Brazil

Negotiated M&A Guide 2022

IBA Corporate and M&A Law Committee

Contacts

Rodrigo Ferreira Figueiredo

Mattos Filho, São Paulo

rodrigof@mattosfilho.com.br

1. INTRODUCTION

This guide provides an overview of the law and practice dealing with private M&A transactions in Brazil. This guide does not constitute legal advice. Anyone involved in private M&A transactions should seek specialist advice.

1.1 M&A in Brazil: history, recent developments and trends

1.1.1 History of M&A in the country

The M&A boom in Brazil occurred in the mid-1990s, as a result of globalisation and the creation of transnational conglomerates. Global market liquidity and low interest rates in developed countries were the main factors that led foreign investors to seek investments in developing countries such as Brazil, with the United States, France, Spain and Portugal mainly participating in cross-border M&A transactions involving Brazil. According to KPMG,[1] the M&A market in Brazil increased by 44 per cent in the 1990s, and 61 per cent of the 2,308 transactions completed in this period involved foreign capital.

The years from 1990 to 1993 are when Brazil first opened its economy to international investments. Along with privatisations and market concentration, the main M&A transactions took place in the chemicals/petrochemicals and the metallurgical/steel industries. The years from 1994 to 1997 were marked by the adoption of the Brazilian Real (BRL) as the official Brazilian currency. The financial, electronics and auto parts industries saw the most significant M&A transactions of the period, with 1997 emerging as the year with the most M&A transactions of the decade. From 1998 to 2000, other industries such as telecommunications and information technology took the lead with the most significant M&A transactions.

Since the opening of the Brazilian economy to international investment in the mid-1990s, M&A has become a common vehicle for non-residents to establish businesses in Brazil. It is an attractive market for international investors due to several factors, including a domestic market of nearly 213 million people, a growing middle class, a diversified and stable economy, abundance of natural resources, and a strategic geographic position that allows easy access to other South American countries.

Brazil currently ranks as the 12th largest economy worldwide and it is the largest economy in South America. It is one of the largest recipients of foreign direct investment in the world and the largest in Latin America.

In 2021, despite the effect of the Covid-19 pandemic on Brazil's economy, the number of mergers and acquisitions transactions in Brazil increased by 51 per cent compared to 2020, with a value of BRL 595.5bn (approximately US$116.68bn), with the technology industry showing the most representative growth.[2] In 2021, foreign direct investment in Brazil totalled USD 46.4 billion, compared with USD 37.8 billion in 2020, representing an increase of 23 per cent. In 2021, Brazil's largest investor was the US. Investments were made in a variety of industries, including internet, information technology, financial services, electricity, food, logistics, retail, and oil and gas.

---

[1] *Mergers & Acquisitions in Brazil An analysis of the 90's* (KPMG), see kpmg.com.br/publicacoes/corporate_finance/structuredfinance/fa_90s.pdf, accessed 7 September 2022.

[2] Cristiana Euclydes,'Fusões e aquisições no Brasil crescem 51% em 2021, puxadas pelo setor de tecnologia' (Valor Investe, 25 January 2022), see https://valorinveste.globo.com/mercados/renda-variavel/empresas/noticia/2022/01/25/fusoes-e-aquisicoes-no-brasil-crescem-51percent-em-2021-puxadas-pelo-setor-de-tecnologia.ghtml.

1.1.2 Recent developments – impact of Covid-19

Although the Civil Code (see section 1.2.1 has general *force majeure* provisions that may apply to M&A agreements, M&A agreements have traditionally expressly included *force majeure*-type provisions, with the purpose of delimiting or providing further instructions on the determination of what events should be covered under the *force majeure* definition.

In our recent experience with legal discussions arising from Covid-19, we noted that not only the counsels, but the parties themselves are giving more attention to the *force majeure* definition and willing to effectively negotiate its terms and conditions as a manner of allocating the risks among them. Also, *force majeure* events have typically resulted in the termination of M&A agreements, excusing the parties from closing the transaction without penalties, but more recently we have seen signs indicating that parties and arbitrators might also be thinking of applying *force majeure* provisions to specific post-closing obligations such as earn-out and deferred payments.

1.1.3 Trends

The Covid-19 pandemic appears to have accelerated certain trends, which may also be seen in the Brazilian M&A market. There has been increased activity in technology-related M&A, healthcare and venture capital transactions. In 2021, investment in Brazilian start-ups reached R$46.5bn (approximately USD$9.3bn), an increase of 219 per cent in comparison with the previous year. Among the most active sectors were the financial sector (fintech), insurance, retail and healthcare.

1.2 Brief introduction to the legal landscape applicable to M&A transactions (including foreign investment policy, relevant statutes, relevant statutory bodies or regulators).

1.2.1 Legal landscape

In Brazil there is no specific law governing M&A transactions. Therefore, M&A transactions are subject to the general provisions applicable to contract and corporate law.

The contract and corporate legal system in Brazil are subject to the general principles of the Brazilian Federal Constitution and are governed, primarily, by Law No. 10,406/2002 (the Civil Code), which governs business contracts and corporate entities formation and operation, including limited liability companies (*sociedade de responsabilidade limitada*), and by Law No. 6,404/1976 (the Corporations Law) that governs publicly and privately held corporations (*sociedades por ações*), as well as certain limited liability companies on a complementary basis.

1.2.2 Relevant statutory bodies

Corporations (*Sociedades por ações*) and limited liability companies (*Sociedades de responsabilidade limitada*) are the types of entities that mostly receive foreign capital, due to having a structure clearly set by the relevant law and which is adequate for conducting lucrative businesses. Both those types of entities are managed by one or more officers, who have the power to represent the company.

Other bodies that shareholders may be created to assist with the corporate governance of Brazilian companies, and which are more commonly seen on corporations than in limited liability companies, are:

- the board of directors, which works in a deliberative manner as a group (ie, actions taken pursuant to the voting powers of its members) to oversee actions taken by the officers and review their accounts; and
- other specific consulting committees that might be created to assist the board of directors, such as the audit committee which might be required for certain public companies under the stock exchange rules.

Pursuant to the Brazilian Corporations Law, corporations are also required to have a fiscal council (which may operate in perpetuity or only be put in place when expressly requested by the shareholders) with the purpose of further reviewing management and board actions, as well as audited financial statements. As well as some functions that are attributed by law to the board of directors, such as the election of officers and opinion about the officers' accounts, the parties may negotiate on the company's bylaws or the shareholders' agreement to make other attributions to the board of directors, which usually includes resolutions on strategic and/or expensive obligations to the company that would only be put in practice by the officers if previously discussed and approved by the board. These actions may include the execution of agreements involving an amount above a certain threshold, or the execution of agreements with related parties, among others.

In addition to the Corporations Law and the Civil Code, Brazil has other laws which are sometimes relevant for certain aspects of M&A transactions. These include:

(a) Law No. 12,529/2011 (the Competition Law), which governs the antitrust review of mergers, and potentially anticompetitive actions in Brazil enforced by the Brazilian Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica or CADE);
(b) Law No. 13,709/18 (the Brazilian Data Protection Law or LGPD) which regulates how personal data may be processed by individuals and organisations in Brazil by establishing detailed rules for collecting, using, processing and storing personal data;
(c) Law No. 5,172/1966, the national tax code; and
(d) Law-decree No. 5,452/1943 the national labour code.

1.2.3 Relevant regulators

The primary regulatory bodies typically involved in M&A transactions in Brazil are:

(a) the Brazilian Securities Commission (CVM), which regulates investment funds commonly used as M&A vehicles (including private equity funds), administrators and portfolio managers, and transactions involving public companies and/or offerings;
(b) CADE, which is responsible for approving certain transactions that might be considered a 'market concentration';
(c) the Brazilian Central Bank and the National Monetary Council (Conselho Monetário Nacional or CMN), whenever the M&A transaction involves financial institutions or direct foreign investment; and
(d) sector-specific regulatory agencies that may impose additional rules on M&A transactions. In certain cases, they may even impose a requirement to formally review and authorise M&A transactions involving target companies. Specific industries include:
    i. energy (regulated by the Electric Energy National Agency – ANEEL),
    ii. telecommunications (regulated by the Telecommunications National Agency – ANATEL),
    iii. insurance (regulated by the Superintendency of Private Insurances – SUSEP),
    iv. pharmaceuticals (regulated by the Health National Agency – ANS) and

v. oil and gas (regulated by the Petroleum, Oil and Gas, and Biofuels Agency – ANP).

1.2.4 Foreign investment policy

Under Brazilian laws and regulations, 'foreign capital' means any goods, machinery, or equipment entering Brazil for the purpose of producing goods and services, as well as any capital brought into the country to be used in economic activities. Non-resident individuals and legal entities may invest in Brazil (1) directly, through direct ownership of interests in Brazilian companies or credit extended to a Brazilian resident individual or legal entity; or (ii) indirectly, via the Brazilian financial and capital markets.

The Central Bank has authority to create rules and oversee foreign capital in Brazil. Therefore, in anticipation for the closing of an M&A transaction, foreign individuals or legal entities investing in Brazil for the first time through a direct investment are required to arrange their relevant registration with the Brazilian Central Bank system (SISBACEN). This registration is simple and easily done with the assistance of a specialised service provider, although proof of registration may be required by the banks completing the wire transfer for purchase price payments at closing of M&A transactions.

Similarly, when the target company already foreign capital, it is advisable to confirm during the diligence process if its registration is up to date with SISBACEN. Following the completion of an M&A transaction where seller or buyer is a foreigner, the SISBACEN registration of the target company will also need to be carried out or updated as applicable, to reflect its new shareholding composition and the proportion that represents foreign capital.

There are limitations or restrictions under Brazilian law on foreign corporate control or ownership of companies operating in certain industries, such as:

(a) aerospace;
(b) media and broadcasting;
(c) mail, post and telegraph services;
(d) short sea shipping services;
(e) nuclear power; and
(f) rural land.

1.2.5 Recent legal developments

In September 2019, Law No. 13,874/2019 (known as the Brazilian Economic Freedom Law), was enacted with the purpose of supporting economic activity in Brazil by increasing freedom within private relations and reducing the bureaucracy of doing business in Brazil. The Economic Freedom Law provides, among other matters:

(a) simplification of the procedures to obtain permits and licences for initiating company activities;
(b) the possibility of the Brazilian limited liability company having a single quotaholder, as opposed to the minimum of two quotaholders that was previously required;
(c) a new chapter of the Brazilian Civil Code regarding investment funds, providing for the opportunity of limiting the liability of investment fund shareholders and facilitating the incorporation of investment funds; and
(d) rules regarding the interpretation of parties' agreements, marking a major shift towards greater party autonomy.

Moreover, several changes have been made to the Corporations Law in the past three years, altering important aspects concerning governance structures and obligations that apply to corporations. Corporations are now permitted to have only one officer – previously, a minimum of two officers was required. It is also no longer mandatory for officers to reside in Brazil if they appoint a local representative who can be served with proceedings in lawsuits or proceedings. This appointment must be made by means of a power of attorney, which needs to be valid for at least three years after the respective term of office ends.

In addition, largely incentivised by Covid-19 social distancing recommendations, various changes have enabled remote participation at shareholder meetings; remote voting ballots are now permitted for both publicly held and privately held companies. Under CVM and National Department of Business Registration and Integration regulations, shareholders may submit their votes for items on the agenda before the meeting takes place. Private and publicly held companies are also now permitted to hold shareholder meetings exclusively online. Hybrid shareholder meetings are also permitted, with both in-person and remote voting available as options for shareholders.

1.3 Is Brazil more of a buyer-friendly or seller-friendly M&A market Brazil?

From a purely legal perspective, largely following the *pacta sunt servanda* principle, Brazil does not tend to be more seller or buyer friendly. Contractual provisions negotiated in good faith are enforceable against parties to an M&A agreement as long as those contractual provisions do not infringe the applicable law, and are subject to very few and exceptional limitations (such as the *force majeure* protection mentioned above). Brazilian law also provides that the real intention of the parties embodied in the agreement shall prevail over the literal reading of the provisions.

Further, parties to an M&A agreement should bear in mind that arrangements among them are not always enforceable against third parties. This applies in the case of responsibility for contingencies, for instance. If a contingency arising prior to the transaction materialises after closing, the target company will still be liable before the relevant authorities and third parties, but the buyer may negotiate contractual recourse remedies against the seller, such as indemnification and holdback amounts to secure the recovery of amounts spent with contingencies materialised post-closing. Labour, tax, social security and other such liabilities are provided by law and cannot be changed by any kind of private agreement.

From a market perspective, given the attractiveness of the Brazilian market to both foreign and domestic investors, demand for assets in certain sectors has been consistently strong. Competitive bid processes are common, many of them attracting multiple bidders.

2. TYPE OF TRANSACTION STRUCTURES ADOPTED IN PRIVATE M&A TRANSACTIONS

2.1 Common transaction structures for M&A in Brazil

A large majority of private M&A transactions in Brazil are carried out by means of a direct acquisition by the buyer of the target company shares held by the seller, through the execution of a share purchase and sale agreement or by the direct capitalisation of the target company by the investor through the execution of an investment agreement.

Unlike other jurisdictions, M&A via acquisition of assets upon execution of an asset purchase and sale agreement is not common, because:

(a) licences and operating authorisations are linked to the companies' taxpayer registry and are not easily transferred from one company to another – the mere transfer of assets would require a long process of licence transfer/obtainment;
(b) Brazilian tax and accounting rules may result in specific tax treatments, which can be troublesome and even inefficient where specific taxes are concerned; and
(c) tax, labour, environmental and anti-corruption liabilities linked to the taxpayer registry of the target company may still be deemed to be transferred with the assets if, on a case-by-case analysis, the relevant authorities determine that a part of the business linked with such wrongdoing has been transferred with the assets.

Even in situations where only part of the business is to be acquired, the parties usually agree to a reorganisation as a condition precedent to the closing. Under this, the seller is responsible for segregating the acquired business by means of a spin-off or a drop-down to a newly formed entity that will be sold to the buyer upon closing.

2.2 Tax considerations for each structure

There are a number of relevant tax aspects to be considered in M&A transactions, from both the buyer and seller side. These can provide several challenges, due to the potentially opposed interests of the parties, a complex legal landscape, and the often-aggressive behaviour of Brazilian tax authorities against certain tax planning structures.

From the buyer's perspective, the main discussions relate to the possibility of generating tax-deductible goodwill in the transaction. Since Brazilian tax authorities are known for challenging goodwill tax deductions, based both on the need for compliance with strict rules and on their adoption of a substance-over-form approach, it is very important to carefully design the acquisition structure to maximise tax deductions and mitigate tax exposures.

From the seller's perspective, the main concern is usually related to the taxation of capital gains. In this regard, several discussions may arise regarding pre-sale reorganisations – structuring the reorganisation to benefit from a potentially more beneficial tax regime, applicable rules for the calculation of capital gain taxes, mechanisms for withholding taxation regarding non-Brazilian sellers and, depending on the acquisition structure, taxation of dry income. Likewise, a careful evaluation of the transaction structure itself will also be important to minimise tax impacts and risks.

2.3 Specific compliance considerations relevant to each structure

Under Brazilian Law No. 12,846/2013 (Anti-Corruption Law), liability for breaches of the Anti-Corruption Law may reach beyond the entity directly involved in corruption actions. Pursuant to joint and several liability rules implemented by such statute, controlling companies, subsidiaries, affiliates, and consortia partners (within the scope of the relevant agreement) may become liable for fines and payment of damages imposed against an implicated entity in the event of enforcement.

Based on this, the acquisition of assets as opposed to equity acquisition would, in principle, mitigate the liability risk. However, Anti-Corruption Law liability depends on a case-by-case analysis, and authorities may still attempt to transfer the liability to the buyer of the assets if they consider that the business has ultimately been transferred to the buyer along with the assets. In this scenario, authorities could claim that the transaction was structured as an asset sale to evade liability, and that it should be treated as an equity sale for purposes of successor liability.

3. PRE-AGREEMENT DOCUMENTATION

Unless confidentiality undertakings by the buyer are covered by any other pre-agreement document, a non-disclosure agreement (NDA) is typically the first pre-agreement document to be executed in the context of an M&A transaction. The purpose of the NDA is to grant a certain degree of protection to the seller as to the confidentiality of any information provided to the buyer for their due diligence and price offer. Besides delimiting what should be treated as confidential information, as well as the protection to be given by the buyer around such confidential information, and the persons who may have access to that information and for which purpose, an NDA may also include non-solicit and non-compete obligations to protect the seller from having its clients and employees solicited by the buyer, as well as the buyer using the target company confidential information to compete with the target company business.

Term sheets, non-binding offers, memoranda of understanding, letters of intent or other equivalent instruments are also pre-agreement documents commonly executed in the context of M&A transactions. Their purpose is to document the key terms of the transaction, particularly its scope, the main terms and conditions that should guide negotiations, and the initial terms of the legal and business relationship to be developed between the parties.

The main matters usually provided in these preliminary agreements are:

(a) a description of the target company or assets;
(b) price and payment conditions;
(c) main condition precedents;
(d) due diligence procedures;
(e) transaction and auxiliary agreements that may need to be negotiated (for example, investment agreements, shareholders' agreements, services agreements, non-compete and/or non-solicitation agreements, among others);
(f) confidentiality;
(g) exclusivity commitments;
(h) governing law; and
(i) dispute resolution.

Pre-agreement documents are often non-binding agreements between the parties as they are not obliged to execute a definite agreement, except for a few binding provisions such as confidentiality, exclusivity, dispute resolution and applicable law provisions. Notwithstanding this non-binding characteristic, some conducts are advisable to execute to ensure these pre-agreement documents are treated as a 'preliminary document', not a 'preliminary agreement' from a Brazilian law perspective; this could result on a damage claim by the party whose intentions were frustrated upon non-completion of the transaction by the other party's decision or even an attempt to enforce the execution of the definitive agreement. These recommended conducts are:

(a) expressly indicating in the pre-agreement document that the parties do not wish that document to be biding;
(b) expressly indicating in the pre-agreement document that any party may unliterally cease negotiating, at its own discretion and at any time; and
(c) always follow good faith principles throughout negotiations and interactions with the other party.

4. DILIGENCE STAGE

4.1 Points to be cognisant of

As well as the financial due diligence that is carried out by the buyer with the assistance of its financial advisers, for M&A transactions conducted in Brazil the buyer typically engages an accounting firm to review procedures and accounts of the target company, as well as legal counsel to conduct legal due diligence.

The legal counsel's role is to review the main legal aspects involving the target company that are considered by the legal counsel to be relevant, for the buyer's consideration and knowledge in the context of the potential M&A transaction. The documents disclosed for the due diligence by the target company are usually made available on a virtual data room, and the legal counsel analyses the documentation. Brazilian legal due diligence usually encompasses analysis of risk in accordance with the materiality criteria previously agreed with the client, from documents and information relating to the following.

4.1.1 Corporate documents

The main purpose is to assess if the seller has title of the shares subject to the M&A transaction, and if there are any liens or encumbrances on the shares that may impact the transaction.

4.1.2 Commercial agreements

The main purpose is to review commercial agreements executed by the target company, such as supply agreements and client agreements, and identify provisions that may present a restriction to the M&A transaction. These may include early termination of a relevant agreement, or the risk of having relevant agreements being terminated for no cause by the other party.

4.1.3 Financial arrangements

The main purpose is to identify provisions that may present a restriction to the M&A transaction, such as early termination of financial agreements that are triggered by a change of control or any other corporate reorganisation expected to happen in the context of the M&A transaction.

4.1.4 Banking

The main purpose is to review the target company compliance with Central Bank rules about foreign investment.

4.1.5 Intellectual property

The main purpose is to review the proper ownership or right to use the intellectual property used by the target company on its operations, such as trademarks, signs and patents, as well as identify whether there is any risk of having third parties claiming ownership of those intellectual properties and/or obliging the company to cease their use. The National Institute of Intellectual Property (INPI) has a public database regarding registered intellectual properties; it is common for legal counsel to access this database and perform an independent search concerning the intellectual property of the target company.

4.1.6 Data privacy

The main purpose is to review the procedures put in practice by the target company to comply with data privacy regulations, including the Brazilian General Data Protection Regulation (LGPD) – particularly if the target company stores, processes, transfers or otherwise has access to personal data or holds interactions with public entities.

4.1.7 Real property

The main purpose is to confirm the ownership or right to use the units used by the target company to conduct its operations, review if there is any risk for the target company to be obliged to leave those properties due to any lien or encumbrance on the respective unit or due to contractual lease arrangements that are not favourable to the target company, and confirm if the target company has the real property licences required to operate.

4.1.8 Environmental

The main purpose is to confirm if the target company has the environmental licences required by the relevant environmental authorities, as well to review ongoing environmental litigation. Depending on the activities performed by the target company, if potentially polluting activities are conducted in the target company premises, the engagement of a specialised environmental firm is advisable to perform an *in loco* due diligence in the site.

4.1.9 Civil, labour and tax litigation

The main purpose is to review the ongoing litigation of the target company. With respect to the tax and labour review, there is a division in the due diligence performed by the accounting firm and the legal counsel: the legal counsel review has a scope limited to materialised contingencies, while the accounting firm reviews compliance with the applicable law and regulations and flags conducts that may potentially give cause to litigation – therefore red-flagging contingencies that are likely or possible to materialise after the M&A acquisition is completed.

Besides the legal review of the material made available in a virtual data room, the legal counsel engaged by the buyer commonly also assists with the preparation of a risk assessment of the potential contingencies identified by the accounting firm and liaises with it to mitigate and deal with those risks. In Brazil, due diligence about target company litigation is based on reports prepared by the counsels who conduct the defence of those lawsuits, and also on certificates issued by courts that indicate whether ongoing litigation is in place before different Brazilian courts. Though the certificates should ideally be provided by the seller, the buyer may also independently obtain most of those certificates. Depending on the places where the target company conducts its activities, the issuance of certificates may have to be conducted in several locations, as the authority for processing certain claims varies according to several factors.

4.1.10 Regulatory

The main purpose is to review the specific purpose certificates that the target company might be required to have if it performs regulated activities or handles regulated products, as well as any administrative proceedings before national agencies. Depending on the target company's activities, authorities such as the national sanitary agency, national army or the federal and civil police may require the procurement of certain licences to operate, and the maintenance of those licences may also be subject to certain conducts by the target company.

4.1.11 Insurance

The main purpose is to review the insurance policies held by the target company, as well as any administrative proceedings before the Brazilian Private Insurance Authority (SUSEP).

4.1.12 Antitrust

The main purpose is to review any administrative proceedings before CADE.

4.1.13 Anti-corruption compliance

If requested by the buyer, legal due diligence may also include a compliance assessment to review the effectiveness of the target company's anti-bribery and corruption policies, as well as to conduct an independent search in the public domain concerning the target company and the seller's reputation.

More recently, as companies become more conscious about the need to protect their reputation, new areas of due diligence investigation are emerging, such as environmental, social and governance (ESG) considerations and human rights considerations.

4.2 A brief overview of issues that are typically seen and how they are typically addressed

Legal due diligence findings are helpful for the buyer to assess the risks flagged in connection with an M&A transaction and, if required, to negotiate contractual remedies to be included in the transactional documents to mitigate those risks. The most common contractual strategies to deal with due diligence findings are:

4.2.1 Conditions precedent

These agree that certain actions or achievements shall be resolved and completed by the seller as a condition precedent for closing the transaction. These actions usually include the procurement or renewal of pending licences, procurement of waivers and authorisations from any third parties whose approval for the transaction is needed, or any other action agreed upon by the parties.

4.2.2 Indemnification by the seller

Regardless of the due diligence findings, it is not uncommon in Brazil for sale and purchase agreements to provide that the seller should indemnify the buyer for losses arising from facts and actions occurred before the closing of the transaction. Due diligence findings may give grounds for the buyer to negotiate for guarantees to cover for indemnification obligations, or even a holdback amount or the opening of an escrow account to hold part of the purchase price until the issues flagged in the due diligence findings no longer present a high risk.

4.2.3 Representations and warranties

Representations and warranties by the seller are typical in M&A transactional documents to deal with any matters that have not been revealed as a potential issue during due diligence but are still relevant for the buyer. Sellers are typically obliged to indemnify buyers for any breach of representations and warranties. Through the preparation of the disclosure schedules that complement the representations and warranties by the seller, the buyer can also confirm if there have been any omissions during the due diligence process.

5. MAIN TRANSACTION AGREEMENT

5.1 Formal requirements

In Brazil, the acquisition of a company, business or asset usually encompasses the negotiation and execution of a purchase and sale agreement between the buyer and the target company's shareholders or asset owner. Generally, no special formal requirements need to be followed. Share purchase agreements (SPA), quota purchase agreements (QPA), asset purchase agreements (APA), investment agreements (IA) and similar instruments are widely used; these generally resemble SPAs, QPAs, APAs and IAs commonly used internationally in cross-border transactions involving other jurisdictions. Inspired by common law agreements, the transactional agreements in Brazil tend to describe the relevant aspects by which the sale and purchase of the assets and/or equity is implemented, including details of the purpose of the acquisition, the price and payment conditions, and the general indemnification structure that will prevail following the acquisition to handle any losses incurred by the parties.

As previously mentioned, under the Brazilian Civil Code the parties are generally free to establish by contract, at their own will, their responsibilities and obligations regarding the assets and liabilities involved in the transaction and structure the contract as they desire. Since Brazilian entities and assets (including formalities regarding transfer, assignment and effects of ownership with respect to third parties) are governed by Brazilian law, in effect almost all M&A agreements in Brazil involving the direct acquisition of Brazilian entities choose Brazilian law as the governing law, to avoid any conflicts between the M&A agreement and the law applicable to the target company.

5.2 Overview of the typical key clauses in the agreements, including representations and warranties, indemnification, etc.

M&A agreements commonly foresee the execution at closing of other ancillary documents relating to the M&A transaction and the different kind of relationships between buyer, seller and the target company that may be created in the context of the transaction of completion of the M&A transaction. A draft of these ancillary documents, when applicable, are included as an exhibit to the M&A agreement. The most common agreements are:

5.2.1 Shareholders' agreements

These govern the relationship between the parties after the transaction in situations where the seller retains an equity stake in the target company, and will interact with the buyer in the capacity of shareholders to conduct the business of the company.

5.2.2 Escrow agreements

These govern the maintenance of the escrow account, where part of the purchase price is kept to guarantee the seller's indemnification obligation for a certain period.

5.2.3 Amendment to the articles of association/by-laws of the target company

These put in place the articles of association/by-laws that will govern the target company as of the closing date, when the buyer becomes a shareholder. If the target company is a corporation, the new by-laws will be approved upon execution of a shareholders' meeting minute. If the target company is a limited liability company, the new articles of association will be approved by means of an amendment to the articles of association. In both cases, these documents may also contemplate the resignation of current officers/board members and approve the election of new

officers/board members. If the target company has a board of directors, the board members are chosen by the shareholders and the officers by the board of directors.

5.2.4 **Powers of attorney**

These enable the current target company's officers to grant the newly appointed officers powers to take actions on behalf of the target company for the period necessary to complete the registration of the closing corporate documents before the relevant board of trade, therefore giving publicity as to who the new officers with powers to represent the companies are. The execution of these powers of attorney are recommended because third parties and public authorities may not recognise the new officers' representation powers until the documents electing them are duly filed before the board of trade. The powers of attorney will enable the newly elected officers to take actions on behalf of the target company as of the closing.

5.2.5 **Transitional services agreement**

This provides the rendering of services by the seller to the target company in situations where the buyer needs the seller's expertise or knowledge to fully conduct the target company's business after closing. These services agreements are usually temporary and last for as long as the parties deem reasonable for the target company to learn how to fully operate without interventions by the seller. As a variation to this agreement, when the seller is an individual who has a key position in the company, it is also possible to foresee the execution of management agreements or consulting agreements as a solution to having the seller working for the target company, even if it has sold partially or fully its equity stake.

The main clauses provided in M&A Agreements in Brazil (further to preamble, recitals, definitions, term, and other ancillary clauses) are the following:

(a) scope of the transaction;
(b) price (which may include price adjustments, earn-outs, deferred price payment holdback amounts, and applicable interest and fines in case of default);
(c) conditions precedent;
(d) conduct of the business between signing and closing;
(e) closing and closing actions;
(f) limit term to close the transaction (ie, the long-stop date);
(g) post-closing covenants;
(h) representations and warranties by the seller, the buyer and the target company (which include fundamental representations and warranties, and operational representation and warranties by the seller and the target company);
(i) indemnification provisions;
(j) guarantees;
(k) non-compete, non-solicitation, and confidentiality;
(l) responsibilities for anti-trust and other regulatory clearances; and
(m) governing law, jurisdiction and dispute resolution.

Usually, the seller's representations and warranties are given on behalf of themselves and the target company, and are extensive in covering the following main topics, among others:

(a) ownership of shares and/or assets, and confirming no encumbrances or liens over them;
(b) compliance with law by the target company, particularly with tax, labour, intellectual property and anti-corruption laws;
(c) Its organisation and valid existence in accordance with Brazilian law;
(d) confirming there are no judicial or administrative decisions or laws that would be an

impediment to implementing the M&A transaction;

(e) The existence and validity of licences, registrations, authorisations and insurances necessary for operation;

(f) confirming there is no other litigation other than those known by the buyer; and

(g) procurement of authorisations, waivers and/or approvals necessary for the transaction.

Any exception to the representation and warranties, such as a lien over the equity or asset to be sold or ongoing lawsuits relating to them, are usually listed by the seller on disclosure schedules to be included in the M&A agreement.

The buyer's representations and warranties are typically limited to the fundamental representation and warranties that refer to their solvency, capacity and legitimacy to enter into the M&A agreement, and to fulfil their obligations and consummate the transaction.

It is common for parties to agree that the seller will have the obligation to indemnify the buyer and the target company for breach of seller's representations and warranties or obligations, and for all losses incurred by the buyer and the target company as a result of actions whose triggering event occurred before closing, regardless of the disclosure of those potential contingencies in the form of a disclosure schedule. In our experience, we have also seen some transactions in which seller was not obliged to indemnify for losses previously disclosed in any disclosure schedule.

Limitations to indemnity provisions may be negotiated among the parties and may comprise:

(a) amount limits (ie, cap limitations, baskets and *de minimis* clauses);
(b) time limitations (which, in the case of Brazil, may be longer than seen in the US or in Europe); and
(c) definitions of indemnifiable losses and contingencies, especially if they involve out-of-pocket issues such as lost profits.

On the other hand, the buyer's indemnity provisions commonly cover only breach of buyer's representations and warranties or obligations. In general, sellers' and buyers' liabilities are not differentiated by rules or laws, especially in relation to labour and/or fiscal contingencies. Therefore, solid contractual provisions governing indemnities and representations and warranties are considered highly important in Brazilian M&A transactions.

Despite not being required by Brazilian law, restrictions on share or quota transfers are common in Brazilian private companies. Those restrictions are typically set in shareholders' agreements and quotaholders' agreements. The most common restrictions typically negotiated among parties are: (1) rights of first offer and first refusal, drag along and tag along rights, which are provided for in the articles of association or shareholders' agreement to the benefit of all or certain shareholders; and (ii) call options and put options provisions, among others. These restrictions are largely used by shareholders of corporations and limited liability companies in Brazil, but the drafting of those restrictions should be carefully revised by the transaction counsels to avoid restrictions on share transfers that could eventually be considered null or void for being excessively strict or unreasonable.

5.3 Specific considerations when drafting dispute resolution clauses

Most M&A agreements in Brazil have arbitration as the exclusive dispute resolution mechanism. The Arbitration Act was enacted in 1996, whereby the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was ratified and internalised in Brazil by Decree No. 4,311/2002. Brazil is also a party to the Inter-American Convention on International

Commercial Arbitration, internalised by Decree No. 1,902/1996. Since the enactment of the Arbitration Act, Brazil has become an arbitration-friendly country, with established jurisprudence favouring arbitration when freely chosen by the parties.

According to statistics published by major arbitral institutions in Brazil, most of the disputes submitted to arbitration are related to corporate matters. In 2020, 38 per cent of the arbitration proceedings initiated at the CIESP/FIESP Chamber of Conciliation, Mediation and Arbitration were related to corporate matters, while other commercial agreements and sales and services agreements ranked second and third (33 per cent and 15 per cent, respectively).

Similarly, the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil–Canada reported that 51 per cent of arbitration proceedings initiated in 2019 were connected to share purchase agreements, shareholders' agreements or similar corporate agreements, while arbitrations relating to sales and services agreements and construction agreements came second and third, representing 15 per cent and 13 per cent of the caseload respectively.

The Market Arbitration Chamber reported that 69 per cent of its ongoing caseload in 2019 related to corporate matters, while other general agreements came second with 22 per cent and construction third with 8 per cent.

There is a general impression that arbitration tends to be cheaper, faster and more efficient for resolving complex disputes when compared with court proceedings in Brazil. Also, the possibility of confidential arbitral procedures is an attractive feature for parties that are not willing to publicise their disputes.

Although the Brazilian Arbitration Act does not provide for confidentiality by default, it allows the parties to agree that any dispute submitted to arbitration should be treated as confidential – except disputes involving the public administration, which must always be public. In addition, most Brazilian arbitral institutions provide for confidentiality by default in their procedural rules, including the Market Arbitration Chamber. Consequently, disputes submitted to arbitration in Brazil are often confidential.

A minority of M&A disputes that are not subject to arbitration agreements are occasionally taken to Brazilian courts for judgments on the merits. When this is the case, most disputes are filed with the courts of São Paulo, where most Brazilian companies are headquartered, and which can be chosen by the parties as the appropriate venue for disputes arising out of an agreement or the company's by-laws. In the state of São Paulo (whose GDP represents nearly one-third of the GDP of Brazil) there are two courts of appeal dedicated exclusively to business law. Other states have also implemented specialised courts that deal with corporate disputes, including Rio de Janeiro, Minas Gerais and Rio Grande do Sul.

Finally, some cross-border M&A agreements include foreign jurisdiction clauses instead of arbitration agreements. Since 2015, the Code of Civil Procedure has expressly provided that Brazilian courts do not have jurisdiction to hear and rule cases in which the parties to an international agreement have chosen an exclusive foreign jurisdiction and the defendant raises this argument in its defence.

6. TYPICAL CONDITIONS TO CLOSING/RELEVANT REGULATORY REGIME

6.1 Typical conditions for closing

In general, the following clauses are seen as condition precedent in M&A agreements in Brazil:

(a) the obtaining of third parties' waivers for the transfer of corporate control when identified during the due diligence process that certain financial and/or commercial agreements relevant for the target company provide for restrictions on change of control;
(b) non-occurrence of events with material adverse effect to the target company and the market in which it operates;
(c) competition clearance by CADE, pursuant to the Competition Law, and antitrust authorities of other jurisdictions involved in the transaction, if applicable;
(d) other regulatory clearances by the relevant regulatory agencies, usually required for insurance companies, oil and gas, energy, telecommunications, healthcare companies and financial institutions, among other regulated sectors;
(e) the conclusion of prior corporate reorganisations when necessary to separate the part of business and assets part of the transaction;
(f) procurement or renewal of any real estate, environmental or regulatory licence or authorisation required to operate and identified as pending throughout the due diligence process; and
(g) accuracy of the representations and warranties on the closing date.

Except for a few exceptions – such as the procurement of financing by the buyer, the antitrust clearance and certain regulatory approvals that may be requested jointly by the buyer and by the seller – the seller is generally the party responsible for the necessary actions to satisfy the conditions precedent. Only the buyer would be allowed to waive any condition precedent not fulfilled by the seller.

6.2 Antitrust approval

Pursuant to the Competition Law, a transaction is subject to mandatory filing when it satisfies three cumulative thresholds:

(a) the transaction has actual or potential effects in Brazil – this effect test is typically met if the target has assets/operations and/or export sales to Brazil; however, a case-by-case analysis is advisable;
(b) the transaction amounts to a concentration – under the Competition Law, the definition of concentration includes mergers between two or more companies, the acquisition of sole or joint control, certain minority shareholding acquisitions, joint ventures, and consortia. Unlike other jurisdictions, collaborative agreements and acquisition of assets may also be regarded as reportable transactions; and
(c) the groups involved in the transaction meet the applicable revenue thresholds, ie, one group must have registered total gross revenues of at least BRL 750m in Brazil in the year prior to the transaction, and the other group must have registered total gross revenues of at least BRL 75m in Brazil in the same period. The thresholds would need to consider not only the buyer groups and the target, but also the seller group.

Non-complex transactions, such as those resulting in minor, or no horizontal or vertical, relationships are eligible to fast-track review. In those cases, CADE has up to 30 calendar days from the formal filing to issue a clearance decision. Transactions that are not eligible for fast-track review should follow the ordinary proceeding. These cases take, on average, 90–120 calendar days to be cleared, to the extent they do not raise significant concerns and/or the need for remedies. Transactions raising substantial antitrust issues may take longer to be reviewed (up to 300 days or more from formal filing) and may require remedies to be approved.

Transactions subject to mandatory filing may not be closed before obtaining final merger control clearance. Failure to comply with this standstill obligation exposes the parties to fines ranging from BRL 60,000 to BRL 60m, injunctions declaring null and void the acts undertaken in

violation of the standstill obligation, and an investigation into the parties' behaviour. CADE is entitled to seek a range of remedies in court to invalidate acts implemented without clearance.

The Competition Law provides that any conduct that has the potential to prevent, distort or in any way be detrimental to competition is an antitrust violation. Corporate defendants may be subject to fines for such violations. Fines are calculated as percentages of the gross revenues recorded by the company, group or conglomerate in the fiscal year prior to the launching of the investigation.

The Competition Law also contemplates nonmonetary sanctions and directors, and officers are also subject to fines. In the course of investigations, the Brazilian Antitrust Authority has comprehensive powers, including the power to search companies and seize documents or other appropriate materials. Dawn raids without prior notice are also possible but require a court order. Finally, third parties harmed by anticompetitive conduct are allowed to pursue private claims for damages.

CADE reviewed 454 transactions in 2020 – 391 via the fast-track process and 63 via the ordinary process. The number of reviews trended significantly upward in 2021, totalling 610 transactions, 526 of which were submitted via the fast-track process and 84 via the ordinary process.

Beyond the sharp rise in reviewed transactions, several cases involving important discussions on competition issues were reviewed both by CADE's General Superintendence and Tribunal. CADE has been requesting greater detail in the information parties present in these cases, with a growing emphasis on economic data. We have also noticed more in-depth analysis and remedy negotiations, which has increased the duration of reviews in certain cases. Finally, CADE's scrutiny of the accuracy of the data provided by notifying parties has increased (having received accusations of submitting misleading information), and there has been an increase in the number of requests by CADE's tribunal to carry out secondary reviews.

CADE is known for its efficiency in clearing merger cases. However, the average review time can vary (especially under the ordinary proceeding). Together with the increased number of filings, these factors seem to have impacted the merger review period in 2021, especially in sectors that have been undergoing consolidation such as healthcare, pharmaceuticals, retail, financial services, agriculture, education and sectors related to digital markets.

Companies should bear in mind that CADE has been reviewing cases with a higher level of scrutiny in recent times, which may include using different relevant market scenarios as well as various proxies to measure the level of market concentration. As such, there is an increasing emphasis on economic data.

7. CLOSING ACTIONS

7.1 Typical steps to be undertaken for consummation of the proposed transaction

Procedures for closing Brazilian M&A transactions commonly involve the following actions.

7.1.1 Transfer of the acquired equity/assets

The transfer of the ownership of shares in closely held corporations is completed by means of the execution of transfer deeds in the target company's corporate share transfer and registry books; the transfer of the ownership of quotas of a limited liability company is completed by means of the execution of an amendment to the target company's articles of association. With respect to assets acquisition, the assets title may be represented by mere transfer or possession

or, as applicable for some specific assets such as real properties and vehicles, the registration of ownership with the relevant registry.

7.1.2 Representation and warranties

The seller confirms that the representations and warranties given by the seller and on behalf of the target company at signing are still correct, up to date and accurate on the closing date. This confirmation may occur pursuant to the execution of a certificate by the seller. If necessary, the seller may also update the disclosure schedules to reflect any change that occurred between signing and closing.

7.1.3 Price payment

The buyer pays the seller the purchase price, or whatever portion of it has been agreed to be paid at closing. If applicable, this is also the stage when funds are transferred to the escrow account and, in the event of a primary investment, the capitalisation amount shall be transferred by the buyer to the target company.

7.1.4 Ancillary documents

Any other document which has been agreed in a draft form to be included in the M&A agreement as an exhibit is executed at closing. These ancillary documents may include shareholders' agreements, escrow agreements, service agreements, powers of attorney, instruments formalising guarantees or security interests, or any other documents negotiated among the parties.

7.1.5 Closing certificate

The parties may also execute a closing certificate acknowledging that the conditions precedent for closing have been fulfilled and that the closing has been completed with the execution of all closing actions set forth by the M&A agreement.

7.2 Any additional inputs when it is a cross-border M&A

The closing of a cross border M&A transaction is not significantly different from the closing of a domestic M&A transaction, except for the requirements to be followed by the foreign buyer for the purpose of complying with the Brazilian Central Bank requirements for remitting funds to Brazil and becoming a shareholder of a Brazilian company.

As previously mentioned, this requirement includes that the foreign buyer should complete its registration with the Brazilian Central Bank prior to the closing of the transaction. The banks chosen to operate the remittance of funds will likely oversee the fulfilment of the application registration, as the proof of registration is usually one of the documents requested by the banks to transfer the funds. Upon registration with the Brazilian Central Bank, the foreign investor will be assigned a taxpayer registration number; from a corporate law perspective, the foreign investor will be required to nominate a representative in Brazil with powers to represent the foreign investor before the federal revenue.

It is important to note that, when the seller is a non-resident of Brazil, special rules may apply to payment of capital gains tax. Parties may wish to address this in the M&A agreement.

8. POST-CLOSING ACTIONS

8.1 General actions for post-closing

One of the most important post-closing actions is the filing of corporate documents executed at closing with the Board of Trade, so that they become public and effective before third parties.

If the target company is a limited liability company, the amendment to the articles of association is the document to be filed with the Board of Trade, indicating the transfer of quotas, election of new officers and approval of new articles of association considering the new corporate governance to be adopted.

If the target company is a privately held corporation, the shareholders' meeting minutes and, if applicable, minutes of meetings of the board of directors are the documents to be filed with the Board of Trade to make those same changes publicly available – except for the change of share ownership as reflected in the books of the companies, as that would not require registration with the Board of Trade after closing.

Alongside the filing of corporate documents, post-closing actions may also encompass:

(a) substitution of the sellers from guarantor positions in agreements executed by the target company;
(b) notification of any relevant regulatory agency that may require a post-closing update to its registries; and
(c) updating the registries of all other relevant authorities, as applicable.