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Editor's Letter

Dear Reader:

In this number you can read: "Challenges for Biodiversity Conservation and Protection in Mozambique: the new Law of Conservation", "Lack of minimum number of quotaholders in limited liability quota companies" and "Additional Contributions as a Capitalization Mechanism for Companies".

We wish you a Happy reading!

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Resolution No. 63/2009 of 2 November, approved the Conservation Policy and Implementation Strategy (the "Policy"). As the Policy indicates, along with opportunities for economic development, new threats to biodiversity have emerged. The policy notes a number of critical factors which need to be addressed in order to achieve the required levels of biodiversity conservation and protection in the country. These include stopping uncontrolled exploitation of biodiversity outside of conservation areas ("CAs"); managing the expansion of large scale projects and infrastructure that impact on protected areas; the dispersed nature of regulations and institutions responsible for CAs; lack of sectorial coordination among the various bodies engaging in natural resource conservation; inadequate classification of, and funding mechanisms for, CAs; the need to effectively protect biodiversity while ensuring articulation between different stakeholders including local communities.

Two important steps have been taken in implementing Policy recommendations, namely: (i) creation of the National Administration for Conservation Areas ("ANAC"), through Decree No. 11/2011, of 25 May. ANAC is a body which falls under the Ministry of Tourism ("MITUR"), and is responsible for, among other things, coordinating the activities of the various bodies within CAs, as well as managing national parks and reserves, official hunting areas, game farms and other CAs created by law, and ensuring conservation of biodiversity and associated assets which fall within the national system of conservation areas; and (ii) approval of Law 16/2014, of 20 June, the Law Concerning the Establishment of the Basic Principles and Guidelines on the Protection, Conservation, Restoration and Sustainable Use of Biological Diversity in Conservation Areas and the Integrated Management of the Environment for Sustainable Development (the "Conservation Law"), which has been in force since 20th June this year. This Law aims to reclassify the CAs and create a basis for the protection and conservation of biodiversity as well as for its sustainable use. The Conservation Law partially repeals some provisions of the Forestry and Wildlife Law and Environment Law, and (tacitly) revokes certain other legal provisions which are inconsistent with it.

This article aims to support the dissemination of the Conservation Law and draw attention to its objectives.

With the approval of the Conservation Law, certain concepts related to CAs in earlier legislation are given a new classification and categorization, which should imply harmonized usage and adjustment of legislation which is inconsistent with the new Law.

Thus "protection zones" as defined as "*demarcated areas of land which are representative of the national natural heritage and are designated for conservation of biological diversity and fragile ecosystems or animal or plant species*". These, in turn, are divided into total conservation areas and sustainable use conservation areas.

Total conservation areas are therefore "*areas within the public domain, designed to preserve ecosystems and species without the intervention of resource extraction, and permitting only indirect use of natural resources, within the exceptions provided for in this Law*". And sustainable use conservation areas are "*areas within the public and private domains, intended for conservation, subject to integrated management with permission levels for the extraction of resources which respect sustainable limits according to management plans*".

Total conservation areas include integrated nature reserves, national parks and cultural and natural monuments, and sustainable use conservation areas include special reserves, environmental protection areas, official hunting areas, community conservation areas, sanctuaries, game farms and municipal ecological parks.

In addition to CAs mentioned above, the Conservation Law also refers to the existence of transfrontier CAs, defining how these are created, namely by agreement or treaty signed and ratified by the relevant institutions of States parties to the agreement or treaty.

The Conservation Law determines that MITUR is responsible for policy implementation, including participative management with the participation of the private sector and local communities. This Law also states that mechanisms are to be created to compensate for conservation efforts. Note that the Policy highlights the need for partnerships with the private sector as a way to not only ensure more participatory management, but also as way to ensure that management and operation of CAs can become financially sustainable. Nevertheless, we believe that although the Conservation Law has upheld this principle, it has not gone far enough in defining ways to attract investors to CAs, a challenge that must be addressed by ANAC, and which will most certainly require complementary supporting regulation in some matters.

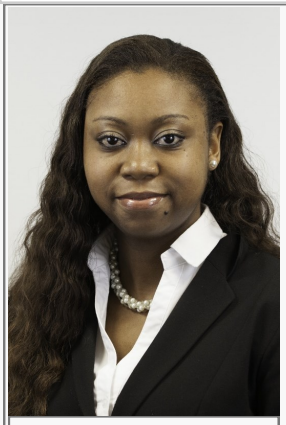
One widely discussed issue in relation to CAs in the country is how to deal with the people who live within them. In response the Law has adopted the principle of retaining the population, as long as this is not inconsistent with, or does not jeopardize the objectives of, the area. Where the presence of a population is incompatible with the legal status of the CA or is an impediment to its management, the State must resettle the population, which implies the payment of fair compensation. The Law does not provide the criteria that will be used for that purpose. However, the Spatial Planning Law, No. 19/2007, of 18 July, and its regulation, provide rules to be followed in cases of expropriation due to necessity, utility or public interest.

In order that maintaining populations within them does not cause risk to the CAs in question, the Law encourages participative management involving members of local communities, which should be encouraged to follow good practices developed, and oriented to change incorrect practices, or ones which create risks for the CA. In this respect, it is important to remember that other policies and strategies are also relevant, such as the guidelines for the management of human-animal conflict.

The Conservation Law includes a number of other interesting provisions which cannot be detailed in full in this article. However, it should be noted that for the Law to be effectively implemented various actions are required of the relevant public authorities, including: adoption of additional legislation, such as the creation of the Management Boards for CAs; establishing the mechanisms for compensating conservation efforts by public and private entities that are using natural resources in the CAs and buffer zones; defining responsibilities and counterparts for state bodies, local government and community authorities in relation to sustainable use conservation areas; reassessment of protected species; the definition of bodies responsible for receiving information from citizen whistleblowers reporting environmental damage; assessment of the potential of each CA to enable definition of actions appropriate for each; assessment of infrastructure to attract investors and tourists; harmonization of fees; improved harmonization of land and marine CAs; and an improved strategy for transfrontier CAs. It will also be necessary to train qualified staff in the field of biodiversity conservation and develop studies and knowledge around biodiversity, in order to assess how and what to preserve and conserve.

It is also important to note that under the Conservation Law, the Council of Ministers must approve regulation of the Law within 180 days from its publication, i.e. by December this year.

From the foregoing we note that important steps have been taken to develop concrete action for the protection and conservation of biodiversity in this country. Nevertheless, we also note that a lot of work and investment is required in this area so that the instruments created can be implemented effectively and so that it becomes possible to see the practical effects of these efforts. It would be a great loss to the public interest if such efforts were not followed through, so we hope that this article has contributed in some way to drawing attention to the need for to follow up with the measures required to ensure the protection and conservation of biodiversity in our country.



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Entrepreneurs generally use the format of commercial companies to carry out their economic activities, especially when these activities involve investments of various types, and require a structure that allows clear organization and expatriation of the investments made.

The Mozambican Commercial Code approved by Decree-Law 2/2005, of 27 December, with amendments made through Decree-Law 2/2009 of 24 April (the "CCom"), establishes five types of commercial companies, namely: general partnerships, capital and industrial companies, limited partnerships, limited liability quota companies, and limited liability share companies.

This article discusses the requirements around numbers of quotaholders in a company, with particular reference to limited liability quota companies ("SPQ"), and practical issues that have arisen due to what appears to be a gap in the CCom.

Article 91 of the CCom provides that "*the minimum number of quotaholders in a commercial company is two, unless the law requires a higher number or allows that a company be incorporated by a single quotaholder.*" The law allows a company to be incorporated by a single quotaholders in the case of a sole proprietorship (*unipessoal*) SPQ, a type of company which, according to Article 328 of the CCom, can only be incorporated by a natural person (Article 332 of the CCom also allows for the existence of a single shareholder in a limited liability share company, specifically where the State, either directly, or through public or state-owned companies, or other similar bodies participates as a shareholder).

Most companies are established for an indefinite duration, and during its lifetime an SPQ may undergo share capital restructuring, for example, resulting in the transfer of quotas between the quotaholders themselves or between them and third parties. Under this restructuring, the SPQ may also undergo amortization of quotas, or dilution of shareholdings, among other situations which may arise in accordance with the legal and / or statutory provisions of the company concerned. It may also be the case that, in the restructuring process, the SPQ ends up with only one quotaholder and that said quotaholder is a legal person. As mentioned above, this is, in principle, contrary to the CCom, because of the collective nature of the sole quotaholder, and the minimum number of quotaholders required by CCom.

However, Article 328, paragraph 2 of the CCom provides that the provisions of Chapter V, which provide for a sole proprietorship SPQ, apply to SPQs which later become sole proprietorship where "*ninety days have elapsed without the company having been re-constituted with more than one quotaholder*".

This provision could be interpreted as allowing an SPQ to have a single quotaholder, which is a legal person, for a period of ninety days and, after that period, unless the minimum number of quotaholders is reestablished, allowing the SPQ to become a sole proprietorship.

This interpretation raises doubts because the CCom provides that sole proprietorship SPQs can only be incorporated by natural persons.

When this situation arises, the company concerned is advised to add another quotaholder, to ensure that it has the minimum legal number required. If it does not do this it finds itself in an irregular situation. The relevant authorities understand such irregularity as leading to the dissolution of the company. However, how this would happen in practice and whether or not it would occur automatically is unclear, since the CCom establishes specific procedures to be followed as regards the dissolution of a commercial company. Moreover, we note that in its Article 229, the CCom does not list the lack of a minimum number of shareholders, as one of the causes of dissolution of a company and therefore this is a gap in the law.

It is worth noting that Article 120 of the previous Commercial Code, approved by the Charter Act of June 28, 1888 and applied in Mozambique by Decree 20, of February, 1894, provided that in the case of limited liability share companies, where these failed to have the minimum of 10 shareholders for more than 6 months, the company would be dissolved. The current CCom does not contain a similar provision.

A comparative study of Portuguese law finds that Article 142, paragraph 1 of the Commercial Companies Code approved by Decree-Law No. 262/86 of 2 September, as amended by Decree-Law 76-A / 29 March 2006, states: "*Administrative dissolution of a company can be applied for on the grounds provided by law or by contract when: a) the number of shareholders is less than the minimum required by law for a period exceeding one year, unless one of the shareholders is a public legal person or equivalent*".

The administrative dissolution process in Portuguese law, as mentioned above, is regulated by the proper regulation and occurs subject to submission of an application by the relevant party at the relevant registration service. So in this case while there is clearly a severe penalty, it should be noted that dissolution is not automatic but is instead a process in which the company is given a deadline by which to rectify its position.

This would be an example to follow in our legislation to remedy the gap discussed above and avoid interpretations being made without legal basis, as well as to ensure greater legal certainty and contribute to the improved functioning and organization of SPQs.

Based on the foregoing, we recommend that companies take into account the legally required minimum number of shareholders for each type of company and ensure that, where a subsequent amendment to the company structure affects this minimum, the situation is rectified as soon as possible to avoid the application of administrative measures which may have negative impacts on the company and its investments.

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Shareholders in the various types of commercial companies regulated by the Commercial Code can contribute to the constitution and maintenance of capital, at the time of, and subsequent to, the company's formation.

Over and above the constitution of the initial social capital, commercial companies need capitalization, both because of expansion and growth, and because of risk, such as for example, the possibility of losing more than half of their share capital value and thus violating Article 119 of the Commercial Code (which refers to one possible cause of dissolution of a company being that its net worth falls below less than half of its social capital value).

Capitalization is the appropriate method for shareholders to 'inject' resources that the company may need subsequent to its formation. There are several ways to capitalize and build up the equity of a company, including, among others, loans, supplementary payments, additional contributions, and issuance of bonds. The mechanism selected depends on each individual case, the current situation of the company in question, and its financial history.

In this article we will discuss additional contributions, which are covered in Article 310 of the Commercial Code

Additional contributions, which are specifically allowed for Limited Liability Quota Companies ("*Limitada Companies*"), are a form of contribution to the maintenance of capital. They are ancillary to that contributed to the social capital, the constitution of the social capital being the principal obligation of the shareholders.

It is our understanding that the legal requirement that additional contributions are only for Limitada Companies, does not prevent them from being used by other types of companies. Thus, other types of companies may include additional contributions in their articles of association or make a shareholders resolution to use this mechanism.

The requirement to make additional contributions arises directly from the articles of association, i.e. there is no obligation to make additional contributions unless the articles of association expressly require it.

The law further provides that the articles of association must establish the essential elements of additional contributions and whether the contributions are interest-bearing or not. Although the law is unclear about the essential elements to be established, doctrine indicates that these elements comprise: the legal fact that gives rise to the obligation, the subjects (active and passive) and the object. These three elements must be described in such a way that the obligations of the shareholders and the rights of company are clearly established in the articles of association.

The articles of association must also specify whether additional contributions correspond to a typical contract, in which case the relevant regulation for that type of contract applies (paragraph 1 of Article 310).

Additional contributions may be pecuniary or non-pecuniary. If they are non-pecuniary, the rights of the company are nontransferable (paragraph 2 of Article 310).

Thus, additional contributions may comprise (i) money, or (ii) provision of a specific benefit to the company (e.g. a vehicle or an office).

The failure to make additional contributions has no established legal sanction. The law states that unless otherwise provided, such failure shall not affect the status of the shareholder in the company (paragraph 2 of Article 310). Based on our analysis of that article, we understand that if the shareholders so agree, nothing shall prevent the articles of association indicating that such failure constitutes grounds for exclusion or amortization of shares.

When dealing with interest-bearing additional contributions, the repayment or refund is not subject to the principle of inviolability of capital and can be carried out regardless of whether or not profits were generated (paragraph 3 of Article 310 of the Commercial Code).

Additional contributions lapse with the dissolution of the company. From an accounting perspective only non-interest-bearing additional contribution (i.e. those which are not refundable or on which interest or other forms of remuneration are not payable) can be integrated into the company's funds.

It is also worth highlighting some differences between additional contributions and supplementary payments, and loans. Therefore, we will briefly discuss the main characteristics of supplementary payments and loans.

Supplementary payments are provided for in Article 311 and subsequent articles in the Commercial Code. Supplementary payments can be demanded if the articles of association allow for it, and the corresponding maximum overall amount thereof must be established in said articles. These provisions (i) must always be paid in money, (ii) do not bear interest, (iii) are not part of the social capital of the company and do not confer the right to participate in profits, and (iv) must be provided in proportion to the percentage held by shareholders in the share capital.

Unlike additional contributions, supplementary payments can only be returned to shareholders as long as the net worth of the company does not become less than the sum of the social capital and reserves, which also constitutes a guarantee to creditors (paragraph 1 of Article 313).

Additional contributions should also not be confused with shareholder loans, since loans constitute part of the liabilities of the company, and are not part of its own funds. Note that loans are repaid depending on what is agreed in the articles of association or loan agreement.

Conclusion:

From the foregoing we can see that additional contributions are one possible way of capitalizing a company, and the legal regime which governs them tends to be more flexible than that for supplementary payments or loans. Additional contributions are useful in resolving a company's solvency issues or when the company is undergoing a period of expansion or risk.

Because of their flexibility, additional contributions are increasingly preferred as a mechanism for capitalizing companies.