge of the target company, including the ability to establish a constructive negotiation with its shareholders and directors;
- (iii) the commercial terms and conditions of the offer;
- (iv) the selection of knowledgeable advisers and performance of a structured due diligence; and
- (v) the buyer'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 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.

There have been no such changes or developments in 2020.

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

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

- the possibility of shareholders' signatures included in the deed of incorporation being notarised without the shareholders being obliged to sign in the Notary's presence (in other words, shareholders' signatures may be notarised by resemblance);
- the possibility of creating special rights of shareholders in the company's articles of association and by the Shareholders' General Meeting;
- clarification of the regulations applicable to minority shareholders, as well as those applicable to any abuse of this position;
- the inclusion in the MCC of the competences of the Shareholders' General Meeting, as well as those of shareholder representatives in the General Meeting;
- the establishment of new duties for directors of companies; and
- the possibility of any interested party obtaining a copy of the company's balance sheets and annual accounts.

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

## Acknowledgment

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Kenny Laisse joined GDA Advogados in 2018, as an Associate.



**Guilherme Daniel** is Founder of Guilherme Daniel Advogados. 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.

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