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Corporate M&A

Brazil: Law & Practice

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BRAZIL

Law and Practice

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1. Trends

1.1 M&A Market

In the last 12 months, Brazil has been experiencing the government's efforts to pass reforms and stimulate the economy, as well as certain favourable macroeconomic conditions, such as decreasing interest rates. In this context, there was an increase in new investments and in activity in the M&A market at record levels, both in terms of number of deals and of amounts involved.

The USA continues to be the main country involved in inbound and outbound cross border deals with Brazil. Japan and Canada jumped some positions to become the second and third countries of origin of bidders in number of inbound deals, but this situation is fluid and is always changing. The number of deals in the internet and technology sectors increased a lot and a greater participation of venture capital and private equity deals have been seen. Middle-market deal activity remained intense. Divestitures of distressed assets continued to occur. We also saw new divestitures of assets by state-owned companies such as Petrobras and governmental banks.

1.2 Key Trends

On the one hand, in 2019 we saw the continuation of the increase of the participation of venture capital and private equity in deals, as well as of the increase of deals involving technology and internet companies. On the other hand, while the valuation of companies had been seeing continuous growth, the failure of certain IPOs of large companies in the USA in the latter part of 2019 seems to have forced the Brazilian market to pause and rethink valuations in Brazil itself.

An increase was also seen in interest in deals in the infrastructure and logistics industries. The Brazilian President's visit to China in the fourth quarter of 2019 had reduced the tension between the countries and was expected to bring Chinese investors back to the high level M&A deals with China that had been seen in the past. However, this scenario is likely to be affected by COVID-19, its impacts on the financial markets and the available liquidity.

In fact, the partial lockdown measures taken by most Brazilian States in March 2020, with a view to containing the speed of the dissemination of COVID-19, created a major impact on the financial markets and the productive sector, thus raising several doubts about how the economy and the M&A market will react. Generally speaking, as of early April 2020, although several M&A deals have been suspended, several deals are still on track but the parties involved in these deals are studying the contracts regarding a revision of some of their terms.

The ensuing crisis will affect different industries in different ways. In any event, the future is very uncertain at this moment, as companies put a focus on survival measures and cash maintenance strategies.

1.3 Key Industries

The technology and internet industries, including fintechs, were responsible, in 2019 and early 2020, for the highest number of deals, but not necessarily the largest amounts in Brazilian reals. Financial and insurance, healthcare and life sciences, education and retail industries also saw substantial M&A activity in 2019 and early 2020. Divestiture of distressed assets continued to play an important role.

The COVID-19 pandemic is likely to affect different industries in different ways. Some industries will require consolidation (and transactions involving distressed assets are likely to increase), while others may find opportunities in the new environment, particularly in the fields of technology (eg, virtualisation services, communication tools, cybersecurity), life sciences and healthcare, and logistics for home delivery.

2. Overview of Regulatory Field

2.1 Acquiring a Company

In the Brazilian market, the most common means by which to acquire a business are a share acquisition or an asset acquisition. On a successor liability perspective, there is no material difference between these structures under Brazilian laws. The structure depends mostly on whether one is acquiring the entire company/business or only part thereof. It also depends on the licenses that are required in order for the acquired business to continue operations after the purchase.

The obtaining of certain licences, such as sanitary and environmental licenses, may take up to one year. For acquisition of part of the company business, there is usually an asset drop down to a new company and a share sale of the new company ("NewCo").

However, as many licences and permits are not transferred in an asset drop down, a spin-off may be considered, either to transfer the target business to a NewCo or to keep only the target business in the existing company. If the assets are to be transferred to a NewCo, the transaction must be planned and implemented to assure that the NewCo has all the enrolments, licences and permits in place at time of closing in order to prevent business interruption. Mergers and consolidation are usually considered a second step, once the tax impacts are dully assessed.

2.2 Primary Regulators

The primary regulators for M&A activity are the Brazilian Securities Commission (CVM), which regulates the capital markets in Brazil and all its participants, including stock exchanges, public companies, financial intermediaries and investors, and the Brazilian Antitrust Agency (CADE), which is responsible to ensure free competition in the market.

Depending on the sector of the company, other governmental authorities and regulatory agencies may also have to approve the M&A transaction, such as in the energy, financial, insurance, telecom and healthcare sectors.

It is worth noting the existence of the *Comitê de Aquisições e Fusões* (CAF), a private association inspired on the British Takeover Panel, formed by representatives of the main participants of the securities market in Brazil and which works on the basis of voluntary self-regulation. The CAF's goal is to ensure equitative conditions in tender offers and business combinations involving publicly-held corporations.

2.3 Restrictions on Foreign Investments

Brazilian Law prohibits foreign investment in certain sectors such as: postal and telegraph services, aerospace industries and activities involving nuclear energy. Besides that, foreign investment in the ownership of rural land is subject to certain limitations with respect to size, location and proportion to local ownership in the same municipality, and will require prior approval of the federal government in most cases.

Activities involving the research, drilling, refining and transportation of oil may only be developed by the federal government, which may itself engage national or foreign controlled companies to perform such activities. In communications companies (newspapers, magazines, broadcasting and television networks) Brazilian citizens must hold at least 70% of the shares.

In such cases, the shareholder control must remain with Brazilian shareholders. In the banking sector, foreign ownership is subject to international treaties, reciprocity or acknowledgement that it is in the best interest of the country by the Federal Government (currently through the Brazilian Central Bank).

More recently, the federal government issued a decree acknowledging that fintechs operating in direct credit and personal credit are of interest of the federal government and, therefore, 100% foreign control is now allowed.

2.4 Antitrust Regulations

The ultimate administrative body responsible for the analysis of competition related matters and antitrust enforcement is the Brazilian Antitrust Agency (CADE), which has three primary functions:

- preventive: analyse and decide on mergers, acquisitions and economic concentration operation between large companies that may put free competition at risk;
- repressive: investigate and judge cartels and other harmful actions related to free competition; and
- educational: instruct the society and companies about the harmful actions that may prejudice free competition.

Broadly speaking, a transaction must be submitted to CADE's approval if the following thresholds are met: at least one of the economic groups involved in the deal has achieved in Brazil, in the last calendar year, an annual gross turnover that is equal to or above BRL750 million; and at least one other economic group involved in the deal has achieved, in the last calendar year, an annual gross turnover or total volume of business in Brazil that is equal to or above BRL75 million.

Penalties for "gun jumping" can be severe, including fines of up to BRL60 million. Also, if competitors will exchange sensitive information prior to CADE approval, they need to enter into an antitrust protocol, which must address how "clean teams" should work, in order to avoid penalties by antitrust authorities.

2.5 Labour Law Regulations

In accordance with the Brazilian Labor Code (CLT), changes to the corporate structure of the company will not affect the employment conditions of the employees. In this regard, the fact that the control of a company is being sold to another company, or that a company is to be merged to another, will not change the employment conditions of any employees, who will continue to receive the same salary and benefits (or, indeed, receive others that may be more advantageous).

Nevertheless, if the acquisition process involves the setting up of a NewCo and the transfer of employees, there is the need to perform some ancillary obligations, such as registering the new employers' name on the employee's employment booklet (CTPS), inform the government about such change by including information in certain mandatory periodic forms, etc. Differently from other countries, in principle, an M&A transaction is not subject to approval by any body related to workers.

2.6 National Security Review

As a rule, in Brazil, there is no national security review. However, there are certain areas where foreign investment is restricted (and subject to review), for national security reasons, such as the acquisition of real estate properties located in border areas, aerospace and nuclear energy.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

We have seen interesting decisions related to M&A discussions recently in Brazil. However, M&A recent discussions (after 1996, when the arbitration law was enacted in Brazil) usually only initiate the dispute in the regular courts for injunctions as they are then transferred to arbitral tribunals since most shareholders agreements of Brazilian big companies set forth that disputes shall be handled by arbitration.

Arbitration awards are confidential, which makes it difficult to follow them up. In a dispute initiated in 2018 in the Sao Paulo court, the purchase of a portion of dairy company Itambé by the French competitor Lactalis was challenged by Vigor. Itambé's shares were sold by the *Cooperativa de Leite de Minas Gerais* (CCPR) to Lactalis. Two weeks later, upon Vigor's request, the transaction was suspended after allegations of a breach of the shareholders' agreement. Actually, this dispute is also related to another transaction, involving the Mexican Lala and the acquisition of Vigor.

When Vigor (which belonged to the JBS/J&F group) was sold, Mexican Lala became the owner of 50% of Itambé's rights and wanted to buy the other half from CCPR. However, CCPR had a preference and acquired full control of Itambé. The "problem" was that in the very next day after the purchase, CCPR sold the company to French player and competitor Lactalis. The sale of Itambé's shares was suspended until the effective start of the arbitration. The dispute in arbitration ended up in a settlement concluded last year.

It is also important to mention a relevant decision recently issued by the Superior Court of Justice not accepting the participation of the Brazilian Federal Union (as the controlling shareholder of Petrobras) in an arbitration dispute involving Petrobras' minority shareholders in one side and Petrobras and the Federal Union on the other.

In this decision (which was taken by the majority of the Justices involved), the Court understood:

- that the Union could only be submitted to arbitration proceedings if there were a legal or regulatory provision authorising its submission to the arbitration clause in the Bylaws approved by the General Meeting of Petrobras;
- the lack of legal authorisation and clarity of the arbitration clause provided for in Petrobras' Bylaws would imply its inexistence in relation to the Union;
- the approval of Petrobras' arbitration clause is in fact a manifestation of the will of Petrobras but not of the Union to abide by the arbitration jurisdiction; and
- the scope of that specific dispute was not within the limits of the arbitration clause.

The decision surprised scholars and litigators and it will likely be used to guide the courts and arbitration panels in future similar disputes.

3.2 Significant Changes to Takeover Law

There have not been any major changes to takeover laws in recent years. Brazilian law seems to closely follow the Brazilian market with respect to the manner in which acquisitions are concluded. Despite the number of acquisitions increasing throughout the last few years, transactions are still usually carried out in the "old-fashioned way", through deep and sometimes heavy negotiations (Brazilians used to enjoy long negotiations).

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Considering that Brazilian companies with dispersed control are rare, hostile takeovers are not common in Brazil. In this context, building a stake prior to launching an offer may occur, but is not necessarily common.

4.2 Material Shareholding Disclosure Threshold

In accordance with CVM regulations, any transaction or group of transactions in which the stake owned, directly or indirectly, by an individual, entity or group of individuals representing the same interests increases or decreases to above or below multiples of 5% (5%, 10%, 15% and so on) of a type or class of shares representing the capital stock of a publicly-held company must be informed to the company (the same applies to acquisitions of rights on shares and certain securities and derivatives based on shares).

Where the acquisition aims at changing the control or management structure, or in cases where a tender offer is mandatory as a result therefrom, communication to the market is required. Specific situations may be subject to specific rules, for example, during a tender offer for the acquisition of control, any group of people holding 2.5% or more of a class or type of shares must disclose any variation of 1% in their holdings.

4.3 Hurdles to Stakebuilding

CVM regulation does not allow the 5% threshold for disclosure to be increased in the company's by-laws, shareholders' agreements or other corporate documents. However, there is no

express provision that prohibits it from being lowered, although this is not common.

Some companies have chosen to adapt their by-laws to include a "poison pill", triggered if a bidder or shareholder reaches a stake percentage previously determined and/or if the final purpose of such acquisition is to allow a shareholder to own more than a certain stake percentage (eg, 20% or 25% of the capital stock).

Although usually set forth to be irrevocable, these provisions can be challenged in court on the grounds of restricting the shareholders' right to dispose of their stake. The M&A Self-regulatory Code issued by CAF establishes that the relevant stake provided in the by-laws should not be lower than 20% (nor in excess of 30%). In addition, CVM regulation establishes that, when the stake of the controlling shareholders in publicly-held companies, or related persons, exceeds, by any means other than a tender offer, one third of the total outstanding shares, new acquisitions may only take place by means of a tender offer, regardless the number of acquired shares.

4.4 Dealings in Derivatives

Dealings in derivatives are permitted in Brazil and the requirements for their validity are specified in Law No 12,543/2011. In addition, CVM regulation establishes that derivatives may be sold outside a tender offer process, provided that during the period of such offer, the offeror and its related parties are prohibited from trading derivatives involving the same class of shares of the ongoing offer.

4.5 Filing/Reporting Obligations

Any acquisition or sale of a relevant equity interest in a company must be disclosed to that company (and, by the acquirer and that company, to the market) in case the acquisition aims at changing the control or management structure or in case a tender offer is mandatory as a result therefrom.

CVM regulations considers as relevant any transaction in which a stake increases or decreases to above or below multiples of 5% (5%, 10%, 15% and so on) of the shares of the same class that are held by an individual or group of individuals representing the same interests. This threshold is also applicable in case of acquisition/sales of rights on shares and certain securities and derivatives based on shares.

Filing/reporting obligations for rights on shares and certain securities and for derivatives based on shares are similar to filing/reporting obligations for shares.

4.6 Transparency

CVM Instruction No 358 establishes that whoever increases or decreases their stake to above or below multiples of 5% (5%, 10%, 15% and so on) of a type or class of shares (in one or more transactions) must disclose the final purpose of such transaction, including the targeted stake and/or if such transaction aims to change the company's control or administrative structure.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

If the M&A operation is carried out between closely-held companies, there is no need to disclose the deal. However, when it comes to publicly-held company, Brazilian law sets forth certain obligations, such as disclosure of material facts.

According to CVM Instruction No 358, any merger, acquisition, spin-off or any transaction involving change of control are considered a material fact and the disclosure of the deal must occur immediately after the signing of the definitive agreements, even if there are conditions to close. There are exceptions to this provision, such as when the officers understand that the disclosure could cause damage to legitimate interests of the company.

5.2 Market Practice on Timing

The market practice on timing of disclosure when the transaction does not involve public companies is after the signing of the definitive terms or after the closing of the M&A operation and does not differ from the legal requirements. Some publicly held corporations with high levels of transparency and corporate governance may disclose certain transactions at earlier stages.

5.3 Scope of Due Diligence

The scope and length of the due diligence depends on the specific circumstances of each transaction and the industry involved. The main subjects to be analysed in a legal investigation are tax, labour and employment, contracts, environmental, real estate, regulatory, litigation, corporate, anti-corruption and data protection. This is to identify liabilities and contingencies and indicate whether the risks are quantifiable and the issues can be solved, or whether their solution must be a condition for closing.

Tax, labour and employment, environmental and anti-corruption are the issues that usually break the deals. It is common to also engage an auditing firm to conduct a simultaneous investigation on tax and labour practices. In many cases, a technical due diligence, such as environmental, real estate, operational or IT, needs to be carried out by experts as well.

If competitors will exchange sensitive information, they need to enter into an antitrust protocol, which should address how "clean teams" should work, in order to avoid penalties by antitrust authorities.

5.4 Standstills or Exclusivity

Exclusivity is usually demanded in the first stage of the negotiation of an M&A operation, in order to protect the confidential information of the parties and in consideration for the time and effort of the parties during the negotiation process. Standstills are usually requested upon the signing of the M&A documents and before the closing of the transaction.

5.5 Definitive Agreements

In the context of an offer to the owners of a closely-held company, the parties normally enter into a memorandum of understanding or a letter of intent at the beginning of negotiations in order to establish certain conditions to the offer, but establishing the non-binding effects of such instruments, with no obligation to complete the deal, but simply to act in good faith in the negotiations of the definitive agreements.

After the negotiations, the parties enter into the definitive purchase and sale agreement and other relevant documents. As for a tender offer regarding a publicly-held corporation, the adhesion to the offer represents an agreement.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The duration of a business and/or stake acquisition/sale process may vary depending on the size of the intended operation, the scope of due diligence and the need for prior approval by one or more regulatory agencies.

Considering the average of recent tender offers, it is estimated that operations involving publicly-held companies take an average of six to eight months to be completed, assuming that there is no litigation involving minority shareholders.

Merger clearance by antitrust authorities (CADE) are not taking long for simple transactions that do not raise antitrust concerns, as these may be subject to fast-track proceedings. In some cases, under the fast track procedure, clearance took less than 20 days.

6.2 Mandatory Offer Threshold

In accordance with Brazilian corporate law and CVM regulations, a tender offer is mandatory in publicly-held companies when the controlling shareholder(s), or persons related to them, acquire(s) shares (by any means other than a tender offer) exceeding one third of the total outstanding shares of each type or class and when there is a change of control.

In addition, it should be pointed out that once a mandatory tender offer for the increase of the controlling shareholder stake occurs, new acquisitions may only take place by means of a tender offer, regardless of the number of shares that are intended to be acquired. Furthermore, tender offers are also mandatory for the cancellation of registration (delisting) although not related to a threshold.

6.3 Consideration

Cash is more commonly used as consideration, but we also see, on occasion, a combination of cash and shares.

6.4 Common Conditions for a Takeover Offer

Hostile takeovers are uncommon in Brazil, which makes it difficult to comment on "common market conditions" for takeover offers. In any event, a tender offer is subject to general conditions described in CVM Instruction No 361 such as:

- shareholders of the same type and class of shares must be treated indistinctly and on equal terms;
- the tender offer must be intermediated by a brokerage company or distributor of securities or a financial institution with an investment portfolio; and
- an appraisal report must be prepared if the tender offer arises from the own company, its controlling shareholder(s) or its management, among other conditions.

In addition, a tender offer may be subject to conditions required by the bidder only if the implementation of such conditions does not depend, directly or indirectly, on the will of the bidder or its related persons and if these conditions are expressly provided for in the corresponding documents.

6.5 Minimum Acceptance Conditions

The recipients of a tender offer for acquisition must be expressly assured the ability to condition their acceptance to the number of shareholders that adhere to such offer. If the number of shareholders that adhere is not sufficient to grant the bidder with the target company's controlling power, the bidder may not acquire control of the targeted company and the offer is deemed unsuccessful.

There is no specific threshold, as "controlling powers" must be verified case by case. Tender offers for the cancellation of registration also require that shareholders representing at least two thirds of the outstanding shares to approve the tender offer or the cancellation of the registration.

6.6 Requirement to Obtain Financing

In Brazil, it is relatively common for bidders to condition the acquisition of an equity stake to obtaining financing. Such condition must be expressly stated in the offer.

6.7 Types of Deal Security Measures

Break-up fees are not widely adopted in Brazil but may be seen in some particularly sensitive deals. Exclusivity rights and non-solicitation provisions for a certain period are common provisions, particularly in middle-market deals.

6.8 Additional Governance Rights

In this event, it is common for a bidder to request the inclusion in a shareholders' agreement of certain veto rights; the right to appoint members of the board of directors or executive officers; or changes in the company's management rules.

6.9 Voting by Proxy

Shareholders may vote by proxy in a shareholders' meeting when they are represented by another shareholder, a company officer or a lawyer, provided that the relevant power-of-attorney has been granted less than a year before such meeting. In addition, at meetings of publicly-held companies, the shareholder may be represented by a financial institution. Under certain conditions, the CVM allows remote voting.

6.10 Squeeze-Out Mechanisms

Brazilian law allows compulsory acquisition of shares held by minority shareholders (squeeze-out), in the event that the percentage of adhesion to a tender offer exceeds 95% of the target company's share capital. In such situations, the remaining shares may be compulsorily redeemed at the same price as the price established in the tender offer, provided that the amount to be paid to minority shareholders that did not adhere to such offer is deposited in a bank institution duly authorised by the CVM. One polemical alternative is the consolidation/grouping of shares, which may be challenged depending on how it is made.

6.11 Irrevocable Commitments

Given the low number of companies with disperse control in Brazil, it is common for a bidder to negotiate agreements with the main shareholders of a company in the first place.

7. Disclosure

7.1 Making a Bid Public

A bid must be made public by means of a public notice, after the successful conclusion of the negotiations and before the submission of the deal to the general meeting. The bid may also be made public if the negotiations became public knowledge due to an information leak. In this case, the target company will be required to disclose the offer documents and a Material Fact reporting the nature and stage of the negotiation process.

7.2 Type of Disclosure Required

When involving at least one publicly-held company, the disclosure of certain information that describes the conditions of the intended operation, such as appraisal reports, financial statements, minutes of board meetings and other relevant documents related to the transaction is mandatory.

7.3 Producing Financial Statements

Bidders must disclose financial statements, prepared in accordance with the CVM regulations and other relevant rules and such statements must be audited by independent auditors. The financial statements must be prepared in accordance with Brazilian GAAP.

7.4 Transaction Documents

The public notice of a tender offer must provide complete information about the transaction. In addition, regarding publicly-held companies, the full transaction documents must be made available to CVM. If the transaction meets the thresholds for merger clearance, they should also be submitted to CADE, but the parties may ask that certain information in the documents are kept confidential.

8. Duties of Directors

8.1 Principal Directors' Duties

In a business combination, the directors must act in the best interest of the company and perform their duties with loyalty, care and diligence. The duties of the directors only apply to the shareholders and the company.

8.2 Special or Ad Hoc Committees

It is not common for boards of directors to establish special or ad hoc committees, but it is recommended to establish one in order to analyse business combinations and in cases of conflict of interest that may arise when the board of directors faces an offer. The M&A Self-regulatory Code issued by the CAF exempts companies from certain conditions when a transaction with a related party has been approved by a special committee formed by independent members.

8.3 Business Judgement Rule

In certain takeover situations that were taken to court or to the CVM, the understanding was that if the directors acted in the best interest of the company, performed their duties with loyalty, care and diligence and acted without power and control abuse, the courts defer to the judgement of the board.

8.4 Independent Outside Advice

In case of large transactions, it is common for directors to look for a fairness opinion from a financial institution, as well as legal

advice focused on the impact of the deal on the company and the risks and synergies of the deal. Corporations that adhered to the CAF may voluntarily submit their transactions to the review of the CAF in accordance with the M&A Self-regulatory Code issued by the CAF.

8.5 Conflicts of Interest

The conflict of interest of directors, managers, shareholders or advisers are subject to judicial and administrative scrutiny in Brazil. Brazilian Corporations Law sets forth the prohibition of the directors to interfere in any operation in which they have a conflict of interest with the company.

According to certain decisions of the CVM, the conflict of interest between the company and its directors, officers, shareholders and advisers constitutes a logical and ethical limitation to the performance of their duties, so the directors and officers must refrain from exercising their authority, when a conflict may affect the operation.

9. Defensive Measures

9.1 Hostile Tender Offers

Although hostile tender offers are permitted in Brazil, they are not common. The significant majority of acquisitions are carried out with ordinary negotiations with shareholders but from time to time we see OPAs (the acronym, in Portuguese, for public offer for acquisition of shares). The OPA is the offer in which a bidder expresses its commitment to acquire a specific number of shares, at a specific price and term, respecting certain conditions.

The purpose of the OPA is to offer all shareholders, with equal rights, the possibility of selling their shares in situations that normally involve changes in the company's corporate structure. In Brazil, OPA's can be mandatory or voluntary. The OPA is mandatory in the event of cancellation of registration as a publicly-held company, of an increase in the participation of a controlling shareholder that prevents the market liquidity of the remaining shares, and in the case of sale of the company's control.

Voluntary OPA's are those carried out without any specific norm having forced them to be carried out. They are carried out solely by the offeror's willingness to carry out the acquisition by public offering. The OPA shall always ensure equal treatment for all recipients.

9.2 Directors' Use of Defensive Measures

In Brazil, a common defensive measure adopted by shareholders to protect their position and the management is the inclusion of the poison pills in the company's by-laws (see **4.3 Hurdles to Stakebuilding**).

9.3 Common Defensive Measures

The most common defensive measure adopted by Brazilian publicly-held companies is the inclusion of the so-called poison pills. The poison pill most used by such companies consists of a statutory provision establishing that the acquisition of a percentage of shares issued by the company in the market generates, for the buyer, the obligation to make an OPA addressed to all other shareholders.

As mentioned, the M&A Self-regulatory Code issued by the CAF establishes that the relevant stake provided in the by-laws for the triggering of the poison pill should not be lower than 20% (nor in excess of 30%). However, poison pills are not always built in the best interest of the company, but only in the interest of a group of shareholders, and we have seen cases where they can and are challenged in shareholders' meetings or even in court.

9.4 Directors' Duties

The defensive measures can be proposed by directors, but they are implemented by the company's shareholders, so we do not see any duty on the directors other than complying with the company's by-laws. The non-observance of defensive measures protections set forth in the by-laws could be claimed in lawsuits filed by the shareholders and/or management adversely affected by such omissions. In any event, we understand that directors, officers and all shareholders should always aim for the best interest of the company.

9.5 Directors' Ability to "Just Say No"

Directors must always comply with their fiduciary duties as set forth in the Brazilian Corporations Law. The main principle of the law is based on the idea of the administrator's fiduciary duty to distance himself from the pursuit of his personal interests in the exercise of his activities. Therefore, if the directors understand that saying no to the combination of a business is the best alternative for the company they can and must exercise such right.

However, it may be in the best interest of the company that such a proposal is addressed to the attention of the company's shareholders also, so the final decision is taken the ultimate level.

10. Litigation

10.1 Frequency of Litigation

In Brazil we have a high volume of litigation in several areas of law: civil, commercial, contractual, labour, tax and so on. On

M&A deals it is not rare to see litigation related to post-closing obligations, such as purchase price adjustments, indemnification for pre-closing liabilities, non-observance of non-compete and no-solicitation obligations.

In order to avoid very long discussions in court that could easily last more than five years (we have seen cases where parties dispute for more than a decade), purchase agreements usually have arbitration provisions, in which case the average time for a dispute is about three years and decisions are not subject to appeal unless in very specific and limited circumstances. Confidentiality is another reason for the parties to pursue arbitration rather than court litigation.

10.2 Stage of Deal

Upon conclusion of the deal, when all obligations are (or should be) clearly defined in the purchase agreement and the transaction is effectively closed we see parties disputing about post-closing obligations, such as purchase price adjustments, indemnification for pre-closing liabilities, non-observance of non-compete and no-solicitation obligations.

11. Activism

11.1 Shareholder Activism

In Brazil, corporate activism has not been as significant as in the USA mostly due to factors such as the shareholding concentration of publicly-held companies and the size of the Brazilian capital markets. However, we can expect a growth in shareholder activism in line with the growth of the Brazilian economy and the development of the capital markets.

The focus of corporate activism in Brazil can be divided between investors trying to interfere with management to extract more value – such as the corporate conflicts involving Saraiva's, Gafisa's and Lojas Americana's controllers with investor Mu Hak You, the owner of GWI Asset Management – or local communities and members of the civil society trying to force large companies to change their sustainability practices – such as the case of individuals and groups that are trying to participate in shareholders' meetings at Vale and Rumo.

In the end of 2019, the CVM organised a public hearing to discuss measures to make it easier for minority shareholders to file derivative lawsuits against the managers of the company, if the shareholders' meeting fails to approve a lawsuit against them. We can expect some developments in this area in 2020.

11.2 Aims of Activists

M&A transactions, spin-offs or major divestitures are encouraged by activists, and these are the matters that activists try to interfere with.

11.3 Interference with Completion

Activists try to interfere with the completion of announced transactions.

CGM Advogados is headquartered in São Paulo and practises in a wide range of business sectors. Corporate/M&A is the core area of the firm, consisting of 21 professionals. Extensive experience working with international clients has given the firm the ability to explain the complexity and red tape of the Brazilian legal system to foreigners in a very efficient way when doing business in Brazil and elsewhere. The firm has developed specific expertise in many sectors, including automotive, aerospace and defence, chemicals, heavy industry, retail, internet, technology and life sciences. Many clients rely on CGM for both complex transactions – including greenfield and brownfield investment, M&A and joint ventures – and day-to-day matters, such as compliance, contracts and general corporate services.

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