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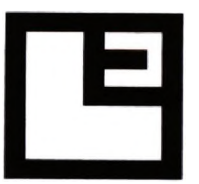

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The single shareholder company of the Mozambican Commercial Law*

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Resumo: A República de Moçambique aprovou, em 2005, um Código Comercial, que traduziu inovações de monta relativamente à situação anterior do ordenamento jurídico-privado. Entre as inovações conta-se a consagração de um subtipo societário com unipessoalidade originária: a sociedade unipessoal por quotas.
O direito moçambicano seguia assim um caminho previamente trilhado pela Dinamarca (1973), Alemanha (1980), França (1985), Holanda (1986) e Portugal (1996), entre outros, e que, nos direitos lusófonos, acabaria também por obter consagração em Cabo Verde (1999) e em Angola (2102).
A técnica de regulação da sociedade unipessoal dos direitos lusófonos é de subordinação sistemática ao conjunto normativo dos correspondentes tipos formados com pluralidade de sócios, o que suscita questões particulares de harmonização e adaptação dos regimes jurídicos em causa, que se procuram dilucidar no presente artigo.

Palavras-chave: Sociedade; Comercial; Unipessoalidade; Quotas; Regime

Abstract: The Republic of Mozambique adopted in 2005 a new Commercial Code, which brought significant innovations to the previous situation of the private law. Among the innovations is a company subtype with original single shareholdership: the single shareholder limited private company. The Mozambican law followed, therefore, a path previously trodden by Denmark (1973), Germany (1980), France (1985), the Netherlands (1986) and Portugal (1996), among others, and that in Lusophone systems was also established in Cape Verde (1999) and Angola (2102). The regulatory technique of the single shareholdership companies of the Lusophone rights is one of systematic subordination to the normative regulatory group of the corresponding company type with several shareholders, which raises special questions of harmonization and adaptation of both the legal regimes, which this article seek to solve.

Keywords: Commercial; Company; Limited; Single; Shareholdership

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1. INTRODUCTION

The Republic of Mozambique adopted in 2005 a new Commercial Code (hereinafter ComC)[1], which brought significant innovations to the previous situation of the private law. The Commercial Code of Mozambique celebrates therefore its 10th anniversary in 2015.

Essentially, the Mozambican Commercial Law system was, before the adoption of the ComC, the one that was received, after independence, in 1975, from Portugal, having been kept in force the Commercial Code of 1888 – which regulated, among other subjects, the company types collected in the French *Code de commerce* (1807) — as well as the Private Limited Company Act (1901).[2] It must also be noticed that Mozambique adopted the Portuguese Civil Code of 1966 (hereinafter CC), being its relevance to the scope of Commercial Law the proper nature of a common – or not particular – law branch, especially in the area of contract law.

Unlike what happened with the Commercial Code of 1888, the definition of commercial matters appears centered in the ComC on the concepts of *commercial entrepreneur* and *commercial act*. Considering the scope of Commercial Law, Article 1 of ComC states that *commercial law regulates the business of commercial entrepreneurs, as well as the acts which are considered commercial*. The status of *commercial entrepreneur* is defined in Article 3: commercial entrepreneurs are (a) *persons, natural or legal, that in self-behalf, by itself or through agents, own a commercial undertaking,* and (b) *commercial companies*.

Formally, the *exercise* of a commercial undertaking is only relevant for the purposes of Article 2, for natural persons and legal persons that are not companies. With regard to commercial companies, their legal status as *commercial undertakings* seems to result immediately upon its *qua tale* settlement.

The concept of commercial undertaking – on which depends, in part, the concept of commercial undertaking other than a commercial company – results from Article 3 of the ComC.

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1 - The code was adopted by the Decree-Law No 2/2005, from the 27th December.

2 - Original Portuguese name: *Lei das sociedades por quotas*.

2. THE COMMERCIAL COMPANY TYPES

The common Commercial Law of Mozambique comprehends now five company types (Article 82, Paragraph 1, ComC): (i) the Collective Company;[3] (ii) the Capital and Labor Company; (iii) the Mixed Limited and Unlimited Company;[4] (iv) the Private Limited Company; and (v) the Public Limited Company.[5] The Capital and Labor Company is a new type, which didn't have a match in the previous law. Considering the company types, one must have in mind that they reflect a Civil Law Latin system and therefore the word *company* includes broadly the Common Law institutes of *Companies* and *Partnerships*; in the Latin tradition – Italy excluded after 1942 – all company types have legal personality upon filling the deed of settlement, which differs from the Common Law tradition on partnerships (although one must note that a significant number of the states of USA have abandoned that tradition in the second half of the twentieth century).
Under Paragraph 1 of Article 82 of ComC the commercial companies are the ones that adopt one of those types, *regardless of its purpose*; the latter expression lends itself to several interpretations: (i) in a sense, it may mean *whatever the nature, civil or commercial, of it objects*[6]; (ii) in other sense, it may mean *whatever activity the company itself engages*. This second meaning is compatible with a legal definition of the commercial company focused on the commercial nature of its objects, as it is the case of point *a)* of Article 83 of the CCom: it is essential for a company to be considered commercial *that it has the purpose of engaging one or more commercial acts*. The first reported sense to Paragraph 1 of Article 82 of ComC, leading to the conclusion that the commercial system deducts the commercial nature of a company purely from the adoption of a commercial type is incompatible with the rule of Point a) of Article 83 of the ComC; a consequence of it would be the non-recognition of the civil company under a commercial type, known in the Commercial Law prior to the ComC.
I believe that the real sense of Paragraph 1 of Article 82 of ComC is the secondly pointed: despite Paragraph 1 of Art. 82 may include a sense of commercial character solely induced by the company's commercial type – which would require the

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3 - Original Portuguese name: *sociedade em nome colectivo*; in general, it functionally matches the General Partnership of the Common Law systems.

4 - Original Portuguese name: *sociedade em comandita*; in general, it functionally matches the Limited Partnership of the Common Law systems.

5 - Original Portuguese name: *sociedade anónima*.

6 - The concept of *objects* appears implicitly in Paragraph 1 of Article 93 of ComC: the activities that the company is intended to engage in.

exclusion of the civil company under a commercial type from the new commercial system – its real meaning is that the nature of the objects of the company does not interfere with the commercial quality of the type: this interpretation is compatible with the rule of Point *a)* of article 83 and, preserving the civil company under a commercial type, is the only one that can be harmonized with the Registration of Legal Entities Regulation, approved after the ComC (by Decree-Law No. 1/2006 of 3 May), whose article 2 states that it is compulsory to register the civil companies under a commercial type.[7]

The legal character of the commercial company ties the adoption of a commercial object (exercise of a commercial undertaking) to the parallel adoption of a commercial company type; this is, in fact, a denial of a contractual freedom of the shareholders, in this case, to choose a purely civil company type (Articles 980 ff CC); companies with mixed objects – commercial and civil – are subject to the linked commercial type rule. Considering the company law institute at a global level, it is continuative, in the new Mozambican Commercial Law, the detection of three areas: the one of the *commercial company* (a company with a commercial objects and commercial type); the one of the *civil company under a commercial type* (a company with civil objects and commercial type); and the one of the *simple civil company*, *purely civil company* or *civil company under civil type* (Articles 980 et ff. of the CC: a company with civil objects and no commercial type); following the traditional interpretation of the relationship between Article 980 of the CC and the (now) provisions of Article 82 of ComC, the three should be considered as species of the legal genus extracted from Article 980.

Having the commercial companies in mind it is also possible to detect subtypes of it. With regard to the Mixed Limited and Unlimited Company, established in Article 270 of the ComC, it has two species: a simple one and a share capital one, which are distinguishable by the representation of the interests of the members in shares, which is a character of the second one but not of the first.

The ComC also sets a separate chapter [Chapter V (*Private Limited Company with a single shareholder*) of Title II (*Commercial companies in particular*) of Book II (*Commercial companies*)] a particular regime of limited liability private company with a single shareholder, comprising Articles 328 to 330. Despite the fact that this regulation is the countenance of a whole chapter, parallel to the systematic unity

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7 - This interpretation is compatible with the rule of art. 5 of Decree-Law No. 2/2005 of 27 December; it is, however, puzzling why this rule has not been brought to the ComC, in whose art. 82 would have a more appropriate systematic seat. Puzzling are also the provisions of Paragraph 3 of Article 5 that: in fact they *push* the former civil companies under a commercial type to the new legal environment of the commercial entrepreneur, which is difficult to understand in a system that continues to recognize that company subtype.

of the regulation of the several shareholder private limited company [Chapter IV (*Private Limited Company*) of Title II (*Commercial companies in particular*) of Book II (*Commercial companies*)], we find here a systematic typological-dependence upon the several shareholder private limited company, which is expressly stated in Paragraph 1 of Article 328: *any natural person may create a private limited company whose capital is a unique share initially hold by the sole shareholder, which is governed by the provisions of this chapter and, with the necessary adaptations, by the provisions applicable to the* [several shareholder] several shareholder private limited company.

3. THE *LONG PATH* OF LIMITING THE LIABILITY OF THE PERSONS INDIVIDUALLY ENGAGED IN COMMERCE

The concept of the partnership as a *contract* is ancient,[8] lying already in the Roman-classical *iurisprudentia*, which designed the *societas consensu contracta*, categorized as a *consensual agreement* [as opposed either the formal contract (*verbis* or *litteris*) or the property contract (re)]. The *societas* (in its narrow and technical sense) is "[...] an agreed contract, whereby two or more persons (*socii*) are reciprocally obliged to put in common, wholly or partially, its property or labor activities, to achieve an outcome beneficial to all (be it a result of a mere management or of gainful activities)".[9]

The western heritage of the *societas* produced a contractual dogma of the deed of settlement of the civil partnership, but it crated also parallel one for the commercial partnership types of medieval origin; one should also notice that the nineteenth-century continental commercial codes added to the experienced general or collective partnership and the mixed limited and unlimited company a new one: the public limited commercial organization, which arrived not just as a partnership but as a *company*.[10]

During the nineteenth century, the public limited company, whose direct historical precedent can be traced in the privileged European colonial companies from the sixteenth and seventeenth centuries, *moved* from the Public Law sector –

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8 - I use the word *partnership* in the sense of its use in the Common Law tradition, for better understanding; it must be noticed, however, that in the Latin tradition, from the nineteen century onwards the word *sociedade* (from the roman *societas*) includes partnerships and companies.

9 - Burdese, *Manuale di diritto privato romano*, 4.ª ed., 1993 (1.ª ed.: 1962), UTET, Turin/Italy (reprint 2000), 470 (author's translation).

10 - See previous note 8.

under which were formed their *ancestors* – to Private Law,[11] transition which was completed with by the fall of the last of the publicist *barriers*: the prior government authorization settlement of such companies. In the framework of Private Law, the public limited company was legally conceived as a *mere type of company/partnership*, among others, being expectable that the contractual dogma for the settlement would also be considered to it, which indeed happened. The public limited company was, however, intended to break the barrier of a *mere contractual relationship between its members* and head the domain of an autonomous subjectivity, capable of holding self-rights and self-obligations... a [legal] *person*; in this path, the public limited company dragged behind it, in the Latin systems, the whole partnership types of medieval tradition.

The direct ancestors – and perhaps the exclusive ones – of the public limited company are the privileged colonial companies, in which the royal action was decisive, if not its settlement, at least in its authorization. These companies were privileged in two ways: on the one hand, they benefited, first, from trade monopolies in the conquered non-European territories in which they exercised royal prerogatives and, on the other hand, they traded with limited liability of its members, something that was virtually unknown in the partnership domain until the modern era.

The limited liability for engaging in commerce is an ancient desire of the people involved in trade, which is linked on the one hand, to the law principle of financial liability, centered in the dogma of its limitlessness, pursuant to which the debtor's assets – all of them – are the guarantee of the creditors,[12] and, on the other hand, the self-risk of trade, generally taken as higher than for the purely civil action, although there are some historical and doctrinal opinions in the sense that the said desire is, in fact, a claim by traders of a privilege. The granting of limited liability – first justified by the idea of a privilege conceded by the political power and, later, after the abandonment of the constitutive authorization systems of public limited companies, as a condition of commerce development – appears sometimes reported in the law doctrine as the very *ratio* of the nineteenth-century dogma of conceiving the public limited company as a *person,*[13] but the point is discussed.[14]

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11 - Galgano, *Storia del Diritto Commerciale*, 2.sd ed., Il Mulino, Bologna/Italy, 1980, 61 ff.

12 - On the transition, occurred in Roman law, between the physical consequences upon the obligation breach and the principle of financial liability see, among others, Menezes Cordeiro, *Tratado de Direito Civil Português*, I (*Parte Geral*), I, 3.rd ed., Almedina, Coimbra/Portugal, 2009, 419 ff.

13 - João Espírito Santo, *Sociedades por quotas e anónimas/Vinculação: objecto social e representação plural*, Almedina, Coimbra/Portugal, 2000, 84.

14 - See, among others, Carmen Boldó Roda, *Levantamiento del velo y persona jurídica en el*

The members of the public company limitation liability – allowing the transfer of a significant part of the corporate business risk to the business creditors – challenged the common rules of civil liability; there settles the idea of a *privilege* as an *exemption from common law property liability*. This business risk distribution system, which guaranteed to the shareholders that they were only subject to the loss of what they invested in the company, was radically different from the known partnerships of medieval tradition. In fact, in the *societas privata* and until the onset of the public limited *embryo*, in the seventeen-eighteen centuries, there was no example of a limited liability that could benefit *all members* of the same partnership. The limited liability of *one* or *a few* partners engaged in commerce, unknown in the general or collective partnership, had only known until then an example in the mixed limited and unlimited company, the limited partner, and with the consequence of him being denied the right to intervene in the management of the partnership – which allowed to explain the limited liability on a justice basis, since the partner did not respond indefinitely by unrelated acts – and his name could not appear in the business designation, so that it did not create false solvency expectations to third parties. Thus, other members would have to exist to respond with all their assets by the business risk, since, on the one hand, the contractual dogma inherited from the Roman *societas* did not allowed to conceive in the partnership other allocation centers for rights and obligations than the actual partners, and, on the other hand, the common system of liability did not allowed to limit their responsibility for business obligations; these were of the general partners; their responsibility settled that the business risk fall essentially upon them, which had, as a consequence, the right of direct management of the partnership.

The formal harmonization between the admission of a purely private interest *corporate scheme* that would guarantee the limited liability of all members and the common regime of liability was achieved through the conception of the public limited company as a legal person. In fact, exceeding the purely contractual area, *raising* the relationship between the partners to the status of an autonomous center of legal attribution and *reducing* the contract that settles a company to a mere genetic act of a legal person allowed to explain that the members were, facing the company, *third parties*.[15] Therefore, for the obligations of the company its own assets were to respond, not the ones of its members. And the company accounted for its obligations with all its assets; the *company-person* did not escape, insofar,

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derecho privado español, Aranzadi, Madrid/Spain, 1996, 31 and 32.

15 - GALGANO, *Diritto civile e commerciale*, I (quoted upon the extract contained in the *Letture di diritto civile*, from Paolo Zatti and Guido Alpa, Cedam, Padua/Italy, 1990), 229 and 230.

the ordinary rules of liability, which, ensuring systematic coherence, allowed to deny – formally at least – that the shareholders of a public limited company benefited from a privilege of limited liability.

The individual merchant's liability limitation was to have a legal compliance only in the mid-twentieth century, in continental Europe, by recognizing the sole *ab origine* single shareholder company. Granted that it was in the commercial codes of the nineteenth century a corporate form characterized by a liability of *all members* which did not reach more than the amount the they delivered for the settlement of an equity fund to ensure business – in short, the limited liability in a collective business –, *claims* of social groups involved in trade, often described as *trade needs*, embarked on the conquest of the extension of liability limitation beyond that circle in which was it originally permitted. On the basis of such claims are, in the case of individual business, the old desire of an exemption from the common law as to the liability involving all the debtor's assets; as to the collective exercise of business, the proper characters of the public limited company – being that the embryonic, pre-codifying, being that erupted in the nineteenth century codes – such as structure complexity, aimed at separating the management from the will of the members *qua tale*, with ambitious minimum capital requirements, often collected with call for public subscription of shares, a minimum number of required members always above the two necessary for the characterization of a contract, and, finally, the contingencies associated with the system of state prior authorization and the settlement taxes, which clearly aim at the satisfaction of the interests of the company that proposes economic activities of major proportions (one can think in mass production that was enabled by industrial machinery or construction and exploitation of transportations and communication nets) and are badly based to collectively pursuing commercial activities of small or medium-sized business, associating few people in a trust basis, with small cash-investing and activity intended to be directly managed by the partners.

The small and medium collectively exercised business was thus confined to legal structures where some or all partners would had to assume unlimited liability on behalf of creditors. These reasons are the historical-sociological basis for the legislative building in the late nineteenth century of a new type of company:[16] the private limited liability company of European-continental law, whose functional equivalent in English law the private limited company.

In the historical path which led to the legal widespread recognition of the limited liability private company, the legal doctrine usually points to two strains: the

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16 - See, among several others, GENNARI, *Società a responsabilità limitata*, Giuffrè, Milan/Italy, 1999, 1; WINDBICHLER, *Gesellschaftsrecht*, 21.st ed., Beck, Munich/Germany, 2008, 206 and 207.

German one, which produced in 1892 an original company type with limited liability, the *Gesellschaft mit beschränkter Haftung* (GmbH), and the English, which created the private company in the Companies Act of 1907. On the aforementioned *legis occasio* one can add, moreover, that there are some opinions that find seeds of the GmbH in the corporate practice onwards the German *Novelle* of 1884, and, also, in the English practice settled in the evolutionary cycle located between the Joint Stock Companies Act of 1844 – which allowed a company incorporation as a mere effect of registration of a settlement agreement with the, then, created registrar of companies, giving rise to the so called *registered companies*[17] –, the Limited Liability Act of 1855 and the Companies Act of 1856 – which admitted the limited liability of shareholders of registered companies and, finally, the Companies Act of 1862, which created the company limited by guarantee, in which the liability of the partners was limited to a certain amount, to effect upon dissolution.[18] Based on these legal frameworks, the English corporate practice will then have generated two types of companies: one, on the one hand, which was engaged in businesses requiring large financial resources, resorted to public subscription of securities publically traded and, on the other hand, one that had no need of massive funding and was settled with a small number of members, who financed it directly, and whose shares were not publically traded; the practice and the legal literature found for the first ones the designation of *public companies* and, for the latter, the designation of *private companies*, whose distinguishing feature was obviously located in the way of their funding.

Between the seventies and the eighties decades of the twentieth century, Denmark (1973), Germany (1980), France (1985) and the Netherlands (1986) admitted, with variants, the private company originally settled by a single shareholder.

The gradual *opening up* of legal systems to the original single member company is the product of a diverse set of explanations, with prevalence to the following ones: (i) the requests of individual traders for the limitation of their business liability to just a part of their assets, with the consequent disaffection to that end of its other assets, which ought to be set in the abandon of the common dogma of the limitlessness of liability; (ii) as a result, the spread of shell companies with limited

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17 - See, among others, FARRAR/HANNIGAN, *(Farrar's) Company Law*, 4th. Ed., Butterworth's, London-United Kingdom/Edinburg-Scotland-United Kingdom/Dublin-Ireland, 1998, 19 e 20.

18 - With this opinion see, among others, GARRIGUES, *Curso de Derecho Mercantil*, I, 2.sd ed. (by Evelio Verdera), Authors Edition, Madrid/Spain, 1955, 292; RIVOLTA, *La società a responsabilità limitata*, Vol. XXX, T. I, from the *Trattato di diritto civile e commerciale* (dir. by Antonio Cicu/ Francesco Messineo/Luigi Mengoni), Giuffrè, Milan/Italy, 1982, 4 ff.; GENNARI, *La società a responsabilità limitata*, previously quoted, 5.

liability, formally constituted with the, at least, two members required by law, but in which only one of them had real interest, aimed at a substantially individual exercise of an economic activity and with the cooperation of *puppet partners*, who had no intention of settling subscribing a company, for better or for worse, and who often were foreordained to the future sell of their shares to the *real partner*; (iii) the seemingly paradoxical compliance of several law systems regarding the supervening single shareholder company, allowing more or less openly, the livelihood of the companies in this condition as separate subjectivities in relation to the sole shareholder; and finally (iv) the organizational demands of the corporate groups.[19]

The first of those factors is undoubtedly the one with historical precedence, going back to the first doctrinal attempts to legitimize the claim for limitation of liability of the individual merchant in the beginning of the twentieth century; among the legal techniques aimed at obtaining such an effect one may include, on the one hand, the special allocation of a property fraction by a trader to his business, which eliminates the settling of a new subjectivity between the merchant and the creditors activity, and, on the other hand, the settlement of an autonomous subjectivity accountable to its creditors with all its property (in fact, separated from the property of the persons who settled it).[20] But underlying this legislative opening to the originally single member company is the prevalence of a legal and economic approach on companies which conceive them, first of all, as a way to legally structure an undertaking, which therefore devalues the question of the number of members and the historical and dogmatic understanding of the company as contract.

In the European Union area, one must also notice the adoption of the Twelfth Directive on companies (89/677/EEC), from the Council, of 21 December 1989, which approved coordination measures for the law of the Member States as to corporate types functionally equivalent to the private limited company.[21]

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19 - For a historical-dogmatic perspective of the evolution that would lead to the widespread of the legal recognition of the incorporation of an originally single shareholder private company in European legal systems, see, among others, Ricardo Costa, *A sociedade por quotas unipessoal no direito português*, Almedina, Coimbra/Portugal, 2003, 113 ff.

20 - See, among others, Ricardo Costa, *A sociedade por quotas unipessoal no direito português*, Almedina, Coimbra/Portugal, 2003, 113 ff.

21 - This directive has been replaced by the Directive No 2009/102 / EC, from the European Parliament and from the Council, of 16 September 2009.

4. AN OVERVIEW OF THE MOZAMBICAN LEGAL FRAMEWORK ON THE SINGLE SHAREHOLDER COMPANY

The *single shareholder company* is the one whose personal substrate is composed of a single member. The statement has not only a doctrinal support, but can be sustained on the rules of Article 328 of ComC. Based on the General Theory of Civil Law, the company is an association – in a broad sense – for profit, whose regulation in the Common Private Law is settled, within the Law of Obligations, in Articles 980 to1021 of the CC, corresponding to chapter III (*Partnership*) of Title II (*Contracts in particular*) of Book II (*Law of Obligations*).

The ComC settles the criteria that point the commercial status of a company (Articles 82 and 83), but does not contain a formally autonomous concept of company, similarly to the previous regulation of commercial companies contained in the old Portuguese Commercial Code of 1888. In a common doctrinal opinion, the systematic consequence of this omission in the ComC would be the necessary use of the CC company concept, contained in Article 980, and pursuant to which it is a *contract by which two or more persons are bound to contribute with goods or services for the joint exercise of certain economic activities other than mere enjoyment, with the aim of sharing the profit generated thereby* (it is certain that the legal definition aims at the settlement of the company, but one can however discuss whether the reference to the *contract* also reports a *possible contractual relationship between the members*, based on the deed, in which case the contract should be configured as *lasting* or *continuous*).

Having this – traditional way of thinking – in mind, the *company* that corresponds to the Article 980 CC definition would constitute a genus within which one could detect in the Mozambican law, at least, two species: *commercial* (commercial type: Article 82 and 83 of ComC) and civil (Articles 980 ff. CC; without commercial type). I do not share, however, this understanding. I believe that the *essence* of commercial companies, as deductible from Commercial Law, is irreducible to the definition of Article 980 of the CC, which implies an effort to build, in dogmatic terms, an autonomous concept of commercial company, based on the positive legal framework.

The main argument against that traditional understanding is the possibility in the common corporate-commercial domain, of incorporation of companies by a single member, which necessarily follows from an unilateral legal action and thus differs from the contract required by Article 980 of the CC. But there´s more: if there are commercial company types in which – despite all of them have legal personality, in accordance with Article 86 of ComC – one can recognize more or less markedly the feature of an economic activity undertaken in common by the members, as in

the case of the Collective Company, only by conscious distortion of reality can be claimed that the same applies to company types with a *corporate structure* – to use a widespread German conception – such as the Public Limited Company,[22] particularly when their shares are admitted to securities markets.
The company single shareholdership may be distinguished in *original* and *non-original* (Article 329, Paragraph 2, ComC): the first is the one that exists from the moment of incorporation; the second, the one which occur after incorporation in a company which had been set up by more than one shareholder, as a consequence of the concentration of all the shares in the ownership of a single member.

5. SPECIAL FEATURES OF THE SINGLE SHAREHOLDER LIMITED PRIVATE COMPANY LEGAL REGIME

5.1. Original and non-original single shareholdership

The rules set forth in Articles 329 and 330 of ComC, constituting the primary legal regime of the single shareholder Private Limited Company, is not self-sufficient, as it clearly result from the latter part of Paragraph 1 of Article 328, which produces a general reference to *the provisions applicable to private limited companies*, being that, for sure, the legal regime of the *several shareholder private limited companies*.
One can ask, however, whether this legal regime applies to any private company whose personal basis is formed by a single shareholder. The answer is negative, because – as it will be noticed shortly – the personal basis of a limited private company may be composed of a single person and yet the only legal regime applicable is the one of the several shareholder private limited companies. It is thus possible to conceive the concept of an *in law single shareholder private*

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22 - The German conception of the legal person assumes a corporate organization that will enable the making of autonomous volitions from the ones of the shareholders, which are therefore considered from a distinct person, and have the following demands: (i) a complete distinction between the assets of the partners and those of the company; and (ii) a management of this property in a different way from that exercised directly by shareholders on their own assets (*indirect management*, wording that expresses that the shareholders only influence indirectly the management, by appointing directors, who differ from the shareholders, or although the directors maybe shareholders, the management activity does not derive from his status as shareholders, but from the integration into the body with the managing competence). The presence of these characteristics define the corporation (*Körperschaft*), being this German conception a recovery of a medieval understanding that had the incorporation of the general meeting as a condition for the existence of the *universitas* (see GALGANO, *Il principio di maggioranza nelle società personali*, 7, Cedam, Padua/Italy, 1960).

limited company (the one which submits to the provisions mentioned in Article 328, Paragraph 1, second part), and a *de facto single shareholder private limited company*, whose legal regime is that of the several shareholder private limited company.

Indeed, Article 328, entitled *single shareholder private limited company*, is split in two paragraphs: Paragraph 1 relates to original single shareholdership and Paragraph 2 to non-original single shareholdership.

Paragraph 1 of Article 328 of the ComC sets *that any person may incorporate a private limited company, whose share capital is composed initially of a single share, of which the shareholder is the owner*; to such a company the provisions of Articles 329 and 330 of ComC are the primarily applicable, as also, secondarily, the legal provisions proper of the several shareholder private limited company. Therefore the incorporation of a private limited company originally by a single shareholder *necessarily settles as in law single shareholder private limited company.*[23] However, an original several shareholder private limited company may afterwards have its personal basis reduced to a single shareholder, case dealt with in the second part of Paragraph 2 of Article 328 of ComC, which states for the application of the provisions of *this chapter* (being that Articles 329 and 330) after ninety days without being recomposed the shareholders severalty. From what has just been said one can draw the conclusion that the in law single shareholdership is an *ex lege* result of the reduced shareholder base of a private limited company to a unique member for ninety, or more, days.

The rule of the second part of Paragraph 2 of Article 328 of ComC leaves, however, one aspect in the shade: in the case of a reduction of the personal basis of the company to a single shareholder, can he/she anticipate the acquiring of the in law single shareholder private limited company status before the period of ninety days? I believe that the answer must be positive, since otherwise it would not be systematically consistent in view of the very admissibility of the original *in law single shareholder private limited company*; this assumes, therefore, that the sole shareholder may perform the conversion of the *de facto* single shareholder private limited company in a *in law* single shareholder private limited company through unilateral legal action.[24]

The *ex lege* conversion settled in Paragraph 2 of Article 328 of ComC does not

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23 - This solution is similar to the Portuguese law (Article 270-A, Paragraph 1, of the Commercial Companies Code).

24 - I argue, moreover, that this conversion must be registered, by analogy with Article 3, Poit *p)* (as what regards to *transformation*) of the Legal Entities Registration Regulation (adopted by Decree-Law No. 1/2006 of 3 of May).

occur if the shareholder severalty is recomposed after the concentration of the shares in a sole shareholder within ninety days, appearing that the conversion of the in law single shareholder private limited company in a several shareholder private limited company is an *ex lege* effect of the shareholder severalty, pursuant to Paragraph 2 of Article 328 of ComC (... *while the single shareholdership remains* ...), which corresponds to a harmonic conclusion with the *ex lege* reverse conversion.

5.2. The ownership of the share(s) of the single shareholder private limited company

The possibility of incorporating a company originally by a single shareholder is expressly restricted by law to natural persons, from what one can reasonably conclude that legal persons have no enjoyment capacity[25] for this purpose (Article 160, Paragraph 1, CC).[26] Unlike other Lusophone law systems – Portugal, Cape Verde and Angola –, the law does not contain a number limit to the single shareholdership companies of which a natural person may be a shareholder.
The restriction of owning share(s) of single shareholders private limited companies to natural persons does not follow expressly from Paragraph 2 of Article 328 of ComC regarding the non-original *in law* single shareholder private limited company, but the systematic connection between the two paragraphs of Article 328 may not lead but to a restrictive interpretation of Paragraph 2: the single *in law* shareholdership resulting from the concentration of the shares in the ownership of a single shareholder assumes that this is a natural person: another conclusion empties the normative limits of Paragraph 1, as it would be easy to incorporate a several shareholder private limited company in which a legal person could be one of the shareholders, who would then acquire all the shares, aiming this the superseding of the restrictions of Paragraph 1 in a two-step scheme. This conclusion supports another one: the concentration of shares of a several shareholder private limited company in the ownership of a legal person cannot produce the conversion *ex lege* in a *in law* private limited company, although the severalty of the shareholders members is not recomposed within ninety days.

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25 - In Portuguese: *capacidade de gozo*.

26 - It is to notice, in this regard, that the ComC does not regulate the groups of companies. The legal solution of Mozambique is identical to that of Cape Verde (cfr. Paragraph 1 of Article 336 of the Code of Business Undertakings), both of which divergent from the Portuguese solution, which does not have such a restriction (see Articles 270- A, Paragraph 1, and 270-C, both of the Portuguese Commercial Companies Code).

The case is not identified as a reason for dissolution of the company (Article 229, Paragraph 1, of ComC), but, given the sustained restrictive interpretation of Article 328, Paragraph 2, being the action from which results the concentration unlawful, it must considered void (Art. 294 CC).

5.3. Businesses between the singleshareholder and the company

Paragraph 1 of Article 329 of ComC states that any business, direct or through third person, between the company and the single shareholder must be written, and be necessary, useful or convenient to the corporate purpose, being void if not. In establishing special rules for legal transactions between the company and the single shareholder the Mozambican law is included in a standard which appears in other Lusophone systems (Portugal, Angola and Cape Verde).

First of all, one must establish the *rationale* for this regime.

The admission of the lawfulness of the businesses between the single shareholder member and the company in which he/she owns the entire share capital is based on the recognition of mutual law independence of the – two – subjectivities in question, and therefore in a general lawfulness of their relations. This remark settles the positive area regime of Paragraph 1 of Article 329 of ComC – with the obvious consequence of the inapplicability to the business in question of legal rules governing the so called self-business (Article 261, CC) – although its most noticeable character is precisely the negative dimension, of which one can highlight: (i) the writing imposed as a minimum formal requirement of such business; (ii) the necessary subordination of the business in question to the objects of the company (expressed in the *need*, *usefulness* or *convenience* to the pursuit of the objects of the company, that reproduces the formula of enjoyment capacity of commercial companies, established in Paragraph 1 of Article 88, ComC) and, finally, (iii) the statement of nullity for the violation of those requirements.

The material *rationale* of the prohibition contained in the regime of the business of the single shareholder with the company lies in the possible abuse of the corporate structure for the benefit of the shareholder, with possible damages to third parties, which the absence of conflicting interests between several shareholders makes easier.[27]

The conceptual framework of the invalidity – in view of its relationship with the imposed respect for the objects of the company – is not totally clear: in a general thesis, it may be seen as a consequence of a lack of enjoyment capacity

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27 - See generally, on this, Ricardo Costa, *A sociedade por quotas unipessoal no direito português*, above quoted, 641 ff.

for the assumption of active or passive legal situations arising from the business in question or as a substantive illegitimacy of the organs of the company to enter in that kind of business, regardless of whether the powers to decide, internally, and to bind, externally, the company belong, or not, to the same organ, since the director(s) is (are) not necessarily shareholder(s) (Article 320, Paragraph 1, ComC) and the power to decide to make the business may lie in the single shareholder, as the substitute organ of the general meeting of shareholders (Articles 319 and 330, both ComC).[28] The first of the proposed conceptual frameworks would imply the inapplicability to the single shareholder company of the rule of Paragraph 1 of Article 152 of ComC, which, in the absence of a rule that expressly states it, doesn't seem a reasonable conclusion;[29] this conceptual framework leads, moreover, to an unacceptable result as to the range of the company enjoyment capacity: that it varies according to who is counterpart of the business: if it is a stranger, the business – if not necessary, useful or convenient to attaining its objects – would not be, by the reason, void, but if the counterpart were the single shareholder, the business would be, attending the same reason, void. I believe, therefore, that the correct conceptual framework for the invalidity is a substantive illegitimacy, which is, by definition, relative: the decisions of the single shareholder *qua tale* to make the business, or the same decisions from the director – whether or not he/she is the shareholder – as well as the external executive acts of the corporation with the sole shareholder which do not pursuit the company's objects, are illegitimate.[30] The company's objects are the *activities listed in the deed of settlement, which the company may exercise*, and are of compulsory inclusion in it [Article 92, Paragraph 1, d) and Article 93, Paragraph 1, both ComC]. In general, the objects of a commercial company don't limit its enjoyment capacity (Article 152, Paragraph 1, ComC).[31] The duty imposed in Paragraph 1 of Article 329 of ComC to the link

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28 - In general, about the possible decoupling of the decision-making power regarding a particular act by the company and the corresponding agency power, see João Espírito Santo, *Sociedades por quotas e anónimas/Vinculação: objecto social e representação plural*, Almedina, Coimbra/Portugal, 2000, 431 ff.

29 - In this regard one may notice that there is a discontinuity between the provisions of Articles 88, Paragraph 1, and 152, Paragraph 1, both of the ComC: if the first seems to put the acts *ultra vires* the objects out of the enjoyment capacity of the company, the set of Paragraphs 1 and 2 of the second, enabling the binding of the company for such acts, assumes the opposite.

30 - On the overall system of substantive illegitimacy, see Pais de Vasconcelos, *Teoria Geral do Direito Civil*, Almedina, Coimbra/Portugal, 2014, 432 and 433.

31 - For the legal distinction between the objects and the purpose of the legal person, see, among others, Pais de Vasconcelos, *Teoria Geral do Direito Civil*, above quoted, 159 ff.; João Espírito Santo, *Sociedades por quotas e anónimas/Vinculação: objecto social e representação plural*, above quoted, 180 ff.

between company's objects with the business in question is not different from that underlying Paragraph 1 of article 88, being different, however, the judgment on the legal value of an act that violates the company's object clause: in general, such an act is not, *qua tale*, void, binding the company to third parties (Article 152, Paragraph 1, ComC), but it can, generally speaking, be the ground for civil liability of the natural person who decided, as a company organ, to take action; in a single shareholder private limited company, and in case of a business of the company with the single shareholder, the act is void (Article 329, Paragraph 1, ComC).

Paragraph 1 of Article 329 of ComC adds a formal demand to the material requirements for a valid business between the single shareholder and the company, presented in a *minimum standard*: such business must always be written (this corresponds to an exception to the general law principle of Article 219 of the CC), but the rule must be understood with the meaning that is reasonably has: if one deal with a business for which the law requires greater solemnity than the written form, the requirement must be respected, under penalty of nullity, in accordance with Article 220 of the CC.

Also it seems to have not been the intention of the legislature to subordinate to the rule of the minimum writing form the businesses concluded in the course of the company's own trade and with the standards normally applied to third parties, which are strictly covered by the rule; the rule must therefore be subject to a restrictive interpretation, pleading analogy with the rule of Article 427, Paragraph 3, of ComC.

To the requirement that the business be materially covered by the company's objects, Paragraph 2 of Article 329 of ComC adds another: the business should *always* be subject to prior report drawn up by an auditor with no relation with the company, including in the report a statement that the company's interests are properly protected and that the business conditions and price are the general ones, otherwise the business cannot be concluded. The rule is somehow puzzling as to the safeguard of the company's interests, which is attributed to the auditors judgment; the wording *cannot be concluded* shows that if it succeeds otherwise, the business is considered to be against the law and therefore null by Article 294 of the CC.

It is last to notice, in this area, that Paragraph 2 of Article 329 of ComC assimilates the sole shareholder to third parties related to him/her, without any concrete definition of who might them be. In fact, what seems to be under scrutiny is a possible *fake third party*, which, if proven, always raises the nullity of the simulated business (Article 240, Paragraph 2, CC).

5.4. Powers of the single shareholder as a company organ

Article 330 of ComC states *that the decisions on subjects which, by law, are powers of the shareholders general meeting should be personally exercised by the single shareholder and be registered in a book kept for that purpose and signed by him.*

The material effect of rule in Article 330 is that the decisions which, in the several shareholder private limited company, depend upon decisions of shareholders, pursuant to the organizing principle that concretely applies (normally, the majority principle), in order to reduce the severalty to the unity, are exercised by the single member as the universal element of the personal basis of the company; the rule covers powers that, belonging to members in the several shareholder companies, must be exercised in organic terms (Article 319 of ComC).

The rule in Article 330 of ComC has the scope of defining that the single shareholder *is a company organ*: the one that, in the several shareholder companies, serves the synthesis of wills of the various shareholders in a single volition.

The general meeting is a legal *synthesis mechanism* in a single volition – thus reducing severalty to unity – to be considered of the company itself, as a different person from the shareholders, which operates through the majority principle (Article 318, Paragraph 3, ComC). The Assembly thus supposes a severalty – a space for discussion and eventually confrontation of different volitions – that does not exist in the single shareholdership, which is why it would be illogical to admit that the sole shareholder meets with himself. In a single shareholder private limited company there is no general meeting.

What has just been said is consistent with the application to the single partner decisions, as a *corporate body*, *ex vi* Article 328, Paragraph 1, of ComC, of the rules of resolutions by shareholders of the several shareholder private limited companies, whose sense is not vanished by the organ uniqueness, serving as examples the rules of Article 142, Paragraph 1, c) and d), first sentence of ComC.

Article 330 also states that the shareholders decisions *must be entered in a book kept for that purpose, and signed by him.* The legal regime of the registration of the shareholders resolutions is set in Article 147 of ComC, entitled *minutes*. The registry shall include the information provided in Paragraph 2 of Article 147 of ComC, which must naturally suffer the adaptations needed to the situation of the single shareholder (for example, the registry of the single shareholder decisions may not contain references to the votes).

The function of the minutes – that one can understand from Paragraph 1 of Article 147 of ComC – is conclusive: the resolutions passed at the general meeting can only be proved by the minutes, which is for them an *ad probationem* demand. The

law does not states, in general, that the minutes must be signed by the shareholders who participated in the general meeting, even though, as what regards to the several shareholder limited company, it is established in Article 317, Paragraph 5, of CCom, that the minutes of the general meetings shall be signed by all members who have participated in them.

The rules of Article 317, Paragraph 5, and Article 330, both of ComC are formally convergent, but its material sense – I believe – is not the same. In the single shareholder private company the registry of the shareholders decisions in minutes *as a management organ strictly speaking* – function that it shares with the(s) manager(s), that may not be the single shareholder – serves the purpose of settling, among the volitions formed by the single shareholder the ones that are attributed to the company, need that follows from the protection of the company's creditors in ensuring the enforcement of legal rules on the company's assets allocation to ensure compliance with its obligations, assuming that the absence of a confrontation among several shareholders' interests creates an increased risk of infringement of those legal rules.

The sense of the rule of the second part of Paragraph 2 of Article 330 of CCom, is, therefore, to establish the minute registry, and its signature by the *qua tale* shareholder, not as a formality *ad probationem* of decisions to be considered as the company's but as a requirement *ad substantiam* thereof, which explains the need of adding a rule to what already resulted, in general, from article 317, Paragraph 5, of the ComC.