

# Signing and Closing: Private Acquisitions (Brazil)

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A Practice Note discussing the mechanics of signing and closing Brazilian share or asset acquisitions. It outlines the deal documents typically produced, and execution and transfer formalities in Brazil.

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Deal closing mechanics and formalities can vary significantly by jurisdiction. Counsel representing parties in cross-border transactions should determine in advance of closing what formalities are required in each relevant jurisdiction to effectuate the deal. This Note sets out the mechanics of signing and closing the acquisition of the shares or assets of a private company in Brazil. It covers:

- The people that should attend, documents that are delivered, and the location of signing and closing meetings.
- Execution and transfer formalities, including the role of notaries (*tabeliões*) in Brazil.
- Formalities that should happen after closing.

Unless otherwise stated, a reference in this Note to:

- Civil Code means Law No. 10.406/2002, the Brazilian Civil Code (*Código Civil Brasileiro*).
- Shares includes the capital stock of:
  - a *Sociedade Anônima* (S.A.) (the Brazilian entity closest conceptually to a US corporation or a UK public limited company), which is divided into shares; and
  - a *Sociedade Limitada* (Ltda.) (the Brazilian entity closest conceptually to a US limited liability company or a UK private limited company), which is divided into quotas.

For more information on the differences between share and asset purchases in Brazil, see [Practice Note, Acquisition Structures: Comparing Asset and Share Purchases \(Brazil\)](#).

## Documents at Signing and Closing Meetings

### Share Purchase: Signing and Closing Meetings

In a share purchase in Brazil, the following documents are commonly produced and executed at signing or at closing:

- Share purchase agreement (SPA).
- Disclosure letter, if disclosures against the representations and warranties in the SPA were not included as schedules to the SPA.
- Evidence of the powers and authority of the parties and of the signatories to enter the transaction. For example:
  - board resolutions approving the transaction and granting authority to sign; or
  - powers of attorney authorizing a signatory (see [Powers of Attorney](#)).
- Shareholders' agreement (in a partial acquisition of the shares by the buyer).
- Services agreements (if the buyer wants to retain the sellers' employees or key persons).
- Corporate documents transferring the ownership of the shares (on closing, usually upon payment of the purchase price, in whole or in part).
- Resignation letters of directors and officers.
- General Meeting and/or Board Meetings minutes (if the company is a S.A.) or an amendment to the company's articles of association (if the company is a Ltda.) to appoint new directors and officers.
- Other documents evidencing the target's ability to conduct its business, which may include title to premises and administrative authorizations or licenses, or the parties' authority and power to enter the transaction (for example, merger control clearance).
- Proof or confirmation of payment of the purchase price and receipt of payment.
- Other ancillary agreements that the parties may negotiate and execute, for example, transitional services agreements or non-compete agreements. However, in most cases these agreements are negotiated together with the services agreement.

If there are no conditions precedent to closing the transaction, signing and closing may occur at the same time. When signing and closing occur separately, the parties usually produce and execute at the signing meeting only the SPA, the disclosure letter, and, in some cases, documents related to evidence of powers and authority. The parties execute and deliver the remaining transaction documents at closing. Nevertheless, it is common practice to have a draft of the ancillary documents included as schedules to the SPA.

Under Brazilian law, the transfer of shares or quotas is implemented through:

- The execution of transfer in the register and share transfer books, for a S.A.
- The execution of an amendment to the articles of association, to be filed with the local board of commerce and other competent authorities, for a Ltda.

(See [Share Transfer Formalities](#).)

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

## Asset Purchase: Signing and Closing Meetings

In an asset purchase in Brazil, the following documents are commonly produced and executed at signing or at closing:

- Asset purchase agreement (APA).
- Commitment of purchase and sale (a preliminary contract common for real property transactions, due to the legal requirement of public deeds for the purchase and sale of real property assets, as provided for in Article 108 of the Civil Code).
- Disclosure letter, if disclosures against the representations and warranties in the APA were not included as schedules to the APA.
- Evidence of the powers and authority of the parties and of the signatories to enter the transaction. For example:
  - board resolutions approving the transaction and granting authority to sign; or
  - powers of attorney authorizing a signatory (see [Powers of Attorney](#)).
- Services agreements (if the buyer wants to retain sellers' employees or key persons to conduct the business).
- Proof or confirmation of payment of the purchase price and receipt of payment.
- Public deed of purchase and sale of real property assets, as provided for in Article 108 of the Civil Code.
- Other ancillary agreements that the parties may negotiate and execute, including, for example, a guarantee.

If there are no conditions precedent to closing the transaction, signing and closing may occur at the same time. When signing and closing occur separately, the parties usually produce and execute at the signing meeting only the APA (or the Commitment of Purchase and Sale, if the asset is real property), the disclosure letter, and, in some cases, documents related to evidence of powers and authority. The parties execute and deliver the ancillary agreements such as guarantee agreements and services agreements, as well as public deeds when the purchased asset is real property, at closing. Nevertheless, it is common practice to have a draft of the ancillary documents included as schedules to the APA. The only document legally required is the public deed for purchase and sale of real property assets.

The transfer of assets is implemented through the applicable registrations in the participating companies' accounting entries and issuance of corresponding invoices. Additionally, depending on the assets that are being purchased, it may be necessary to execute public deeds and amendments to the commercial agreements that are being transferred, for example, to change the parties involved (see [Which Jurisdiction for Signing and Closing?](#)).

Asset purchases that involve an entire business or a substantial part of it are uncommon in Brazil. This is because they:

- Have additional and more complex procedural requirements than a share purchase, for example:
  - the issuance of new licenses to operate the business (which must be concluded before closing the transaction to avoid blackout on the operations); and
  - the transfer of employees.
- Do not avoid the succession of liabilities or contingencies that may arise from the previous operation conducted by sellers, as provided for in Article 133 of Law No. 5.172/1966 and Articles 448 and 448-A of Decree-Law No. 5.452/1943.
- Are generally, from a tax point of view, more burdensome than the sale of an equity interest, because each item of inventory, fixed asset and intangible asset must be reported individually and is subject to issuance of tax documents (for example, an invoice) and assessment of transaction taxes, as applicable.

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

## Which Jurisdiction for Signing and Closing?

The signing and closing of the acquisition of a Brazilian company or of the business may take place in a foreign jurisdiction, although it is uncommon because of the lack of a practical benefit for doing so. Signing abroad may result in certain disadvantages, including the need to have the transaction documents notarized and apostilled to be valid in Brazil according to Article 3 of the Hague Convention (approved by Decree No. 8.660/2016 and Article 129, item 6, of Law No. 6.015/1973), which may result in additional time and costs. Additionally, even if the parties sign an asset purchase agreement abroad, the transfer of the assets (equipment and machinery, for example) is implemented in Brazil through the issuance of the applicable invoices and registration on the accounting entries of the participating companies.

As provided for in Article 108 of the Civil Code, a notary (*tabelião*) in the jurisdiction where the property is located must draw up the mortgage deed and the real property acquisition deed if:

- The transaction agreement provides for a specific guarantee (for example, the mortgage of real property located in Brazil).
- The asset purchase involves the acquisition of real property in Brazil.

(See [Notaries and Notarization](#).)

## Warranties and Indemnities: The Gap Between Signing and Closing

In Brazil, if there is a gap between signing and closing, the representations and warranties given on signing are typically reinstated on closing. This reinstatement is important because the buyer is generally entitled to indemnification for losses derived from acts or facts that occur before the closing date, including breach of the representations and warranties granted by the seller on signing and closing.

## Who Should Attend Signing and Closing Meetings?

Signing and closing meetings in Brazil are usually attended by the:

- Parties to the agreement (buyer and seller).
- Officers or legal representatives of the parties if either party is a corporate entity.
- Intervening parties (legal representatives of the target company).
- Consenting parties (for example, spouses, depending on the type of Brazilian marriage status and its property ownership and distribution requirements).
- Legal counsels of the parties.

If a real property guarantee is provided, the public notary should also be present to formalize the deed (see [Notaries and Notarization](#)).

## Proof of Identity and Authority

It is standard and advisable practice to require:

- Proof of identity by the individuals, which can be evidenced by identity card, driver's license, or passport, among others (see [Execution by Individuals](#)).
- Evidence of the authority of the legal representatives of the parties to sign the documents, which can be evidenced by powers of attorney, certificates of authority, articles of association, or general shareholders meeting, among others (see [Execution by Companies](#) and [Powers of Attorney](#)).

## Execution Formalities

Generally, transaction agreements are signed in hard copy form in the presence of two witnesses, and the parties typically initial all pages and sign on the same counterpart. However, this practice has changed due to the coronavirus disease (COVID-19) pandemic. Electronic signatures have become more common since they are also legally valid and accepted, as provided for in Provisional Measure no. 2.200-2/2001 and Law No. 14.063/2020.

Brazilian law does not require notarization of signatures for share or asset purchase agreements, but it is advisable to certify the signature of the individual and of the representatives of the company. Electronic signatures are usually more cost-effective because they avoid the travel required for physical meetings.

If the parties decide to sign the transaction agreements electronically, it is recommended that the parties use either or both digital and electronic signatures (see [Digital Signatures](#)).

Specific situations may require specific forms, depending on the type of agreement. For example, an agreement may require the public deed for the mortgage guarantee of real property, which must be drawn up by a Brazilian notary, as provided for in Article 108 of the Civil Code, but the parties may execute it electronically through a digital certificate.

## Execution by Companies

For companies incorporated in Brazil, it is common to present either:

- A certified copy of the documents evidencing the legal representative's authority to sign the transaction agreements on behalf of the company.
- Specific powers of attorney.

Transaction agreements may be signed in hard copy form or electronically, as authorized by Provisional Measure no. 2.200-2/2001 and Law No. 14.063/2020. If signing electronically, it is recommended that the parties use the digital signature certified by the public agents or the electronic signature through specific technological platforms.

The formalities for the execution of documents by foreign companies are the same as for Brazilian companies. In the case of foreign companies or individuals, the Brazilian corporate documents that provide for the transfer of quotas and shares must be signed by the legal representatives of the parties, who must be individuals residing in Brazil, as provided for in Regulatory Instruction DREI no. 81/2020 and Regulatory Instruction RFB no. 1863/2018.

## Execution by Individuals

Individuals usually present a certified copy of their personal documents (such as an identity card, driver's license, passport, or other valid form of identification). Brazilian law does not require the notarization of signatures, but it is advisable to certify the individual's signature. If an individual signs the documents electronically, it is recommended that they use either or both digital and electronic signatures (see [Digital Signatures](#)).

Depending on the marriage regime, the signature of the individual's spouse may also be required for the validity and enforcement of the obligation against the married individual (Article 1.647, Civil Code).

## Digital Signatures

Digital and electronic signatures are admissible as evidence of execution. Digital signatures are certified by official public agents and require that all signatories have personal digital certificates. Electronic signatures are made by using technological and specific platforms ([DocuSign](#), for example) and require previous registration on the platform and the use of a specific link with login and password. According to Provisional Measure no. 2.200-2/2001 and Law No. 14.063/2020, a digital certified or electronic signature has the same enforcement power as a physical signature. Electronic signatures performed through digital certificates are considered certified signatures, and therefore do not require notarization.

## **Admissibility of Faxed or Emailed Documents as Evidence of Due Execution**

Since Brazilian Law does not require a specific form for contract unless when the law expressly requires (Article 107, Civil Code), Brazilian courts admit faxed or emailed documents as evidence of execution. However, any discussion in court regarding such agreement can involve other evidence, such as other documents, witness' testimony and market practices, as well as presumptions based on the facts presented by the parties.

Moreover, if there is no signed agreement (that is, executed by the parties and two witnesses, as provided for in Article 784, III, of Law No. 13.105/2015), the courts will first analyze the existence and validity of the agreement before considering the merits of the case. This verification causes a delay in the court procedure.

To avoid this evidence phase and to go directly to the discussion of the merits, it is best practice to sign the agreements in hard copy form and initial all pages, or electronically sign the agreements with digital signatures certified by public agents (for example, [Certisign](#), [Digitalsign](#), [OAB - Brazilian Bar Association](#), [Serasa](#), [Boavista](#), and [Serpro](#)) or with the electronic signature from specific technological platforms (for example, [DocuSign](#) or [Clicksign](#)).

## **Execution in Counterpart**

The same documents must be executed (either physically or electronically) for the Brazilian courts to directly enforce the agreement. If different parties sign separate copies, and the existence of the agreement is contested, the courts will first analyze the validity of the signature and the intention of the parties and only then analyze the merits of the case (Article 784, III, of Law No. 13.105/2015).

As provided for in Article 107 of the Civil Code, Brazilian law:

- Does not expressly require written agreements.
- Accepts verbal agreements.

A simple exchange of messages may therefore be an obligation, but the courts analyze the willingness of the parties to be bound by the obligations before enforcing them against the respective party. For example, a foreclosure procedure is allowed if the party has an agreement signed by all parties and two witnesses. Otherwise, the judge performs a preliminary evidence procedure to certify the willingness of the parties to be bound to the obligation before the judge recognizes the obligation and authorizes the foreclosure procedure. This would delay the overall outcome of the process.

## **Powers of Attorney**

An individual or company may appoint another person to execute documents on its behalf at signing or closing meetings. In these cases, the legal representative (if the grantor is a company) or the individual must grant a power of attorney to an individual with specific powers to execute the transaction documents (Article 144 of Law No. 6.404/1976 and Article 1.018, Civil Code). The individual or company may grant the power of attorney through a private instrument. Even though it is not mandatory, the best practice to ensure greater legal certainty and avoid possible authenticity questions from public agencies

is to notarize the grantor's signature or to sign the power of attorney with a digital signature certified by public agents.

The power of attorney must include specific power to transfer quotas and shares (Article 661, §1, Civil Code).

## Share Transfer Formalities

### Sociedades Anônimas

To transfer title to shares in an S.A., the seller and buyer must sign the company's share transfer and registry books (Article 31, paragraph 1, of Law No. 6.404/1976). Brazilian corporations no longer issue share certificates to attest the ownership of shares.

### Sociedades Limitadas

To transfer title to shares in a Ltda., the seller and buyer must:

- Execute the same version of an amendment to the company's articles of association.
- Register the amendment with the local board of commerce and other governmental authorities.

Although the share ownership is duly transferred after the registry with the board of commerce (Article 1.057, sole paragraph, Civil Code), the company must also update its records with other governmental authorities, such as:

- Federal Revenue (*Receita Federal do Brasil* (RFB)).
- Central Bank (*Banco Central do Brasil* (BCB)).
- State and municipal authorities.
- Social Security Authority (*Instituto Nacional de Seguro Social* (INSS)).

In the case of the Federal Revenue and some state and municipal authorities (depending on the State and City) the update is automatic with the registration with the board of commerce and does not require any further action from the company.

## Notaries and Notarization

### Role of the Notary

In the US, a notary public generally is not an attorney and performs primarily ministerial acts, including administering oaths and acting as an impartial witness to important document executions. In Brazil, notaries (*tabeliões*) are legal professionals appointed by Brazilian states and given a wide range of responsibilities, including authenticating, certifying, and registering the signatures (*reconhecimento de*

*firma*), transaction documents, and powers of attorney. A notary in Brazil may not change the terms of the deal; only the parties to the transaction can do so.

If the transaction involves the transfer of real property or a specific guarantee (for example, mortgage of real property or fiduciary transfer of shares), the notary must draw up and register the corresponding deeds and agreements. If real property is transferred as part of the transaction, a public deed (*escritura pública*) must be written in Portuguese and read aloud to the parties and, after its execution before the notary (which now can be made via a digital meeting), must be registered with the relevant real estate registry office (Articles 108 and 1.227, Civil Code).

In the case of a fiduciary transfer of shares, the instrument does not need to be public but, for it to be effective before third parties, it also needs to be registered with the competent titles and deeds registry office (Article 129, item 10, of Law No. 6.015/1973 and Article 1.361, paragraph 1, Civil Code).

In the event of transfer of other type of assets, other registrations with public bodies are required, such as the registration with the competent transit authority for the transfer of vehicles.

Also, if foreign parties are represented by an attorney-in-fact on the transaction, a duly notarized or apostilled power of attorney (if granted abroad) is required, according to Article 3 of the Hague Convention (approved by Decree no. 8.660/2016 and Article 129, item 6, of Law No. 6.015/1973).

In general, the involvement of a Brazilian notary does not impact the timetable of the transaction, since the parties typically schedule their attendance, when necessary, in advance, and organize all related measures to avoid delaying the signing or closing.

As enacted by Decree no. 8.660/2016, Brazil is a signatory country to the October 5, 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (see [HCCH: Apostille Convention Participating Countries Table](#)). Notarization by *tabeliões* of some documents required for a Brazilian transaction may not be required where these documents were properly notarized in another signatory country. For more information regarding processes through which parties can verify a party's signature is genuine under US and international law, see [Practice Note, Notarizations, Apostilles, and Legalization](#).

## Notaries' Fees

The fees the notary charges depend on the document that the notary is to notarize or produce (for example, a public deed or a public power of attorney). The fees may also vary depending on the quantity of signatures and pages that the notary is to notarize or certify.

These fees are established locally by each Brazilian state, and usually are updated annually. The fees are not negotiable and are provided by the Public Registry Office according to the tabulated prices updated from time to time. In the case of São Paulo, the fees were fixed in State Law 11.331/2002, and can be found in a [fee table](#) posted by the *Colégio Notarial do Brasil*. The fees are as follows:

- A public power of attorney generally costs BRL500.
- Notarization of one signature generally costs BRL6.
- Certification of one document page generally costs BRL4.

## Conditional Closings

Depending on the type of transaction, the parties may sign the transaction agreements and defer closing until certain conditions or formalities are fulfilled, for example:

- Corporate restructuring required before closing.
- Approval of the transaction by the Brazilian Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica*) (CADE) (which depends on the financial thresholds of the companies involved in the transaction and other market criteria established by local anti-trust legislation).
- The target company's execution or termination of certain agreements.
- The obtaining of third-party consents, for example, the approval of the transaction by:
  - financial institutions used by the target company for financing transactions;
  - lessors; or
  - other third parties in certain specific agreements.
- Other regulatory agencies' approval of the transaction.
- Other formalities that depend on the kind of transaction and agreement between the parties.

It is common to make these formalities or approvals a condition of closing. On closing, the parties usually reinstate the representation and warranties, formalize the transfer of shares, and pay the purchase price.

Approval of the shareholders or other governing body is usually required for the signing of the transaction agreement, but not as a condition precedent between signing and closing of the transaction.

## Other Considerations

### Lawyer's Undertaking

It is not common for lawyers in Brazil to give undertakings binding themselves to do or perform certain tasks on their clients' behalf. Attorneys usually act as legal counsels of their clients and only assume specific undertakings related to the professional activities for which they were hired, for example, holding agreements in escrow or filing documents.

### Opinion Letters

There is usually no requirement for legal opinions regarding due execution of the transfer documents or other legal matters to be delivered at closing by the lawyers acting for the parties for share or asset transactions in Brazil, except when dealing with the public issuance of shares in the market or with international attorneys, when legal opinions may be requested to provide assurance of compliance with

the local applicable legislation. The local bar association has not set specific rules for giving opinions, except that they should be given only on legal matters and by licensed attorneys (Articles 1 and 3 of Law No. 8.906/1994).

## Post-Closing Formalities

### Share Purchases: Post-Closing Formalities

#### Required Actions for Sociedades Anônimas

If the target company is a corporation, the parties must update the records of the company with the required governmental authorities after the transfer if there is a change of officers or directors (see [Share Transfer Formalities](#)). As a general rule in Brazil, all company information before public bodies at all levels of government must be kept up to date.

#### Required Actions for Sociedades Limitadas

If the target company is a Ltda., the parties must:

- Register the amendment to the articles of association that approved the transfer of shares with the local board of commerce (Article 1.057, sole paragraph, Civil Code).
- Update the records of the company with the other governmental authorities (see [Share Transfer Formalities](#)). As a general rule in Brazil, all company information before public bodies at all levels of government must be kept up to date.

#### Optional Post-Closing Measures

The parties may agree to additional post-closing measures, including:

- Corporate restructurings.
- Mergers and passing of information to clients, suppliers, and third parties.

The companies should plan post-closing representation with the banks and governmental authorities during the transition period.

### Asset Purchases: Post-Closing Formalities

Brazilian law does not require any additional formalities after the closing of an asset purchase deal.

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