NEWS
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SOCIEDADE DE ADVOGADOS

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LEGISLATIVE AUTHORISATION TO REVISE THE MOZAMBICAN COMMERCIAL CODE

Law no. 1/2021 of 15 April has been enacted and published to authorise the Government to revise the Commercial Code. This new Law was approved by Decree-Law no. 2/2005 of 27 December, amended by Decree-Law no. 2/2019 of 24 April and by Decree-Law no. 1/2018 of 4 May.

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In response to the need for simplification, facilitation and a reduction of bureaucracy, the Law also provides for the introduction of the use of information and communication technologies for company incorporation, registration and publication, dissolution and liquidation These technologies are also to be used in the communication between quotaholders or shareholders, between each other or with third parties, and in business relations in general.

Regardless of the purpose intended to be achieved, whether revision or reform, given that the alterations proposed, if they are put into effect, will not simply mean a revision of the Commercial Code, but a real reform where matters such as structure, systematisation, language, and concepts, among others, will be affected. As there are several important issues are subject to revision, we will only focus on some of them in this Newsletter.

I. GENERAL POINTS

Simplification of the forms of incorporation of companies

Under Article 2(a), the objective of this amendment simplify and reduce bureaucracy in the procedures to incorporate, register, organise, operate, transform and wind-up commercial companies. The idea to simplify the procedures to incorporate, register, publish and license commercial companies, through the one-stop-shop concept, is to be applauded.

This intention of the Government began with the creation of the Balcão de Atendimento Único («BAÚ»), a one-stop-shop) by Decree 14/20007 of 30 May. However, from a practical point of view, the BAÚ, at least the one in Maputo City, has not been able to meet the demand for licensing work, with the result that many users still prefer to deal with the Legal Entities Registry Office. Besides that, this process to centralise the incorporation, registration, publication and licensing of commercial companies has experienced more setbacks than advances. For example, until 2018, the registration and publication could both be done at the Legal Entities Registry Office, because there was a press representative at that institution who was responsible for receiving the application, issuing the quotation and receiving the payment for the publication. Nowadays, the process starts at the notary, followed by the registration stage at Legal Entities Registry Office, and then the publication in the press and licensing at the BAÚ. All these processes take time and are autonomous. Therefore, more than just providing for the one-stop-shop concept in the law, it is necessary to create the material, human and financial conditions needed and that should accompany the legislative development. If this is the government's real intention, the BAÚ should be given a new building that can house all these services. It should also be equipped with the other means that make it possible to carry out these tasks.

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- **Elimination of compulsory digital signature authentication**

Provided for in article 3(d)(iv), the issue of eliminating the obligation of signature authentication in the use of digital signature falls within the scope of simplification and facilitation of procedures. However, it is important that electronic security issues be ensured. Time and again, digital signatures as defined by the law on electronic transactions and digitalised signatures have been confused. The latter, which are more commonly used and confused with the digital signature, do not provide security to the bearer of the signature. Therefore, before talking about the elimination of the obligation to authenticate digital signatures, or before moving towards its implementation, it would be important to make sure that users know which type of signature they are referring to, and thus guarantee the issue of data protection security in its use.

- **Legalisation of foreign public documents**

Article 3(d)(iv) provides for the elimination of the requirement to legalise foreign public documents. This measure will only be effective in commercial law, because it will also be applied in other legislation, such as in procedural law, where the Code of Civil Procedure continues to require the legalisation of documents before they can be exhibited in court cases. (see article 540 CPC).

- **Improvement of the types of companies and introduction of new types of companies and corporate bodies**

The current Commercial Code covers company types such as general and limited partnerships which are no longer adequate for the market, besides the fact they are hardly ever chosen by partners when it comes to adopting a company type. With the growing evolution of the market, people have opted for corporate types that confer greater security on their personal assets and are flexible. These include private limited companies and public limited companies, where personal assets are not mixed up with the company's assets.

This does not occur in general partnerships, where the main characteristic is the subsidiarity of liability for debts with the company and joint and several liability between the partners. In other words, in a general partnership, all partners are jointly and severally liable for the company's debts, so the partners' assets may be used to pay the company's debts. This fact represents great insecurity regarding the personal assets of the partners.

Additionally, general partnerships are inflexible because, only with the consent of all the other partners may a partner exercise, on his own account or on behalf of a third party, an activity covered by the corporate object, be a partner with unlimited liability in another company, or be a partner with a participation of more than twenty per cent of the capital or profits of a company whose object coincides, in whole or in part, with the former. This last part demonstrates the extent to which this type of company is out of line with current practice, where a person may hold shares in different companies, of any type, or not, with or without the same corporate object, without this being illegal.

Limited partnership companies and capital and industry companies are also out of step with the current situation. Therefore, their removal from the Commercial Code is justified.

The establishment of groups of companies is also important, particularly because, in the Mozambican market, there are already many groups of companies registered under the simple form of a company limited by shares or a company limited by quotas, either independently or in the form of branches. This regulation is important for the purposes of liability in the event of debts owed by one of the companies in the group or by the parent company, in the event of insolvency of one of the companies in the group or of the parent company, to determine liability for debts, or continuation or dissolution of the remaining companies, etc., and especially in the event of competition or concentration.

Finally, the institutionalisation of other corporate bodies, such as the company secretary and the audit committee, is important, especially for large companies, in particular, limited liability companies, where the figure of the secretary is crucial to scheduling, holding and legalising the general meetings. (see article 2(b), article 3(d)(ii) and (vii).

- **Standardisation of the classification of micro, small, medium and large companies**

Provided for in Article 3(c)(ii), the standardisation of the classification of micro, small, medium and large companies was a very controversial issue even before this proposal for revision. This is because existing laws have different classifications of micro, small, medium and large companies. Some prefer the criterion of the number of employees and others the criterion of the turnover, etc.

II. MATTERS THAT SHOULD NOT BE COVERED BY THE COMMERCIAL CODE

1. The matter of revision of charges should not be covered by the Commercial Code because this matter is connected to that of registry and notary public services. Even if the intention is not to directly regulate it in the text of the Commercial Code, but to add it as an annex, it does not fall under the scope of Commercial Code matters.

2. The licensing of micro-entrepreneurs is also not a matter for the Commercial Code and it should be regulated under the commercial licensing legislation.

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3. The adoption of international rules on sale and purchase is a matter of international trade law. The only task of the Mozambican state is to accede to the United Nations Convention for the International Sale of Goods.

4. The regulation of actions brought by quotaholders or shareholders is another matter that should not be covered by this code, because it is regulated by procedural law. The legislature may, if it wishes, institutionalise substantive rules concerning actions to be brought by shareholders. Any alteration to or introduction of procedural rules on the exercise of the rights of quotaholders or shareholders must be dealt with in procedural law. Since some procedural rules on the exercise of partners' rights already exist, it is our opinion that the revision of the Commercial Code on this matter should be accompanied by a revision or amendment of section XVII of the Civil Code, which deals with the exercise of shareholders' rights.

5. The inclusion of unfair competition in the revision of the Commercial Code is debatable. Some believe it should be governed by competition law, others by industrial law, and the legislature by commercial law. In fact, even before any discussion that may be raised on this matter of law, its framework is debatable. It is not acceptable to take the position that unfair competition should be dealt with under competition law, because competition law is concerned with regulating and sanctioning practices that go against free initiative and free competition, that is, violations of the economic order and conduct that goes against market structures. Unfair competition involves matters that concern business activity carried on directly by competitors, with regard to customers and industrial property, and it finds support in private law and even in criminal law. Therefore, its framing in the Commercial Code would not be unjustifiable.

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