# Private acquisitions in Brazil: overview

Luís Gustavo Haddad, Bruno Robert, João Paulo de Seixas Maia Krepel and Fabio Weinberg Crocco
Lilla, Huck, Otranto, Camargo Advogados

global.practicallaw.com/8-538-4305

## CORPORATE ENTITIES AND ACQUISITION METHODS

### 1. What are the main corporate entities commonly involved in private acquisitions?

In virtually all private acquisitions, target companies are either:

- **Limited liability companies (*sociedades limitadas*) .** They offer flexibility and a relatively lower level of formality, but cannot issue securities. Instead, they have quotas held by quotaholders.
- **Closely-held corporations (*companhias fechadas*) .** They can issue shares and have shareholders, and allow designing of more sophisticated corporate governance structures.

Limited liability companies are regulated by the Civil Code and their articles of association (*contrato social*). Closely-held corporations (*companhias fechadas*) are regulated by Federal Law 6.404/76 (Corporations Law) and their bye-laws (*estatutos*). Both these entities can also be subject to quotaholders or shareholders agreements.

In addition to the above corporate forms, the buyer may also be:

- A foreign investor (that is, a foreign individual, company, corporation or investment fund).
- A local investor (that is, one or more individuals, limited liability companies, public or closely held corporations and investment funds).

The most common Brazilian investment fund involved in private M&A transactions is the *Fundo de Investimento em Participações* (FIP). FIPs are particularly advantageous for tax reasons and are the usual form adopted by private equity funds. They are subject to the regulations of the Brazilian Exchange Commission (*Comissão de Valores Mobiliários*) (CVM), in particular CVM Instruction 391/03.

Depending on the features of the target company and of the investors, there are two other types of Brazilian investment funds that can be used in M&A deals:

- Fund for Investment in Emerging Companies (*Fundo Mútuo de Investimento em Empresas Emergentes, FMIEE*), regulated by CVM Instruction 209/94.
- Fund for Investment in Emerging Companies: Foreign Capital (*Fundo Mútuo de Investimento em Empresas Emergentes: Capital Estrangeiro*), regulated by CVM Instruction 278/98.

It is also possible to identify and adopt more sophisticated strategies, for instance involving funds of funds, that is, a two or multiple tier investment vehicle, with a multi-market investment fund investing in a FIP.

### 2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

#### Restrictions on share transfer

Although not imposed by law, restrictions on share transfers are very frequent in Brazilian private companies. A significant number of private companies are family owned businesses, which explains why such restrictions are widespread. Since the source of these restrictions is based on contract, they must be analysed on a case-by-case basis.

In limited liability companies, the most common restrictions are:

- Right of first refusal, provided for in the articles of association, to the benefit of all quotaholders.
- Veto right, according to which quotaholders representing a certain stake in the corporate capital can block transfers to third parties, or even among quotaholders.

More complex arrangements also exist, involving tag along, drag along and shotgun provisions. Put and call options are also common.

In closely held corporations, there is less room for strict restrictions on share transfers. Restrictions on share transfers that subject the shareholder to the discretion of other shareholders or of the corporation's administrative bodies (for example, shareholder meetings or the board of directors) are null and void (*Article 36, Corporations Law*). This provision may create doubt about the enforceability of veto rights and/or lock up provisions in closely-held corporations. On the other hand, rights of first refusal, tag and drag along, shotgun, put and call options clauses are frequently used in bye-laws and shareholders agreements of closely held corporations.

Besides these voluntary restrictions, involuntary ones may also apply. Shares and quotas may have been given as collateral to creditors, or seized or attached by them in foreclosure procedures. Investors should also consider legal restrictions on the transfer of debtors' assets.

#### Foreign ownership restrictions

Foreign ownership (at all or above a certain percentage) or foreign control is forbidden or restricted in a limited number of business activities. These include:

- Media and broadcasting.
- Mail, post and telegraph services.
- Aviation companies.
- Aerospace industry.
- Certain healthcare activities.
- Nuclear power.

Foreign investment in Brazil is subject to general and specific regulations applicable to foreign exchange contracts, controls, and investment registrations with the Central Bank of Brazil.

### 3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

The most common way to acquire private companies is through share or quota purchases. Asset sales are less frequent but are an alternative, especially in distressed or special situations. A third path can involve mergers, capital increases and corporate reorganisations, which also include debt-to-equity conversions, spin-offs and reverse mergers.

One of the most important drivers, if not the most important, in choosing an acquisition structure is the tax impact of the transaction on the parties, which can only be assessed on a case-by-case basis.

**Share purchases: advantages/asset purchases: disadvantages**

Share or quota purchases allow the acquisition of the target company's entire and ongoing business, with all its assets, liabilities, contracts and operations. The transfer of ownership occurs at shareholder or quotaholder level. If needed, share/quota purchases can be preceded by, or combined with, corporate restructurings. These allow assets, liabilities or other elements that would not be subject to the acquisition to be included or excluded.

The advantages of the share or quota purchase are more evident when the buyer is not, or does not own, an already operational business entity in Brazil, and needs the target company to continue to be its main operating entity. These advantages also apply in cases where:

- The target company has accumulated tax losses which, in certain circumstances, can be offset by future taxable income.
- The acquisition involves a goodwill/premium (*ágio*) which, provided certain legal requirements are met, can be subject to amortisation and generate tax deductible expenses in the continuation of the target company operations.

Through share/quota purchases, foreign buyers can acquire control of the target companies directly, without having to incorporate a local investment vehicle to perform the acquisition. However, setting up local investment vehicles is usually recommended, for tax reasons.

**Share purchases: disadvantages/asset purchases: advantages**

Asset purchases can be advantageous in cases where the buyer already is, or owns, an operating company to which the acquired assets will be transferred. This means that the assets will be transferred to an operating entity that already holds all applicable licences, authorisations and registrations needed to conduct business in Brazil. In Brazil, obtaining all such licences, authorisations and registrations can take a significant amount of time.

Asset purchases, as a rule, do not prevent succession by the buyer to the liabilities of the target company. However, in certain and specific circumstances, this risk of succession can be mitigated through asset purchase structures. An alternative is the acquisition of an isolated productive unit (*Unidade Produtiva Isolada*) (UPI), from a company that has gone bankrupt or is under judicial restructuring. Provided that certain requirements are met, the acquisition of a UPI can be made without the risk of succession to labour, tax and social security debts and liabilities.

### 4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Sales of companies by auction are not common compared to non-auction sales. However, there are relatively organised processes, in which several potential buyers are contacted and invited to analyse opportunities and make offers. These are informal and unregulated processes, usually conducted by investment banks and/or advisory firms. They normally include the:

- Presentation of "teasers".
- Execution of a non-disclosure agreement.
- Presentation of information memoranda.
- Presentation of indicative offers.
- Performance of due diligence.
- Presentation of binding offers.
- Negotiation and execution of the definitive agreements.

However, strongly regulated auctions can take place in:

- Privatisations, that is, in situations where the government is selling the shares or assets of state-owned companies.
- Sales of assets of debtors under foreclosure, bankruptcy or judicial reorganisation procedures.

## PRELIMINARY AGREEMENTS

### 5. What preliminary agreements are commonly made between the buyer and the seller before contract?

**Memoranda of understandings, letters of intent and term sheets**

These documents commonly point out the main aspects of the intended transaction and, as a rule, are not binding (although they may be binding to some extent in certain situations). These main aspects are the:

- Description of the target company or assets.
- Price and payment conditions.
- Conditions precedent to closing.
- Ancillary agreements that may need to be negotiated (for example, lease, services, supply, non-compete and/or non-solicitation agreements).

It is also common practice for restrictions to be adopted until closing, such as in relation to the following:

- Performance of due diligence.
- The expected time schedule for closing of the transaction.
- Exclusivity commitments.
- Confidentiality.
- Use of financial and/or legal counsel.
- Responsibility for expenses incurred.
- Dispute resolution.

These process based rules (especially confidentiality, exclusivity, responsibility for expenses and dispute resolution) need to be binding, even if the preliminary agreement, with respect to the obligation to conclude the transaction, is not.

### Non-disclosure agreements

Confidentiality and non-disclosure obligations can be included in letters of intent or agreed through separate instruments. The execution of non-disclosure agreements is usually a condition precedent to access sensitive information and/or the start of due diligence.

## ASSET SALES

### 6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

Generally, parties are free to establish by contract their responsibilities regarding the assets and liabilities in the transaction. However, with respect to certain liabilities, these arrangements are not enforceable against third parties.

Statutory rules governing, for example, tax, labour, social security and environmental liabilities, are mandatory and cannot be changed by contract. This means that creditors can seek to enforce their claims, irrespective of agreements between the seller and buyer.

This also means that the buyer will be exposed to risks. If it suffers losses for claims that should be borne by the seller, it will need to be indemnified by the seller and will not be able to use the purchase agreement as a defence to third party claims.

Corporate veils are often pierced in Brazil, particularly in regard to tax, labour, social security and environmental claims. This enhances the importance of conducting careful due diligence and negotiating adequate contractual mechanisms to address and mitigate risks.

### 7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

If the assets being sold constitute a "business unit" (*estabelecimento empresarial*), the purchase agreement will only become enforceable against third parties after it is registered in the Commercial Registry and published in the Official Gazette (*Article 1,144, Civil Code*).

The legal concept of a business unit refers to an organised range of tangible and/or intangible assets intended for the performance of a business activity (*Article 1,142, Civil Code*).

Even where these formal procedures are adopted, if as a result of the sale of a business unit the seller's assets become insufficient to meet its obligations, either:

- The transaction is subject to the creditors' consent.
- The seller must pay its debts (*Article 1,145, Civil Code*).

Further, sellers of business units can be declared insolvent if the creditors' consent is not obtained (*Article 94(III)(a), Law 11,101/05*) (Insolvency Law). If the seller is declared insolvent, transactions that took place before the winding-up order can be rendered ineffective (*Article 129, Insolvency Law*).

The same rules apply to lease agreements of business units.

In bank loans, and other important business agreements, asset sales executed without the consent of the bank (or other creditors, as the case may be) often involve acceleration of the loan and an event of default.

If assets are encumbered by voluntary or involuntary liens, the transfer of such assets is subject to the secured creditor's consent.

## SHARE SALES

### 8. What common conditions precedent are typically included in a share sale agreement?

Common conditions precedent include:

- Competition clearance.
- Other regulatory clearance by the relevant regulatory authorities. This is required, for example, for public utility companies (energy, telecommunications, broadcasting, oil and gas, and other public sectors), financial institutions, insurance companies, and certain healthcare companies.
- Approval by creditors.
- Corporate reorganisation, to include or exclude assets and/or liabilities from the target company.
- Non-occurrence of material adverse changes to the target company, the market in which it operates, general economic conditions, or the legal regime applicable to the company's operations.
- Accuracy of the representations and warranties provided by the parties.
- Performance of obligations that must be performed prior to closing (for example, an obligation of the sellers to continue to conduct the ordinary course of business).

## SELLER'S TITLE AND LIABILITY

### 9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

In limited liability companies, the articles of association indicate the:

- Title to the quotas.
- Names of each equity holder.
- Number of quotas held by each of them.

Articles of association must be filed with the Commercial Registry and are publicly available.

In closely-held corporations, title to the shares is evidenced by entries in its share register book, which is not publicly available and must be kept at the corporation's headquarters. Buyers should verify the share register book, check whether it is updated and extract copies from it, either signed by the corporation's officers or certified by a public notary. The bye-laws of closely-held corporations, although publicly available through the Commercial Registry, do not usually disclose the identity of the shareholders or their precise equity stakes.

In public companies, title to shares is evidenced by a certificate issued by the financial institution hired by the company to provide services of custody and/or book-entry registrations.

As a general rule, the Civil Code (*Articles 477 to 457*) establishes an implied warranty of the seller's title to the asset for sale (*evicção*). This is applicable to any sale, whether of goods, shares or any other tradable asset. However, this is not a mandatory rule, and the parties can agree in writing to enhance, restrict or even exclude the seller's liability for any defect in the legal title of shares (*Article 488, Civil Code*).

It is advisable and common to include in the agreement a seller's representation, in addition to the general implied warranty, reinforcing:

- That the seller is the sole and exclusive owner of the shares.
- The absence of any liens and encumbrances (or the specific disclosure of liens and encumbrances affecting the shares).

### 10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

#### Seller

The Civil Code (*Article 422*) requires parties to act in good faith both during the negotiation of agreements and after their execution. Unless the parties have agreed differently, to render a seller liable for pre-contractual misrepresentation, misleading statement or similar matters the buyer will likely need to prove loss due to the misrepresentation. Since precedents in Brazil on this matter are inconsistent, parties negotiating share/quota purchase transactions normally execute early during the process preliminary agreements (for example, term sheets and memoranda of understanding) expressly stating that:

- The negotiation and its preliminary terms are not binding.
- Any and all information transmitted must be checked during due diligence.
- Parties are not liable if the deal does not go forward, each of them bearing its own costs incurred in the negotiation.

Purchase agreements normally detail the seller's representations about the business and establish the seller's liability for any misrepresentations. Since there are applicable legal rules on this matter, it is important for the share/quota purchase agreement to ensure its co-ordination and/or compatibility with Articles 441 to 446 of the Civil Code, which govern the *vícios redibitórios,* a civil law concept that applies to hidden defects that render assets unfit for the use they are intended for or decrease their value.

#### Advisers

Advisers are unlikely to be liable for pre-contractual misrepresentation, misleading statements or similar matters. They are not sellers, but only service providers, usually retained in the interest of the sellers. If a loss is suffered by the buyer in connection with a misrepresentation or a misleading statement made by an adviser, the buyer will probably seek compensation firstly and mainly from the seller. To hold an adviser accountable, it would usually be necessary to insert a specific provision in this respect in a preliminary or definitive agreement, to be also signed by the adviser (which is not usual).

## MAIN DOCUMENTS

### 11. What are the main documents in an acquisition and who generally prepares the first draft?

The main preliminary documents are non-disclosure agreements, memoranda of understanding, letters of intent, and or term sheets (*see Question 5*). Non-disclosure agreements are usually prepared by the seller. The first draft of these other documents is prepared either by the seller or by the buyer's counsel.

The main transaction documents are the following:

- Quota/share purchase agreement (the first draft is prepared by the buyer or by the seller).
- Exhibits and schedules attached to the share purchase agreement, the most important of them relating to the representations and warranties (and exclusions to them) made by the seller.
- Escrow agreement.
- Depending on the case, investment agreements and/or a shareholders' agreement governing the relationship between the parties after the transaction (assuming the seller retains an equity stake in the company).

## ACQUISITION AGREEMENTS

### 12. What are the main substantive clauses in an acquisition agreement?

The main substantive clauses in an acquisition agreement are:

- Parties.
- Recitals.
- Definitions.
- Scope.
- Price, price adjustments and payment. Fines and interest applicable in case of default.
- Conditions precedent.
- Closing and closing actions/deliverables.
- Term to close the transaction (a longstop date provision).
- Representations and warranties.
- Indemnification.
- Guarantees.
- Non-compete, non-solicitation, and confidentiality.
- Conduct of the business up to closing.
- Responsibilities for anti-trust and other regulatory clearances.
- Governing law, jurisdiction and dispute resolution.
- Termination.

### 13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

The vast majority of share purchase agreements involving Brazilian companies provide for Brazilian legislation to apply. It is questionable, and would create uncertainty, to choose a foreign law to govern the purchase of shares of a Brazilian entity. Assuming the transaction refers to the purchase of quotas/shares in a Brazilian company, it is unlikely for purchase agreements to be governed by foreign law.

In theory, where arbitration (as opposed to courts) is chosen as the method for dispute resolution, the share/quota purchase agreement can provide for a foreign governing law, to be applied by a national or international arbitration panel. Specific formalities under local law to transfer the quotas/shares will still apply (*see Question 24*).

If the purchase agreement provides for choice of forum in Brazil, Brazilian legislation will apply. Article 8 of Decree Law 4,657/42 (*Lei de Introdução ao Código Civil*) provides that the law of the place where the goods are situated applies, to govern the obligations related to them.

## WARRANTIES AND INDEMNITIES

### 14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

The seller's warranties and indemnities is one of the most important and frequent clauses in Brazilian M&A transactions. There are no exact legal rules or precedents separating the seller's and buyer's liabilities, especially in relation to fiscal and/or labour law contingencies. Solid contractual provisions governing warranties and indemnities are key to Brazilian M&A transactions.

Seller's warranties are usually extensive, covering the following main topics (and their possible exclusions), among others:

- The company is duly organised and validly existing.
- No law, judicial or administrative decision is an impediment to implementing the transaction.
- The seller has obtained all required waivers, authorisations and approvals for the transaction.
- The financial statements have been properly made and include all assets and liabilities of the company.
- The company complies with the law, especially labour, social security, tax, consumer, intellectual property, anti-trust, environmental, and anti-corruption laws.
- The shares are owned by the seller and there are no encumbrances over them.
- Licences, registrations and authorisations exist and are valid.

Seller's indemnity provisions typically cover breach of representations and warranties, and also debts and contingencies referring to acts or omissions prior to closing.

What are the main limitations on warranties?

Typically, the limitations on warranties may be the following:

- Information provided through due diligence or by reference to disclosure schedules attached to the purchase agreement may be excluded from indemnity obligations.
- Limitations on the amount are normally negotiated (cap, *de minimis*, and materiality limitations).
- When there is a time limit on the seller's indemnity obligation, it is normally set at five years from the closing date, or until the statute of limitation relating to each contingency has elapsed. Typically, but not necessarily, seller's indemnification obligations cover liabilities, losses and claims relating to facts occurring before closing.
- Risks or disputes relating to the whole market or sector in which the company operates, which may be considered a market risk and not a legal risk particular to the target company.

### 15. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

**Remedies**

The main remedies for breach of warranty are:

- Indemnification, as established in the purchase agreement, with possible compensation/offsetting against future instalments of the purchase price, or payment out of an escrow account. There may also be offsetting provisions regarding other post-closing payments due to the seller, for example under lease or service agreements.
- Legal remedies for contractual breach, including specific performance.

**Time limits for claims under warranties**

The statute of limitation for claims connected to indemnifications in general (time limit to seek indemnification for torts) is three years (*Article, 206(3)(V), Civil Code*) from the date of the loss.

Under share/quota purchase agreements, it is possible to govern the subject by contract. It is important to do so in detail, to avoid the risk of application of the very short time limits provided for in Articles 445 and 446 of the Civil Code.

## CONSIDERATION AND ACQUISITION FINANCING

### 16. What forms of consideration are commonly offered in a share sale?

**Forms of consideration**

Cash is the main form of consideration offered in share sales. The terms and conditions regulating payments in cash vary significantly, depending on the characteristics of each transaction.

Payments can be made in a lump sum or in instalments. In the latter case, parties often establish mechanisms that allow offsetting of indemnity claims against future payments.

Escrow accounts are also often used as security for indemnity obligations undertaken by sellers. The purchase price can be deposited in such accounts in part or in full. Moreover, the amounts held in escrow can be released in one or several instalments. Contingent and earn-out payments are also common in M&A transactions in Brazil.

Non-cash assets are commonly offered as consideration in sales of shares/quotas. Examples are shares/quotas (in the buyer or another company) and real estate.

Another common form of consideration is the assumption of liabilities and obligations of the target company. This usually involves the acquisition of distressed companies.

**Factors in choice of consideration**

Various factors influence the choice of consideration. Generally, such choice tends to be affected by:

- The characteristics of the parties involved.
- The goals of each of the parties.
- Macro and micro-economic factors.

Common factors that influence such choice are:

- Level of indebtedness of the target or of its corporate group.
- Nature of contingencies and liabilities of the target or of its corporate group.
- Financial constraints from the buyer's side.
- Whether the seller will exit the target company or retain an interest in it.
- If the parties want to incentivise the sellers to contribute to the target's activities after the transaction.
- The ability of both the seller and the buyer to offer security (the first for indemnity obligations and the second for the purchase price).
- Need for cash on the seller's side.
- Availability and cost of credit to finance the transaction.
- Commercial/strategic reasons.

- Market specific circumstances.
- Tax issues.
- Timing.

**17. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?**

### Structure

The structure of the transaction largely depends on whether the share issue is private or public. Issues of shares to the general public are more complex, costly and time-consuming compared to private issues.

Debt issues are also common in Brazil to raise funds to finance acquisitions.

### Consents and approvals

**Private issues.** Depending on what is stated in the company's bye-laws, the general meeting of shareholders and/or, in certain circumstances, the board of directors must approve the issue of shares. Unless the company's bye-laws establish a higher threshold, share issues must be approved by majority voting. This approval must be formalised by appropriate corporate resolutions, which must be registered in the competent Commercial Registry and published in the Official Gazette and an ordinary newspaper. The shareholders have at least 30 days to exercise pre-emptive rights to subscribe new shares.

Limited liability companies can also raise funds for acquisitions through private issues of quotas. Holders of at least 75% of the company's quotas must approve the issue, which must be formalised through amendments to the company's articles of association. This corporate document must also be registered with the competent Commercial Registry. Quotaholders also have at least 30 days to exercise pre-emptive rights to subscribe new quotas in the company.

Share issues by companies that carry out regulated activities (for example, financial institutions and insurance and public utility companies) are often subject to specific regulations.

**Public issues.** Only Brazilian corporations can publicly issue and trade shares. In addition to private consents and approvals (*see above, Private issues*), the issuer must register the share issue with the Brazilian Securities and Exchange Commission (CVM) (*www.cvm.gov.br/ingl/indexing.asp*). The São Paulo Stock Exchange (*BM&FBOVESPA*) must also approve the transaction.

### Requirements for a prospectus

The main documents to be prepared/presented in public issues of shares are the following:

- Offering registration request.
- Prospectus.
- Financial statements.
- Drafts of public announcements.
- Agreements executed with the underwriters.
- Minutes of corporate resolutions.
- Bye-laws.
- Reference form (containing detailed information about the issuer).

The prospectus must meet the disclosure requirements established under CVM Instruction no. 400/03. The issuer must disclose information about the following matters, among others:

- Summary of the issue.
- Issuer's management, advisers and consultants.
- Securities issued.
- Issue characteristics.
- Issuer and its business.
- Financial statements.
- Risk factors.
- Guarantors.
- Details about the distribution agreement and other agreements related to the issue.

**18. Can a company give financial assistance to a potential buyer of shares in that company?**

### Restrictions

Under Brazilian law the concept of financial assistance is not expressly established. As a rule, target companies are not prevented from providing funds to potential buyers for the purpose of financing the acquisition of their own quotas/shares.

However, if the buyer is a related party to the target company's controlling shareholder or any of its officers or directors, the financing transaction must be entered into on an arm's length basis (*Articles 117(1)(f) and (2) and 156(1), Corporations Law*).

### Exemptions

Not applicable.

## SIGNING AND CLOSING

**19. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?**

### Signing

Documents commonly produced and executed at signing meetings include:

- Acquisition agreement (for example, share/quota or asset purchase agreement).
- If it is not a 100% acquisition, a draft of the shareholders' agreement.
- Documents formalising guarantees or security interests.
- Power of attorney (if any of the parties is not present).
- Corporate resolutions approving the transaction and giving authority to enter into the transaction documents.

### Closing

Documents commonly produced and executed at closing meetings include:

- Closing protocols.
- Documents formalising the transfer of the shares/quotas or the assets (*see Question 24*).
- Corporate resolutions approving the transaction and giving authority to enter into the transaction documents.

- Relevant agreements (for example, transition, consultancy, escrow, employment and lease agreements).
- Shareholders' agreements in cases involving partial acquisitions of shares/quotas.
- Waivers of pre-emption rights.
- Evidence of consent of third parties (for example, creditors and landlords).
- Restatements of representation and warranties.
- Documents evidencing payment of the purchase price.
- Resignation and appointment letters.
- Documents formalising guarantees or security interests.
- Release of any security and/or guarantees relating to the shares/quotas and/or assets of the target.

### 20. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

#### Sales of equity interest

As a rule, private instruments to sell shares/quotas must comply with a few formalities:

- Two witnesses usually execute the agreement, since this is one of the requirements for a private document to be considered an extra-judicial execution title.
- Although not mandatory, notarisation of signatures is also common in transactions governed by private documents.
- Purchase agreements are usually executed as a private document, with some exceptions (for example, agreements for the acquisition of real estate).

Public deeds must follow the formalities applied to each specific document and be drawn up by a public notary.

#### Sale of a going concern

Acquisitions of going concerns are subject to certain formalities:

- Agreements governing such transactions must be filed with the relevant Commercial Registries and published in the Official Gazette.
- If, as a result of the acquisition, the remaining assets owned by sellers are not sufficient to cover their obligations, transfers of going concerns are contingent on settlement of all outstanding debts before creditors or the creditors' approval.

### 21. What are the formalities for the execution of documents by foreign companies?

Formalities vary depending on the circumstances. Generally, for foreign documents to be valid in Brazil, it is necessary to provide their notarisation, legalisation and sworn translation. In some cases, documents need to be registered with a registry of deeds and documents. Such procedures are relevant in case foreign parties attempt to enforce rights in Brazil.

Moreover, foreign shareholders/quotaholders are required by statute to grant specific power-of-attorneys to persons resident in Brazil to formally represent the foreign investor in corporate resolutions. Such documents are subject to the above procedures.

### 22. Are digital signatures binding and enforceable as evidence of execution?

Under Brazilian law digital signatures are binding and enforceable as evidence of execution agreements (*Article 10, Provisional Measure 2.200-2/01*).

In practice documents governing M&A transactions are almost always physically executed, as the procedure for collecting digital signatures is considered relatively complex.

### 23. What formalities are required to transfer title to shares in a private limited company?

Transfers of registered shares are effected through transfer terms stated in the company's Book of Transfers of Registered Shares, which must be dated and signed by both the transferor and transferee. After the transfers take place, the management has to update the company's Book of Registered Shares. This whole process is straightforward, does not involve public bodies, is not public, and does not involve amending the company's bye-laws.

Transfers of quotas in limited liability companies are effected through amendments to the company's articles of association. Transfers of quotas only bind third parties on registration of the amendment to the articles of association in the Commercial Registry (*Article 1,057, Civil Code*). Such transfers are therefore made public.

## TAX

### 24. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

#### Share sale

There is no tax on share/quota transfers in Brazil, except for corporate taxes on share/quota sales (*see Question 27*).

Tax on financial transactions (IOF) is levied if non-residents in Brazil sell or buy shares/quotas.

#### Asset sale

The following taxes are payable on a sale of assets or goods:

- Real estate transfer tax (ITBI). This is a municipal tax charged on transfers of real estate properties and rights. The applicable rate can vary from 2% to 6%. The buyer is responsible for paying this tax.
- Tax on industrialised products (IPI) at a rate up to 25%, and tax on the circulation of goods and services (ICMS) which generally applies at 18%. Such taxes are levied on a sale of assets accounted as current assets. Sales of assets accounted as permanent and fixed assets are not subject to IPI and ICMS.
- IOF is levied if non-residents in Brazil sell or buy assets.

### 25. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

#### Share sale

IOF is charged at a rate of 0% for currency exchange transactions related to both the inflow and outflow of funds for investments performed under Resolution CMN No. 2.689/00, and for equities that are publicly traded.

### Asset sale

See *Question 25, Asset sale*.

## 26. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

### Share sale

Corporate income tax (IRPJ) and social contribution on net profit (CSLL) are payable on sales of shares/quotas. They are levied at an aggregate rate of 34% on the difference between the sale price and the purchase price of the shares/quotas (the capital gain).

Share/quota sales (accounted as current assets) are also subject to the contribution to the social integration plan (PIS) and the contribution for social security financing (COFINS). They are levied at an aggregate rate of 4.65%. However, sales of shares/quotas accounted as permanent and fixed assets are not subject to PIS and COFINS.

The following taxes are levied on sales of shares/quotas involving individuals or non-resident individuals or entities:

- Individual income tax (IRPF) is charged on capital gains earned by Brazilian residents, at a rate of 15%.
- Non-resident withholding tax (IRRF) is charged on the profit made from sales by non-resident individuals or entities, at a rate of 15% (residents in a low-tax or privileged jurisdiction are subject to IRRF at a rate of 25%).

### Asset sale

The taxes potentially payable on an asset sale are the following:

- IRPJ and CSLL at an aggregate rate of 34%, on the difference between the sale price and the book value of the assets (capital gain).
- PIS and COFINS (9.25% under the non-cumulative regime and 3.65% under the cumulative regime) are levied on sales of assets booked as current assets.

The following taxes are levied on sales of shares/quotas involving individuals or non-resident individuals or entities:

- IRPF is charged on the capital gain made from sales by Brazilian-resident individuals, at a rate of 15%.
- IRRF is charged on the profit made from sales by non-resident individuals or entities at a rate of 15% (residents in a low-tax or privileged jurisdiction are subject to IRRF at a rate of 25%).

## 27. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

### Share sale

Generally, the structures used to minimise tax burdens in Brazil are based on holding companies, vehicle companies and investment funds. However, the tax authorities can question and disregard these structures, where there is shown to be a lack of economic substance and/or business purpose for using them.

**IRPF (residents in Brazil).** Net gains are exempt from income tax if they both:

- Are earned by individuals in transactions with shares traded on a stock exchange market.
- Do not exceed BRL20,000 a month.

Additionally, there is a full exemption from tax on capital gains arising from sales of shares/quotas acquired and maintained by individual taxpayers for at least five years (*Article 4, Decree-Law No. 1.510/76*). However, this exemption only applies to shares acquired between 1976 and 1983, as this provision was subsequently repealed by Article 58 of Law No. 7.713/88.

Full exemption is also applicable on capital gains arising from sales of specific shares on the Brazilian stock exchange market (under rules established by Provisional Measure no. 651/14). This only applies for sales related to small and medium companies (market value under BRL700 million, before the relevant IPO).

If the transfer of shares is structured as a gift, the Tax on Inheritance and Donation (ITCMD) is also levied. The ITCMD tax basis is the equity value of the shares being transferred. The ITCMD rate varies (up to 8%) depending on the donor's residence. Illustratively, São Paulo provides an exemption of up to BRL48,000 of donations for each consecutive 12-month period.

**IRRF.** Non-resident investors who are not based in a tax haven listed on the Brazilian Black List (Normative Instruction RFB 1.037/10) who carry on investments in Brazil are exempt from tax on capital gains earned on transactions on the Brazilian stock exchange market (under rules established by the Brazilian Monetary Committee (CMN), under Resolution 2.689/00).

### Asset sale

**PIS and COFINS.** Disposals of permanent and fixed assets are not subject to PIS and COFINS.

**IRPF.** If individuals are selling real estate properties, tax reductions apply based on the time that the individual holds the property and if he/she uses the funds from the sale to acquire a new real estate property.

## 28. Are other taxes potentially payable on a share sale and an asset sale?

ITCMD is also levied when the transfer of shares is structured as a gift (*see Question 28*).

## 29. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Brazil does not have any group taxation or consolidation tax system for companies belonging to the same group. It is not possible to offset tax losses of the target against profits of the buyer after acquisition.

However, there are tax advantages for amortisation of goodwill/premium paid in the acquisition followed by the merger of the target company, if there is business purpose and economic substance for making the transaction.

# EMPLOYEES

## 30. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

As a rule, there are no employee information or consultation obligations on a share/quota or asset sale.

The law considers employment agreements to be personal, concerning the employee only. This means that the employer can change during the employment relationship, without interfering with the agreement's effectiveness as regards the employee.

Brazilian law authorises a change of employer, without consultation of or authorisation from the employee. However, any change in the company structure or ownership must conserve the labour contracts and all rights acquired by the employee.

### 31. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

In Brazil, there is no specific legal protection for employees against dismissal without cause in a share or asset sale, even in a transfer of an undertaking.

In a business sale, unless the previous owner has dismissed the employees, the employment contracts are automatically transferred to the buyer, which becomes responsible for complying with the labour obligations of the previous employer.

Under Brazilian law, transfers of business units (*see Question 7*), in full or in part, result in the succession of employers, that is, the buyer automatically replaces the seller as the employer.

If the buyer intends to maintain the employment contracts, it is necessary to formalise the transfer of employees. In this case, the employees must be informed about the new employer and/or any changes to their contracts (which cannot impose any detrimental condition on the employee).

The buyer may also be liable even if the buyer does not maintain the workforce, especially if the seller extinguishes its activity or the target company is wound up. Prior termination or transfer of the employees to another company does not annul the liability of the buyer for the accrued labour rights.

In the event of termination of the employment agreement by the employer without cause, the employee is entitled to:

- Receive an indemnified notice (in the amount of his monthly salary).
- Withdraw the total Government Severance Indemnity Fund (FGTS) deposits made by the employer in his FGTS account, plus interest, monetary adjustment and a 40% fine based on the total amount deposited.

When a company intends to terminate employment agreements (particularly if there will be a mass dismissal), it is advisable to:

- Check the employment contracts and collective bargaining agreements, especially with respect to job tenure and rules governing termination.
- Assess whether it is advisable to discuss the matter with the relevant trade union as a cautionary measure.

## PENSIONS

### 32. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes for employees are not so common in Brazil. This type of scheme is most often adopted by large companies.

If the seller transfers employment agreements to the buyer, the buyer must comply with all the terms and conditions previously agreed with the employees.

The succession of employers (*see Question 32*) does not allow modification of employment conditions that is not formally authorised by the employee. Further, even on the employee's authorisation, modifications to employment conditions with detriment to the employee are null and void.

However, this general rule in principle only applies for labour purposes, and has not been applied as strictly to social security relations. The Supreme Court has held in some cases that matters regarding employees' private pensions schemes should not be decided by labour courts.

Therefore, each individual case must be analysed, considering the type of private pension scheme and the agreements between the parties.

## COMPETITION/ANTI-TRUST ISSUES

### 33. Outline the regulatory competition law framework that can apply to private acquisitions.

**Triggering events/thresholds**

Under Article 90 of Law 12,529/11 (Competition Law), and provided the thresholds below are met, the following transactions must be notified to the Council for Economic Defence (CADE) (*www.cade.gov.br*):

- Mergers between independent firms.
- Acquisitions of control of companies.
- Acquisitions that do not involve transfers of control but satisfy certain minimum thresholds.
- Consolidations of companies.
- Associative agreements, consortiums or joint ventures (consortiums for participating in public bids are not considered relevant transactions).

The Competition Law adopts a two-tier test for determining which transactions must be subject to merger review. Such statute requires that both (*Article 88, Competition Law, together with Inter-ministerial Ordinance 994/2012*):

- One of the parties involved in the transaction has in Brazil group annual revenue of at least BRL750 million.
- Another party to the deal has in Brazil group annual revenue of at least BRL75 million.

**Notification and regulatory authorities**

Brazil adopts a pre-merger review system. Accordingly, mergers meeting the above thresholds have to be previously cleared by CADE as a condition precedent to their implementation.

Transactions subject to mandatory filing that are effected before being cleared by CADE are regarded as null and void, and the parties involved can be subject to fines from BRL60,000 to BRL60 million.

CADE is also authorised to review transactions on a retrospective basis, within one year of consummation of the deal, even if the revenue of the groups involved falls below the above thresholds.

**Substantive test**

In Brazil there is no substantive test for triggering the duty to subject transactions to merger control. Such a test existed under the previous Competition Law (*Law 8,884/94*), but was abolished in 2012. Under the Competition Law in force, the test in question is of an objective nature.

## ENVIRONMENT

**34. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?**

Before competent authorities, the owner or possessor of the real estate property is liable for clean-up of contaminated land, even if such person/entity was not responsible for contaminating the soil. However, the party that contaminated the land can be subject to criminal and administrative sanctions.

### Share sale

The target company that owns or possesses the land is liable for clean-up of the soil, even if there is a change in its ownership structure.

However, the buyers of a target company can insert clauses in the acquisition agreement, establishing that the seller is responsible for indemnifying the target company (and its shareholders/quotaholders) for losses and damages relating to environmental liabilities, arising from facts occurring before the transaction. Such clauses are common in Brazil.

### Asset sale

A buyer of real estate properties is liable to environmental authorities to clean-up the land. However, a buyer can contractually establish that the seller is responsible for indemnifying the buyer for losses and damages related to environmental contingencies, relating to facts that took place before the acquisition. Such clauses are common in Brazil.

# Practical Law Contributor profiles


**Luís Gustavo Haddad, Partner**

Lilla, Huck, Otranto, Camargo Advogados
T +55 11 30381010
E luis.haddad@lhm.com.br
W www.lhm.com.br


**Professional qualifications.** Graduated in Law from Universidade de São Paulo, 2000; Master's Degree in Civil Law from Universidade de São Paulo, 2009; Doctorate Degree in Civil Law from Universidade de São Paulo, 2013.

**Areas of practice.** Corporate law; corporate and capital market issues; corporate contracts; debt restructuring; funding and financial markets; mergers and acquisitions (M&A); regulatory and competition authorities.

**Languages.** Portuguese, English


**Bruno Robert, Partner**

Lilla, Huck, Otranto, Camargo Advogados
T +55 11 3038 1010
E bruno.robert@lhm.com.br
W www.lhm.com.br


**Professional qualifications.** Graduated in Law from Universidade de São Paulo, 2003; Specialisation degree in Economics from School of Economics of Fundação Getulio Vargas, 2006; Masters in Corporate Law from Universidade de São Paulo, 2009; LLM in Financial and Securities Regulation from the School of Law of Georgetown University, 2010; Doctorate Degree in Corporate Law from the Universidade de São Paulo, 2014.

**Areas of practice.** Corporate law; corporate and capital market issues; corporate contracts; debt restructuring; funding and financial markets; mergers and acquisitions (M&A).

**Languages.** Portuguese, English, French

**João Paulo de Seixas Maia Krepel, Partner**

Lilla, Huck, Otranto, Camargo Advogados
T +55 11 3038 1010
E joao.krepel@lhm.com.br
W www.lhm.com.br

**Professional qualifications.** Graduated in Law from Universidade de São Paulo, 2003; Specialisation degree in Economics from School of Economics of Fundação Getulio Vargas, 2006; LLM from Columbia University, 2010

**Areas of practice.** Tax law.

**Languages.** Portuguese, English

**Fabio Weinberg Crocco, Partner**

Lilla, Huck, Otranto, Camargo Advogados
T +55 11 3038 1010
E fabio.crocco@lhm.com.br
W www.lhm.com.br

**Professional qualifications.** Bachelor of Laws from São Paulo Law School (EDESP) Fundação Getúlio Vargas (FGV); Master of Laws (Magister Juris) with distinction from the University of Oxford, earned the Clifford Chance Proxime Accessit Prize for Outstanding MJur Achievement for the second best performance in the programme

**Areas of practice.** Corporate law; corporate and capital market issues; debt restructuring; funding and financial markets; intellectual property and technology; regulatory and competition authorities.

**Languages.** Portuguese, English, Italian