Acquisition Structures: Comparing Asset and Share Purchases (Brazil)

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A Practice Note discussing the key differences between a share purchase and an asset purchase transaction in Brazil. It discusses some of the main advantages and disadvantages of structuring a private acquisition as a share or an asset purchase, and other issues to consider when choosing a transaction structure in Brazil.

There are two principal methods of structuring a private acquisition in Brazil:

- **Share purchase.** This involves the buyer acquiring all or a majority of the shares (or quotas) in the company which carries on the target business, or even a minority stake (which may still represent a controlling position).
- **Asset purchase.** This involves the buyer acquiring a collection of assets and rights, and sometimes assuming certain liabilities relating to the target business.

While both structures can achieve broadly the same commercial objective, there are fundamental differences in their legal effect. Counsel in cross-border transactions should understand the differences in Brazil when advising parties on transaction structure.

This Note discusses the two transaction types, and highlights some of the key differences between them. It also considers the main legal and commercial issues that can influence the parties' structuring choices.

Private acquisitions in Brazil may also be structured as a merger of companies. However, these are less common in the context of private company acquisitions.

This Note covers share and asset purchases involving companies whose shares (or quotas) are not listed on a public stock exchange, such as:

- A *Sociedade Anônima* (S.A.), which is closest conceptually to a US corporation or a UK public limited company.
- A *Sociedade Limitada* (Ltda.), which is closest conceptually to a US limited liability company (LLC) or a UK private limited company.

For more information on the types of entities formed in Brazil, see Practice Note, Trading Vehicles: Overview (Brazil).

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The acquisition of shares of a publicly traded S.A. would be subject to a formal set of rules under the Corporations Law and the Securities and Exchange Commission Law, as well as a set of rules set forth by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* (CVM)).

Although the differing tax implications of share and asset purchases are often instrumental in driving the final transaction structure, detailed consideration of the tax position is outside the scope of this Note. In addition, the impact of other aspects, such as employment, social security, competition, and regulatory approvals, should be considered when deciding the most appropriate route, but an in-depth analysis of these matters is also outside the scope of this Note.

Unless otherwise stated, a reference in this Note to:

- Civil Code means Law No. 10.406/02, the Brazilian Civil Code (*Código Civil Brasileiro*).
- Corporations Law means Law No. 6.404/76, the Brazilian Corporations Law (*Lei das Sociedades Anônimas*).
- Securities and Exchange Commission Law means Law No. 6.385/76, the Brazilian Securities and Exchange Commission Law.
- Shares includes the capital stock of an S.A., which is divided into shares, as well as the capital stock of an Ltda., which is divided into quotas.

What is a Share Purchase?

In a share purchase transaction, the buyer acquires complete or partial ownership of the company that carries on the target business (the target company). The acquisition may involve all shares, a controlling block, or a minority stake of shares. Another way to acquire a private company is through a subscription of shares, in which case the former shareholder remains a minority shareholder. A combination of direct purchase and subscription may also be used. Accordingly, the only assets that are transferred in a typical share purchase transaction are the shares in the target company, which are transferred from the current shareholders or issued by the target company, depending on the chosen structure, to the buyer.

While there is no legal requirement for an agreement for the sale and purchase of shares to be in writing, in most arm's length deals the terms and conditions of the purchase of equity interests are provided in a share/quota purchase agreement (SPA). The transfer of shares of an S.A. is made through the execution of a transfer term in the corporation's shares transfer book, and the transfer of quotas of an Ltda. is made upon the execution of an amendment to the articles of association of the company, which shall be filed with the competent Register of Companies.

The sellers in a share purchase are the shareholders of the target company, who may be one or more natural or legal persons (for example, a holding company). Therefore, a share purchase is only a viable option if the target business and its underlying assets are owned by a trading vehicle with a separate legal personality and share capital that can be sold.

As the target company has a separate legal personality from its shareholders, ownership of the underlying assets and rights and responsibility for the liabilities of the target company will not usually change because of a share purchase transaction. This means that, generally, the buyer will take over the

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target company with the benefit of all its assets and rights, but subject to all its liabilities and obligations (whether past, present or future).

However, liability may be reallocated between the parties in accordance with the warranties and indemnities in the SPA.

For more information on documenting a share purchase in Brazil, see Practice Note, Key Documents for Acquiring a Private Company (Brazil).

What is an Asset Purchase?

In an asset purchase transaction, the buyer takes over the target business by purchasing a collection of specified assets and rights, and sometimes assuming responsibility for certain liabilities, which together comprise the target business. In this Note, an asset purchase refers to the sale of a whole business or business unit, as opposed to individual assets of a business.

The question of exactly which assets, rights and liabilities of the target business are transferred to, or assumed by, the buyer as part of an asset purchase deal is a matter for the parties to negotiate and ultimately depends on the terms of the contract governing the transaction (commonly known as the asset purchase agreement (APA)). The purpose is to ensure that the collection of assets, rights, and liabilities function as an autonomous unit with the ability to continue running the business once the transaction has completed.

While the final division of assets between the buyer and seller will vary from deal to deal, items that are commonly acquired as part of an asset purchase include:

- Business information and records.
- Goodwill.
- Information technology and IT systems.
- Intellectual property rights.
- Licenses, permits and regulatory authorizations (depending on the nature of the business).
- Plant and machinery.
- Premises.
- Stock.
- The benefit of business contracts.
- Real estate properties.
- Vehicle fleet.

By contrast, items that are often (but not always) excluded from an asset purchase include cash, debts, insurance claims, and litigation proceedings.

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However, there are certain assets and liabilities that cannot be excluded, and which will always automatically transfer to the buyer (see Control Over What Transfers), although the APA may contain indemnity provisions covering automatically assumed liabilities.

As an asset purchase involves buying the underlying assets and rights of the target business rather than the legal entity which owns them, this transaction structure can be used to acquire an unincorporated business (such as a business carried out by a sole proprietor (*empresário individual*)), or part of the business of an incorporated entity.

It also follows that the seller in an asset purchase transaction is the person or entity which carries on the target business. For example, if the target business is being carried on by a company, the seller will be the company itself, and not an individual shareholder in the company.

Finally, while the transfer of specific assets which do not comprise a whole business unit should not lead to the assumption by the purchaser of liabilities concerning the seller, the transfer of assets which may be deemed as a business unit should trigger such exposure. In such case additional formalities may be required, such as:

- The filing of the contract with the competent Register of Companies.
- The prior consent from the creditors of the seller whenever the seller is expected to not remain with enough assets after the transaction to solve those debts.

For more information on documents typically used in an asset purchase in Brazil, see Practice Note, Asset Acquisition Documents: Private Acquisitions (Brazil).

Choosing a Transaction Structure

General Considerations

The most common way to acquire a private company in Brazil is a straightforward purchase and sale of shares/quotas. Asset purchases that involve an entire business or a substantial part of it are not as common in Brazil because of the additional procedural requirements (see Structural Complexity) and the inability to avoid the succession of certain liabilities (see Control Over what Transfers). An asset purchase is common, however, in relation to real estate properties or specific equipment or machinery.

In certain limited situations, the parties may have no choice over which transaction structure to adopt (see Circumstances Requiring an Asset Purchase). However, where the target business is carried out by a solvent company, it will usually be possible for the transaction to proceed either as a share or an asset purchase, and the parties therefore need to decide which route to take.

When considering whether to proceed by way of an asset purchase or a share purchase, there may be a single overriding factor which dictates using one structure over another. In many jurisdictions, the route that secures the most advantageous tax treatment for the parties (or the party in the strongest bargaining position) will often prevail. However, in some instances, choosing the right structure for the deal requires balancing a range of competing legal, commercial, and tax factors, and it is not unusual for the seller to favor one structure while the buyer favors the other.

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While the relative advantages and disadvantages of the available structures always need to be assessed having regard to the circumstances of the deal, there are several factors which could make one structure more attractive for a party than the other. For the main advantages and disadvantages of each transaction structure, see:

- Key Advantages of a Share Purchase.
- Key Disadvantages of a Share Purchase.
- Key Advantages of an Asset Purchase.
- Key Disadvantages of an Asset Purchase.

Circumstances Requiring an Asset Purchase

In some situations, an asset purchase may be the only viable option for acquiring a target business in Brazil. This might be the case where:

- The target business is operated by an unincorporated sole proprietor (*empresário individual*), a cooperative or a *Sociedade em Nome Coletivo* (SNC), an entity similar to a general partnership that does not have a separate legal personality from its owners.
- The target business is a division or business unit of a corporate seller's larger enterprise, and it is not operated by a separate subsidiary.
- There are dissenting minority shareholders who are not prepared to sell their shares.
- The target company is undergoing insolvency proceedings. A transaction involving a financially distressed target company is usually structured as a sale of its business and assets so that the buyer can avoid, to the extent possible, taking responsibility for its creditors and other liabilities.

Pre-Sale Reorganization

Depending on the circumstances, it may be possible to achieve a share purchase structure in the above scenarios by carrying out a pre-sale two-stage hive down, which involves transferring the target business to a newly formed company or an already existing subsidiary of the seller (Newco), and then selling the shares in Newco to the ultimate buyer. The viability of a pre-sale reorganization is highly dependent on the tax treatment and intended timeframe.

Key Advantages of a Share Purchase

Share purchases generally have the following advantages in Brazil for sellers or buyers in comparison to asset purchases:

- Structural simplicity and business continuity (see Structural Simplicity).
- Clean break for the seller (see Clean Break for Seller).

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- Direct receipt of sale proceeds by the shareholders (see Direct Receipt of Sale Proceeds).
- The ability of the buyer to use the target's tax benefits and tax losses, if any (see Tax and Accounting Considerations).

Structural Simplicity

A key advantage of a share purchase for a buyer and seller is its speed and structural simplicity. Where the buyer is acquiring shares in the target company rather than its business and assets:

- The only asset that needs to be transferred from the seller to the buyer is the share capital of the target company.
- There is no change in the underlying ownership of the various assets and rights, status of the target company's employees, or responsibility for the liabilities, that collectively comprise the target business unless the parties agree otherwise (for example, the seller may assume responsibility for certain liabilities through indemnity provisions in the SPA).

This continuity regarding the target business removes many of the transaction complexities that otherwise arise on an asset purchase, often with resulting savings in the transaction timetable and costs. In a share purchase:

- It is not necessary to identify each asset, right, or liability of the target company included in, or excluded from, the transaction. Consequently, there is a much lower risk that the buyer may omit to acquire a key asset or right which is required to continue operating the target business. (On the flipside, see Buyer May Acquire Unwanted or Hidden Liabilities).
- There is no need to deal with a multiplicity of transfer formalities for different categories of assets and rights.
- The target company's contractual, licensing, and similar arrangements are largely undisturbed by the transaction, and the buyer acquires the target company with the benefit (and subject to the burden) of all the contracts, licenses, and similar arrangements to which the target company is a party at completion. This means that, except in isolated cases (for example, where a particular contract, license or public concession includes a change of control clause), there is generally no need to obtain third party consents for a share purchase. It also does not leave room for counterparties to attempt to renegotiate contracts.

Conversely, an asset purchase can often be comparatively complex to document and implement (see Structural Complexity).

Clean Break for Seller

A key attraction of a share purchase for the seller is that it delivers a clean break from the target company and its associated liabilities. On completion of the transaction, the continuing obligations, responsibilities, and liabilities of the target business stay with the target company, and the seller's post-transaction liability is generally limited to the extent of any representations, warranties, indemnities, and covenants it agrees to give the buyer in the SPA.

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In contrast, in an asset purchase, a seller may retain problem assets or liabilities that the buyer is not prepared to take on and which will not transfer by default (see Seller May Be Left with Problem Assets and Liabilities).

While a clean break may be a commercially attractive outcome for the seller, it can be a major drawback for the buyer, particularly if the target company's liabilities are extensive, or there is a risk that it is exposed to significant contingent or unknown liabilities (see Buyer May Acquire Unwanted or Hidden Liabilities).

Direct Receipt of Sale Proceeds

In a share purchase, the consideration is paid directly to the target company's shareholders, generally avoiding the potential tax implications and legal constraints that could arise when seeking to extract the proceeds of sale from a corporate seller following an asset purchase (see Complexities Around Extracting Sale Proceeds).

Key Disadvantages of a Share Purchase

Share purchases generally have the following disadvantages in Brazil for sellers or buyers in comparison to asset purchases:

- Buyer may acquire unwanted or hidden liabilities (see Buyer May Acquire Unwanted or Hidden Liabilities).
- Sale must gain shareholder approval (see Shareholder Approval Required).

Buyer May Acquire Unwanted or Hidden Liabilities

In a share deal, the buyer acquires the target company and all assets, liabilities and obligations owned by it (including its tax and labor liabilities) (see Clean Break for Seller). Liabilities associated with the target company may include, for example, environmental liabilities. A company that owns polluted land can be held liable to clean up the land after the sale of its share capital, even if the pollution occurred before the share acquisition date or was caused by third parties. Environmental liabilities may also include civil, administrative, and criminal aspects related to the company's activities.

While a clean break from liabilities associated with the target company may be a commercially attractive outcome for the seller, it can be a major drawback for the buyer, particularly if the target company's liabilities are extensive, or there is a risk that it is exposed to significant undisclosed or unknown liabilities.

The buyer can mitigate some of its exposure by negotiating a price reduction or requiring the seller to provide extensive representations, warranties, and indemnities in the SPA. However, contractual protections of this type have their limitations. Any such agreement would only be binding on the contracting parties; it would not be enforceable against the target company's creditors. Breach of warranty claims can be costly and time-consuming to enforce and, ultimately, they are of no value if the seller does not have the requisite financial substance to meet the buyer's claim.

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As a result, if the target company has significant exposure to liabilities that cannot be addressed to the buyer's satisfaction through a price reduction and/or warranty and indemnity coverage, or if there is a risk that it is exposed to significant contingent undisclosed or unknown liabilities, the buyer may seek to structure the transaction as an asset purchase to enable it to cherry-pick what it is buying (see Control Over What Transfers).

Shareholder Approval Required

To acquire 100% of the issued share capital of the target company or, at least, a controlling stake, the buyer will need all shareholders of the target (or a significant number) to agree to sell their shares. If any of the shareholders are either untraceable or unwilling to participate in the transaction, the deal is unlikely to be able to proceed as a share purchase unless both:

- A requisite majority of the shareholders support the transaction.
- The company's by-laws or articles of incorporation or association (or a related shareholders' agreement) include a contractual mechanism that can be invoked to force the missing or recalcitrant minority to sell their shares to the buyer.

Key Advantages of an Asset Purchase

Asset purchases generally have the following advantages in Brazil for sellers or buyers in comparison to share purchases:

- More control over what is being transferred (see Control Over What Transfers).
- Limited shareholder involvement (see Limited Shareholder Involvement).

Control Over What Transfers

The principal commercial advantage of an asset purchase is that, in general, it gives the parties control over which of the target's assets and liabilities the buyer acquires. The parties are free to contractually exclude certain assets and liabilities from an asset purchase. The collection of assets, rights, and liabilities (if any) acquired should enable the buyer to continue running the target business in the same manner as the seller once the transaction has completed.

Generally, no assets transfer automatically on an asset purchase in Brazil, and exactly what the buyer acquires will depend on the terms of the APA. The buyer therefore has some scope to cherry-pick the assets that it is particularly interested in, and to leave any unwanted assets with the seller. The inherent flexibility over what transfers to the buyer may also be an attractive feature to a seller who is looking to divest a business division or unit of a larger enterprise.

Subject to certain limited exceptions, the liabilities of the target business will remain with the seller on completion of the transaction, unless the parties expressly agree otherwise in the APA. From the perspective of the tax authorities and employees, an asset purchase involving the entire business is treated similarly to a share purchase. The APA may establish that the seller will remain directly liable for its debts and obligations, but the buyer may be liable for tax, social security, and labor liabilities and

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contingencies if the seller fails to comply with its obligations. In addition, as environmental liabilities are attached to the property, it is necessary to address the remaining obligations in the APA related to its remediation, whether the pollution was caused by the seller or third parties.

The ability to leave liabilities behind can be a major advantage for the buyer, particularly where the target business has extensive known liabilities, or its operations involve an unacceptable exposure to unquantified or unknown liabilities (such as product liability claims). It can also help to simplify negotiation of the APA, as the buyer may be prepared to accept less extensive warranty coverage from the seller if it is not assuming the risk of historic, undisclosed liabilities.

Limited Shareholder Involvement

Where the target business is carried on by a company, it may be possible for an asset sale to be approved and implemented by the seller's directors, without involving the company's shareholders in the transaction process.

However, shareholder approval for an asset sale may be required if the by-laws, articles of incorporation/association or a shareholders' agreement sets forth specific rules for those operations.

Key Disadvantages of an Asset Purchase

Asset purchases generally have the following disadvantages in Brazil for sellers or buyers in comparison to share purchases:

- Structural complexity (see Structural Complexity).
- No clean break for seller (see Seller May Be Left with Problem Assets or Liabilities).
- Complexities around extracting sale proceeds (see Complexities Around Extracting Sale Proceeds).

Structural Complexity

The principal legal and commercial drawback of an asset purchase is the complexity involved in documenting and implementing the transaction. Asset purchases that involve an entire business or a substantial part of it are not that common in Brazil, because they may cause increased bureaucracy (such as the issuance of new licenses, authorizations, and registrations needed to operate the business and transfer of employees) and do not necessarily avoid the succession of liabilities or contingencies which arose from the previous operation conducted by the sellers (see Control Over What Transfers). In particular, the parties must:

- **Identify what is being sold.** The parties must identify the individual assets, rights, contracts, and liabilities comprised in the target business, and ascertain which of them will transfer to, or be assumed by, the buyer, and which will remain with the seller. Once the parties have agreed to a commercially acceptable split of the relevant assets and liabilities, it is essential to ensure that the agreed position is accurately documented in the APA. Generally, no assets transfer automatically on an asset purchase, and certain transfers depend on registrations towards public authorities (as is the case of real estate properties and vehicles) and issuance of invoices

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(for inventory and further assets). Therefore, buyers need to be mindful of the risk of failing to identify and include a key asset in the transaction. Equally, the parties must ensure that they do not inadvertently agree to assume or retain (as the case may be) an undesired liability. Care is required in defining which assets are included and which are excluded, and (where relevant) the liabilities for which one of the parties has agreed to accept responsibility and perhaps indemnify the other.

- **Deal with transfer formalities.** The parties must comply with the individual legal formalities required to transfer title to the purchased assets (or responsibility for any assumed liabilities) to the buyer. The applicable transfer formalities vary depending on the type of asset, right, or liability and, in practice, it is likely that a variety of different transfer documents will have to be produced. Further, specific regulations may govern the transfer of certain assets. For example:
  - conveyance or assignments will be required to transfer any leasehold property included in the transaction;
  - intellectual property may require formal transfers or assignments, including registration with the relevant public registries;
  - update of enrollment with the competent traffic authority will be required to transfer vehicles;
  - legal assignments or novation may be required to fully transfer the benefit (and, where relevant, the burden) of the target's business contracts to the buyer; and
  - transfer of real estate assets must be incorporated into a public deed and registered with the corresponding land registry.
- **Obtain third-party consents, permits, and approvals.** As an asset purchase involves transferring a collection of individual assets and rights to the buyer, there are likely to be several third parties (including suppliers, customers, and lessors) who will be affected by the transfer, and whose consent may be required. For example, where:
  - any leasehold property is acquired, the landlord's consent will generally be required before the lease can be assigned to the buyer. Almost all leases contain clauses that restrict the circumstances in which the lessee may assign, sublet, or share occupation of the property, including a requirement for the landlord's consent to be obtained before the lease is assigned;
  - any business contracts that are to be transferred to the buyer contain restrictions on assignment (which is often the case in practice), the consent of the counterparty may be required before the assignment can proceed;
  - leased equipment is particularly important to the target business, the buyer may need to arrange for the leases to be assigned or novated to it at completion, which is likely to necessitate agreeing on terms with the lessors beforehand;
  - the target business is involved in a business activity that cannot be carried on without a license, permit or other regulatory approval, the buyer may need to obtain approval from

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the relevant regulator for the post-completion continuation of any such license or approval, or the grant of a new license or approval in the buyer's name; and

- the target business has executed any agreement making the disposition of assets subject to a creditor's prior consent, or the buyer is going to assume any financial liabilities relating to the business, it will need to obtain approval from the financing entity and expressly assume the position of the seller under such financing obligations, including the granting of any security. If the financing liabilities remain with the seller, the seller must ensure that its post-transaction status does not breach any covenants under the financing arrangements that would trigger early repayment obligations, penalties, or other consequences.

Additionally, the acquisition by foreign investors of an entire business through an asset deal must be performed by a Brazilian subsidiary (a company incorporated, and with head offices located, in Brazil and governed by Brazilian law). If the buyer does not already have a local investment vehicle in place to perform the acquisition, a subsidiary entity will need to be incorporated and authorized to conduct business prior to closing.

At the very least, the need to address the above matters is likely to add to the overall transaction costs and timetable, and at worst, it could make the asset acquisition structure unviable in practice. This might be the case where the parties are unable to obtain a third-party consent to the novation of a key business contract, or approval from an applicable regulator for the transfer or re-grant of an essential license or permit. In some cases, however, it may be acceptable to proceed without a formal assignment or novation.

Seller May Be Left with Problem Assets or Liabilities

In an asset purchase, generally the only assets and liabilities that transfer are those included in the APA. This is subject to limited exceptions for certain assets and contracts (see Control Over What Transfers).

If the buyer does not agree to take on certain problem assets or liabilities, the seller may have to retain a shell entity with residual liabilities even after the key assets of the target business have transferred to the buyer.

If, however, in the sale of a business unit, the seller does not remain with enough assets to meet its outstanding obligations, the effectiveness of the deal will depend on the payment of such obligations or on the consent of the respective creditors within 30 days upon notice.

Complexities Around Extracting Sale Proceeds

In an asset purchase, the selling company receives, and is taxed on, the consideration paid by the buyer. For the seller's shareholders to subsequently extract the proceeds of sale, it will usually be necessary for the selling company to pay a dividend (if there are outstanding profits and enough cash) or make some other form of distribution to its shareholders.

By contrast, on completion of a share purchase, the proceeds of sale are paid directly to the target company's shareholders (see Direct Receipt of Sale Proceeds).

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Tax and Accounting Considerations

Tax

In many jurisdictions, the differing tax consequences of share and asset purchases are usually a fundamental driver in determining which route is taken.

- **Share purchase.** In a share purchase in Brazil, the price premium paid by the buyer may be deducted from Corporate Income Tax if certain requirements are met, which include a direct or reverse merger between the target and the buyer and demonstration of the purchase price allocation among the book value of assets, their fair market value, and goodwill. If the target is entitled to tax benefits or has accrued net operating losses, those desirable tax attributes are generally maintained if the target remains operating in the same line of business. Transaction taxes and value added tax (VAT) are generally not imposed on a share purchase.
- **Asset purchase.** In an asset purchase in Brazil, each asset is subject to taxes according to the respective type of asset being purchased. For instance, inventory sales are generally subject to VAT, Excise Tax, and Social Contributions on Gross Income. Fixed asset sales may be subject to Excise Tax and VAT depending on facts and circumstance. These taxes are generally recoverable in subsequent sales of inventory, or by depreciation of fixed assets. Additionally, real property is subject to Municipal Property Transfer Tax. An asset purchase usually does not involve other tax attributes of the seller, but depending on the extent of assets being purchased, the buyer could be responsible for tax liabilities associated with business transactions carried out with the assets prior to the purchase.

Accounting Treatment

The purchase of assets of a target business or the purchase of the shares of the relevant target company do not cause different accounting treatment in Brazil when it comes to the consolidated financial statements of the buyer. However, relevant differences arise in the individual financial statements of the companies.

Brazilian accounting regulations were revised to converge with International Financial Reporting Standards (IFRS), and these regulations are mandatory for all types of companies, large or small, publicly traded or privately owned, including subsidiaries of foreign companies. Listed corporations, large sized companies (with total assets over BRL240 million or annual gross revenue over BRL300 million), financial institutions and insurance companies must follow the complete set of IFRS (full IFRS), while medium and small-sized companies are subject to a slightly different and more simple set of rules (IFRS-SMEs).

The focal point of these regulations has always been the consolidated financial statements, where the accounting for asset or share sales does not deviate. In both cases the initial recognition is based on the fair value of the assets acquired. The acquirer recognizes separately the identifiable assets, liabilities and contingent liabilities that exist at the date of acquisition. Goodwill is recognized as an intangible asset and is subject to impairment (full IFRS) or amortization over its useful life or ten years (IFRS-SMEs). Transaction costs are capitalized (IFRS-SMEs) or treated as expenses (full IFRS).

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In the individual financial statements, the treatment will be different since Brazilian corporate law requires the use of the equity method to measure investments in subsidiaries (as well as in joint ventures and associations). IFRS was also adapted in 2014 to reinstate the option to use the equity method in separate/individual financial statements (IAS 27). For that reason, the accounting of an asset deal versus a share deal will render different results at the level of the individual financial statement, as follows:

- **Asset purchase.** In asset deals, the cost of acquisition of assets and liabilities acquired will be allocated to each individual item of asset/liability acquired.
- **Share purchase.** In share deals, the cost of acquisition will be accounted for as an investment in a subsidiary at the transaction price. The difference between the cost of the investment and the entity's share of the net fair value of the investee's identifiable assets and liabilities is accounted for as goodwill, and it is included in the carrying amount of the investment. Amortization of this goodwill is not permitted.

Alternative Structures

Although most acquisitions in Brazil are structured as a share or asset purchase, they may also be structured as a merger or spin-off of the involved companies, swaps of shares or assets, performance of initial public offers, and other complex structures depending on the issues and conditions of the deal, such as a two-stage hive-down (see Pre-Sale Reorganization).

Another alternative would be an umbrella agreement governed by Brazilian law regulating the cross-border deal in its entirety, with separate transfer documents to be prepared by local counsel, but this approach is not that common in Brazil.

Auctions

Sales of assets, such as real estate, by auction are common in Brazil in judicial proceedings.

It is also common to sell a company through a private bid procedure which aims to maximize the value of the company. Private bid procedures are usually organized by the seller, and potential buyers are invited to participate and present non-binding indicative proposals. The buyers that have presented the more attractive proposals are invited to perform full due diligence of the company and submit a binding proposal. In these procedures, the sellers may choose to whom they want to sell the company, at their sole discretion.

Other Significant Issues in Brazil

Foreign Investment

Although generally there are no restrictions on foreign investment, the following requirements must be met by any foreign investor before acquiring any shares issued by a private company:

- Register with the Federal Revenue (the Brazilian tax authority) and obtain a taxpayer registration (CPF for individuals and CNPJ for entities).

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- Indicate an attorney in fact resident in Brazil with powers to receive services of process based on corporate claims.

Additionally, there are restrictions on foreign persons investing in some industries (such as nuclear energy, mail, aerospace, banks, airlines, media, and mining) or acquiring rural properties.

Employee Matters

Share or asset sales do not require employee consent or any type of consultation processes with employees, trade unions and/or any labor authorities.

In the context of share or asset sales, employees are not protected against dismissal. Employees may either be terminated without cause, upon payment of mandatory severance, or transferred from the seller to the buyer, depending on their written consent. In case of transfer, the employment contracts are protected by law against any changes that may cause, directly or indirectly, any losses, meaning that the acquired rights of the employees (mainly, compensation and benefits) should be fully maintained by the buyer. Employees who refuse to transfer give the seller no alternative other than severing.

For more information on employee issues in private acquisitions in Brazil, see Practice Note, Employees: Cross-Border Private Acquisitions (Brazil).

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