M&A Litigation

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GETTING THE DEAL THROUGH

Brazil

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1 Identify the main claims shareholders in your jurisdiction may assert against corporations, officers and directors in connection with M&A transactions.

The main claims shareholders may assert are:

- claims related to any violation of the corporation by-laws or legal provisions that might have occurred in the context of an M&A transaction;
- indemnification claims against officers and directors for damage caused to the corporation in violation of the by-laws, or as a result of acts or omissions performed with:
  - negligence;
  - recklessness;
  - lack of professional skills; or
  - wilful misconduct; and
- indemnification claims against controlling shareholders for any damage caused by acts performed by an abuse of power.

Minority shareholders may also file a claim in the context of an M&A transaction if it involves a corporate reorganisation (such as a merger, amalgamation or spin-off) and the minority shareholder receives fewer shares in the surviving entity than expected. Minority shareholders may also exercise withdrawal rights (not applicable to publicly traded corporations) and challenge the value to be paid for their shares.

As a principle of law, any individual or entity that caused damage resulting from an action or omission of the corporation is entitled to indemnification for damages.

2 For each of the most common claims, what must shareholders in your jurisdiction show to bring a successful suit?

As a condition to filing a successful claim, a shareholder must show that he or she has standing to sue (ie, he or she was a shareholder prior to the transaction and was affected by it); and a legal interest to bring the claim based on a violation of his or her rights.

In relation to the substantive law and burden of proof, the shareholder must have strong elements to prove that a breach of the company's by-laws or the law has in fact occurred as a result of the transaction, thus causing direct damage to the shareholder.

3 Do the types of claims that shareholders can bring differ depending on whether the corporations involved in the M&A transaction are publicly traded or privately held?

Publicly traded corporations are subject to the supervision of the Brazilian Securities and Exchange Commission (CVM) according to the Brazilian Security Law. Therefore, CVM has power to impose penalties and fines in cases of violation of the applicable law or other rules arising from CVM's normative power. For this reason, publicly traded corporations can be party to punitive administrative proceedings before CVM as a result of a claim brought by shareholders.

Other procedures can be pursued whether the corporation is publicly trade or privately held. Note that shareholders of publicly traded corporations are not entitled to withdrawal rights and any lawsuits deriving therefrom.

4 Do the types of claims that shareholders can bring differ depending on the form of the transaction?

As a general rule, shareholders can bring a claim for indemnification in the case of breaches of legal duties, legal provisions and governing documents by company directors, officers or controlling shareholders in the context of M&A transactions, regardless of the form of the transaction. Shareholders can also bring a lawsuit against their counterparties in the M&A transaction in relation to the transaction documents.

In transfers of publicly traded corporations, disputes about the exercise of tag-along rights by minority and preferred shareholders may also take place.

However, there are certain transaction structures that entail additional rights for shareholders, particularly those involving reorganisations such as mergers, amalgamations and spin-offs. In such case, claims may challenge the exchange rate of shares of the corporation being merged, amalgamated or spun-off for shares in the surviving entity. Another alternative for dissenting shareholders is to exercise the right of withdrawal of the corporation, in which case shareholders may challenge the amount to be paid to the withdrawing shareholders.

5 Do the types of claims differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer?

Although unsolicited offers are conceptually possible under Brazilian law, they are very rare in practice. Brazil adopts the mandatory bid rule, whereby the decisions on the offer remain with the shareholders. The board of directors must give an opinion on the success of the offer, but the shareholders have the final word (section 32-D of CVM rule 361).

Unsolicited offers can, in theory, be challenged based on the regularity of the offer under Brazilian law. Potential violations of the regulations preventing competing offers may also give rise to litigation.

Claims seeking indemnification for abuses of controlling shareholders are more likely in negotiated transactions due to the nature of unsolicited offers.

Regardless of the type of transaction, whenever the corporation or its shareholders suffer damage due to acts or omissions of the management, claims for indemnification may be sought against directors and officers.

6 Do the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder?

Even though the claims for these follow the same proceeding, they are based on different legal grounds.

In the case of a loss suffered by the corporation, as general rule, the legal entity has the standing to file a lawsuit to recover its losses as set forth in article 159 of the Corporate Law. However, if the losses are caused by directors' or officers' acts or omissions, there is the possibility of a derivative suit brought by shareholders on behalf of the corporation according to the third and fourth paragraphs of article 159 of the Corporate Law.

On the other hand, if the loss is suffered directly by shareholders, they can seek an indemnification from the wrongdoer based on the general provisions regarding civil liability set forth in the Brazilian Civil Code. Furthermore, shareholders can bring a claim against directors or officers if they suffered a direct loss caused by the acts or omissions of

such management members as provided in the seventh paragraph of article 159 of the Corporate Law.

7 Where a loss is suffered directly by individual shareholders in connection with M&A transactions, may they pursue claims on behalf of other similarly situated shareholders?

Brazilian civil procedure law does not provide for class actions in the same terms as those under US law. There are specific civil collective actions that may be filed by the Prosecutor's Office, agencies, associations and other entities to defend the interest of a group of individuals under the same conditions, but M&A transactions would not fall under such hypothesis if there have been no securities violations. The shareholder him or herself is not entitled to file such collective claim.

Nevertheless, a suit brought by several individuals is allowed under Brazilian law. In this case, all of the individuals are considered co-claimants, and have the same rights and responsibilities in the lawsuit. However, the number of claimants allowed to stand in a lawsuit may be limited by the judge if he or she deems that an excessive number of claimants undermines the expedited resolution of the dispute, or hampers the regular defence of the defendant or the execution of the award.

Recently, groups of Brazilian individuals have been forming associations of minority shareholders of certain large corporations. The underlying rationale is that such associations file for a class or collective action, in which case the indemnification shall revert to the association. This phenomenon is recent, and to date there is no relevant case law on this.

8 Where a loss is suffered by the corporation in connection with an M&A transaction, can shareholders bring derivative litigation on behalf or in the name of the corporation?

Brazilian law does not recognise derivative actions brought by shareholders in the name of the corporation against third parties, although the Corporate Law allows shareholders to bring lawsuits in the name of the corporation against officers and directors.

Shareholders can bring derivative suits against directors and officers according to the third and fourth paragraphs of article 159 of the Corporate Law. Such provisions establish two possibilities regarding derivative suits against directors and officers:

- shareholders can bring a derivative suit if the corporation does not file the claim within three months counted from the date of the shareholders' meeting that authorised such lawsuit; or
- shareholders representing at least 5 per cent of the capital stock can file a derivative suit if the claim against members of the management has not been approved in the shareholders' meeting.

9 What are the bases for a court to award injunctive or other interim relief to prevent the closing of an M&A transaction? May courts in your jurisdiction enjoin M&A transactions or modify deal terms?

In the Brazilian legal system, any individual has the possibility of filing injunctive relief with the intention of avoiding a loss or preserving the successful outcome of a lawsuit. For this purpose, there are two legal requirements that should be fulfilled. As set forth in article 300 of the Brazilian Code of Civil Procedure, the requirements are the probability of the alleged claim (*fumus boni iuris*), and the risk of loss or injury to the successful outcome of the lawsuit (*periculum in mora*).

Regardless of the subject in dispute, the general provision is applicable to any situation in which a measure is deemed necessary.

Moreover, Brazilian courts can be invoked to enjoin M&A transactions. If an M&A agreement consists of an enforceable instrument, the specific performance of the transaction can be required in the case of a default regarding its implementation as set forth in article 815 of the Code of Civil Procedure.

Notwithstanding, courts are not allowed to modify deal terms, but only to review their validity or their effectiveness. For this reason, the only feasible outcome of a judicial review of a deal's terms is to find them null, void or ineffective. Conceptually, indemnification may be sought if the provisions of the transaction documents entail an abuse of a right (article 187 of the Civil Code) or a breach of the principles of good faith.

Antitrust authorities, in the context of the pre-merger analysis, may request the modification of the deal terms, in which case disposal of assets of the parties may be required.

10 May defendants seek early dismissal of a shareholder complaint prior to disclosure or discovery?

No. The summary proceeding set forth in article 275 of the previous Code of Civil Procedure no longer exists. Nevertheless, it was not a procedural measure similar to a motion to dismiss.

Currently, there are the possibilities of summary judgment (article 355 of the Code of Civil Procedure) and of dismissal of the claim (article 330 of the Code of Civil Procedure). Notwithstanding, in both situations, it is common to produce documentary evidence when the party files the claim.

11 Can shareholders bring claims against third-party advisers that assist in M&A transactions?

Shareholders can bring claims against third-party advisers that assist in M&A transactions.

In the Brazilian legal system, third-party advisers, such as lawyers and other consultants, have a duty of care regarding the work that they are retained to perform. This means that such parties are bound to apply their technical skills with diligence in the performance of their work, although they are not required to reach any previously determined results.

Should an adviser in an M&A transaction fail to act with the required diligence in the performance of his or her attributed tasks, either as a result of negligence, recklessness or lack of the required technical skills, or as a result of malicious intent, an aggrieved shareholder can bring a claim against the applicable adviser. It shall be incumbent upon such plaintiff to prove that the adviser's performance fits into one of the hypotheses that justifies a claim against such party.

12 Can shareholders in one of the parties bring claims against the counterparties to M&A transactions?

Yes. The parties must act in good faith and according to their fiduciary duties. Breach of such duties entitles the aggrieved party to present a claim against the other party.

Claims may be brought during the negotiation of an M&A transaction, such as those related to break-up fees, breaches of the exclusivity or confidentiality obligation, or bad faith behaviour in the negotiations.

Pending closing, claims may also be brought, such as those requesting specific performance of the obligation to close or the termination of the M&A documentation.

After closing, claims may be filed to discuss, among other things:

- the terms and conditions of the transaction;
- price adjustments;
- earn-outs;
- breaches of representation and warranties;
- indemnifications; and
- breaches of covenants.

Post-closing bad faith behaviour can also give rise to lawsuits grounded on the protection of the principle of good faith, leading to potential indemnifications.

13 What impact do the corporation's constituting documents have on the extent board members or executives can be held liable in connection with M&A transactions?

Under Brazilian law, company managers can be held liable for breaches of their legally established duties, or obligations and duties set forth in the company by-laws.

As the company by-laws can set forth obligations and duties for the managers that are additional to those set forth in law, the breach of which can imply their liability, such constituting documents may amplify the hypotheses under which company managers can be held liable.

On the other hand, provisions in by-laws seeking to limit the extent to which managers can be held liable in any matters, including in connection with M&A transactions, can be challenged in litigation. The regime of managers' liability for breach of legal duties or of provisions of the company by-laws is set forth by law.

In the context of M&A transactions, managers are exempted from liability pertaining thereto once the general shareholders' meeting approves the accounts of the management for the fiscal year in which the transaction took place without reservations. See question 14.

In M&A transactions in Brazil that involve a change of corporate control of an entity, it is also common that the selling parties demand that, among the documents formalising the transaction's completion, which frequently include provisions whereby the company's management is replaced, the replaced managers are exempted from liability by the acquiring parties.

14 Are there any statutory or regulatory provisions in your jurisdiction that limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions?

In Brazil, there are no statutory or regulatory provisions limiting the shareholders' ability to bring claims against directors and officers specifically in connection with M&A transactions.

There are, however, statutory provisions that limit shareholders' ability to bring claims against directors and officers in general, including in connection with M&A transactions, as follows:

(i) as a general rule, liability claims cannot be filed against managers for their acts or omissions that have taken place during a fiscal year regarding which the financial statements and the accounts of the management have been approved by company shareholders, provided that this general rule shall not apply where the shareholders have been induced to erroneous approval due to malicious intent, fraud or sham documentation;
(ii) the statute of limitations to file a liability claim against a company manager is three years counted as from the publication of the minutes of the shareholders' meeting that approved the financial statements of the fiscal year in which the breach by the manager of his or her duties or of the legal or governing law provisions has taken place; and
(iii) as a general rule, the initiation of a civil liability claim against a company manager for losses incurred by the company shall require prior approval by the majority of those present at a general shareholders' meeting of the company. If the matter is not approved, the claim may be filed by shareholders representing at least 5 per cent of the corporate capital.

In the case of item (i), there is a statute of limitations of two years to annul resolutions taken in shareholders' meetings where such resolutions were approved as a result of malicious intent, fraud or sham documentation.

15 Are there common law rules that impair shareholders' ability to bring claims against board members or executives in connection with M&A transactions?

As a civil law jurisdiction, Brazil does not have any common law rules impairing shareholders' ability to bring claims against board members or executives. Access to justice and judgments upon the merits are essential corollaries of the Brazilian procedural system.

In practice, Brazilian courts are reluctant to assess business decisions or to modify negotiations. Unless negligence, recklessness, lack of professional skills or wilful misconduct are present and duly characterised at court, courts will likely decline to second guess informed and reasonable decisions.

However, according to article 159, paragraph 6 of the Corporate Law, judges are authorised by law to acknowledge the exclusion of a board member or executive's liability under exceptional conditions when a business decision is made in good faith and in the corporation's best interest.

16 What is the standard for determining whether a board member or executive may be held liable to shareholders in connection with an M&A transaction?

Articles 153 to 157 of the Corporate Law establish diligence, fiduciary and information duties. The Civil Code also contains liability provisions to be followed by managers and executives of limited liability companies.

In corporations, executives must conduct business responsibly, such as every diligent and honest person would habitually employ in his or her own business (article 153). They are also prohibited by law to use business for their own benefit or that of a third party (article 155, subsection 1). Particularly in public corporations, it is their duty to report to shareholders any relevant fact related to the corporation in compliance with CVM rule 358/2002.

Brazilian courts are reluctant to second guess business decisions of officers and directors, and management does not have the burden of proof in claims involving their liability. Even in cases of a breach of law or of the governing documents of the corporation, the officers and directors will not be held liable if they have acted in good faith.

17 Does the standard vary depending on the type of transaction at issue?

No.

18 Does the standard vary depending on the type of consideration being paid to the seller's shareholders?

Should an M&A transaction involve the exchange of shares of the corporation being merged, amalgamated or spun-off for shares in the surviving entity, officers and managers are expected to follow market standards for the valuation of the entities and the calculation of the exchange rate, which imposes upon them additional liabilities in connection with the M&A transaction.

19 Does the standard vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction?

Article 156 of the Corporate Law establishes that directors and officers shall not take part in any corporate transaction in which they have a conflict of interest. Likewise, they are not allowed to be part of any resolution of the board related to such matter. If the above provision is violated, directors and officers can be held liable according to article 158 of the Corporate Law. Therefore, a claim can be brought against officers and directors under these circumstances if the acts or omissions of the board cause damage to the corporation.

20 Does the standard vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared ratably with all shareholders?

The standard may vary if the officer or director performs an act or omission aiming at benefiting the controlling shareholder, in which case the management will be jointly and severally liable with the controlling shareholder for a power abuse.

21 Does your jurisdiction impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants?

There are no legal restrictions for indemnification, but the parties could establish a cap value in the agreement they enter into. There are also no legal restrictions on the advance of fees, which shall follow the provisions of the company's by-laws or of the articles of association, as the case may be.

22 Can shareholders challenge particular clauses or terms in M&A transaction documents?

On the one hand, in transactions involving the sale of company shares, shareholders will be parties to the applicable transaction documents, and in this case would be personally bound by its provisions, including, as the case may be, termination fees and exclusivity clauses. In this case, there would be no grounds for a shareholder, as a party to transaction documents, to challenge any of its provisions, unless there is any error or fraud in the negotiation of the documents.

There are, on the other hand, M&A transactions that are executed by company managers on behalf of the company to which company shareholders are not parties, including those involving sales of a company's going concerns. In this case, shareholders are entitled to challenge the acts or omissions of company managers, including as to whether, during the course of the transaction negotiations and formalisation, they acted in compliance with the company by-laws and with their legal duties as company managers, including the duty of pursuing company interests; or acted negligently, recklessly, with lack of professional skills or with wilful misconduct.

A manager in breach of a company's by-laws or his or her legal duties, or that furthermore fails to take due precautions or even wilfully

causes damage to the company in the course of an M&A transaction, is subject to a civil liability claim.

Brazilian law does not provide for a derivative lawsuit brought by the shareholders against the counterparty in an M&A transaction.

23 What impact does a shareholder vote have on M&A litigation in your jurisdiction?

Shareholders are personally liable for vote abuses, which are particularly prevalent in cases of conflicts of interest, according to article 115 of the Corporate Law. For companies under the control of a majority shareholder, which are very common in Brazil, votes of controlling shareholders have the power to control almost every corporate decision and strategy.

A shareholder vote plays a central role in M&A transactions involving corporate reorganisations. In such case, a vote of a controlling shareholder must be verified in relation to the limits of and impediments to voting in a situation of a conflict of interest.

24 What role does directors' and officers' insurance play in shareholder litigation arising from M&A transactions?

In the past few years, directors' and officers' (D&O) insurance take up has increased in Brazil following a wave of corporate bankruptcies, corruption scandals, environmental disasters and the exposure of Brazilian companies to securities class actions in the US (eg, Petrobras, Embraer, Banco Bradesco, Vale, Braskem, Eletrobrás and Gerdau). In addition, litigation arising out of M&A transactions is also a significant factor in the demand for D&O insurance and in hikes in premiums.

In Brazil, D&O policies are regulated by Circular No. 553, as of 23 May 2017, issued by the Superintendence of Private Insurance. D&O insurance aims at protecting the personal assets of executives against damage caused to third parties due to potential errors or omissions in their functions.

In the context of an M&A transaction, the buyer or minority shareholders of a company that is about to be acquired, or has been acquired, may feel that previous directors mismanaged the business or find that they failed to fulfil their fiduciary duties (eg, the duties of loyalty, care, disclosure, good faith). In this case, directors can be held liable for the damage caused to the company (see question 5), and D&O insurance can protect them against such claims, provided that they did not act with gross negligence or wilful misconduct.

Note that D&O policies usually contain a 'change in control' clause that automatically ceases coverage for the directors of a company in the event of a business transaction that affects its ownership structure. To maintain coverage, it is advisable to include in a policy a run-off clause to ensure coverage for wrongful acts performed prior to the closing but that have not yet been brought as claims. The policy term should last longer than the statute of limitations for any potential claims.

25 Who has the burden of proof in an M&A litigation – the shareholders or the board members and officers? Does the burden ever shift?

As a rule, the burden of proof under Brazilian civil procedure law is upon claimants regarding the facts on which the claim is grounded, and on defendants as to the existence of facts contrary to the plaintiff's right.

The burden may be shifted by a judge in civil actions in specific cases where he or she concludes that having such burden would impede or make it extremely hard for a claimant to successfully bring the suit, or in cases where shifting the burden to the defendant would be better suited to the lawsuit as the defendant would have better conditions under which to easily prove facts that undermine the grounds of the claim (article 373, paragraphs 1 and 2, Brazilian Civil Procedure Code).

26 Are there pre-litigation tools that enable shareholders to investigate potential claims against board members or executives?

Brazilian corporate law sets forth that shareholders can oversee the management of the business of a company under the terms of the law (article 109, subsection III, of Law No. 6,404).

Shareholders of Brazilian entities have the following rights, which enable them to investigate potential claims against company managers:

- taking part in shareholders' meetings where the business of the company and actions of management are reviewed and discussed;
- receiving financial information and management reports of the company prior to any ordinary shareholders' meeting thereof;
- having access to the corporate books of the company: shareholders entitled to at least 5 per cent of the capital stock may request at court the presentation of the corporate books in cases of supported suspicions of irregularities performed by the company's management;
- financial statements of publicly held corporations and large-scale companies (those that had, in the preceding fiscal year, total assets exceeding 240 million reais or gross revenues exceeding 300 million reais, regardless of their corporate type) shall be subject to audits by independent auditors, which allows shareholders to oversee the financial situation of the company from an independent perspective.

  The independent auditors responsible for auditing the financial statements of the company are required to take part in the ordinary shareholders' meetings that discuss such financial statements and to answer requests for clarifications from shareholders; and
- shareholders may request the establishment of a functioning audit committee responsible for overseeing the performance of the management bodies of the company.

Update and trends

As a result of the development and consolidation of arbitration, most M&A agreements provide arbitration clauses in order to subject potential disputes to arbitration. Parties to such transactions generally consider arbitration to be an expedited and technical means of dispute resolution: by using arbitration, disputes arising from M&A transactions can be settled quickly through a technical decision. Moreover, foreign investors usually require that arbitration clauses be included in the agreements that they enter into.

Furthermore, it is worth highlighting a relevant transaction that is currently in progress: a bid to acquire all the shares issued by Eletropaulo. The main companies interested in the acquisition are Enel, Energisa, Neoenergia and Iberdrola. An auction will be carried out on 18 May 2018 to finish the bidding process. Even though there is no dispute underway regarding the transaction, such transaction and its terms could be challenged at court or before other public bodies by shareholders or third parties interested in the transaction. Any repercussions arising from such transaction shall be paradigmatic, since public offers following auctions are not common in Brazilian practice.

Finally, shareholder activism, although still relatively low in Brazil in comparison to other jurisdictions, continues to increase in various ways, such as:

- joint efforts to appoint members of boards of directors or requests for shareholders' meetings to discuss matters of interest to shareholders; and
- the monitoring of:
  - actions to preserve compliance with internal policies and the Brazilian Corporations Law;
  - derivative suits; and
  - administrative proceedings before CVM.

27 Are there jurisdictional or other rules limiting where shareholders can bring M&A litigation?

As a general rule, litigation in Brazil must be brought before the defendant's jurisdiction (ie, the place of the company's headquarters in the case of a lawsuit brought by any shareholder), but the company's by-laws may provide for forum selection or arbitration as a dispute resolution forum to settle any conflict between the company and its shareholders.

28 Does your jurisdiction permit expedited proceedings and discovery in M&A litigation? What are the most common discovery issues that arise?

In Brazil, there are no expedited proceedings in M&A litigation or discovery proceedings such as in the US. Evidence in Brazilian civil procedures is, as a general rule, produced throughout the proceedings (documents must be presented at the initial pleading or at the defence, while experts' analyses or depositions occur at a later stage). There are also proceedings set forth in the Civil Procedure Code allowing for the production of evidence prior to the filing of a claim in specific cases (eg,

risks of the impossibility of production or difficulty to prove a fact at a later stage, or if the production of evidence could facilitate a settlement or prevent the filing of a claim). However, in both cases the evidence production bears no relation to discovery, as it is limited in scope and extent, and by the relevance of the evidence a party intends to produce.

29 How are damages calculated in M&A litigation in your jurisdiction?

Damages are calculated in accordance with the extent of the loss caused to the claimant, encompassing direct material damages, loss of profits, pain and damage suffered. Indirect damages (ie, for damage that bears no strict relation to the harm caused) are not allowed under Brazilian law. Indemnification values granted by courts must be adjusted taking into account inflation and accrued interests.

Remedies to grant specific performance of obligations are also possible under Brazilian law.

30 What are the special issues in your jurisdiction with respect to settling shareholder M&A litigation?

A settlement in shareholder M&A litigation may be reached both in court or out of court. In the first case, it must be approved (homologated) by the judge. In the latter, a public deed must be executed.

Attorneys' fees to the claimants' lawyers are another important matter, as Brazilian law provides 10 to 20 per cent of attorneys' fees to the winning party's lawyers, which is usually taken into consideration when settling a dispute. Shareholders bringing a suit against controlling shareholders for any damage caused by acts performed by a power abuse are also entitled to an additional 'premium fee' of 5 per cent upon the indemnification value awarded by the court, which might also affect the settlement negotiations.

As to breaches of the regulations of CVM, publicly traded corporations may settle disputes with such governmental authority by entering into a commitment term, which can be negotiated with the authority.

31 Can third parties bring litigation to break up or stop agreed M&A transactions prior to closing?

Although in some circumstances this is possible, it is not usual for third parties to bring litigation to break up or stop agreed M&A transactions prior to closing.

In Brazil, certain third parties may be entitled to contractual rights to prevent an M&A transaction from closing. Examples include the stakeholders of a company being entitled to rights of first offer or rights of first refusal in connection with the acquisition of corporate interests from other stakeholders. If any stakeholder of such entity seeks to sell corporate interests disregarding the rights of other stakeholders, the latter group could seek to stop the transaction prior to closing. However, these third-party rights would usually be verified in due diligence, and it is very unlikely that they would be overlooked by a potential buyer.

It is also common in M&A transactions in Brazil to have the closing subject to prior waivers from certain third-party lenders (or other third-party counterparties) of the target company, but it is unusual that such third parties seek to break up or stop the M&A transaction prior to closing via litigation.

In transactions subject to prior approval by Brazilian antitrust authorities – Brazilian law sets forth objective criteria to determine whether a transaction shall be subject to such prior approval – third parties, including competitors of the target company or of the parties to the transaction, may present oppositions to the sought transaction based on its potential damage to competition in a given sector. This opposition can be brought before the antitrust authorities, and subsequently before the courts.

Conceptually, in the context of M&A transactions resulting from unsolicited offers, third parties can bring a lawsuit to challenge the offer or potential violations of procedures preventing competing offers. In the latter case, an administrative procedure before CVM may be an alternative.

32 Can third parties in your jurisdiction use litigation to force or pressure corporations to enter into M&A transactions?

Under specific circumstances, third parties can use litigation to force or pressure M&A transactions. The transactions in such cases shall be the outcome of a decision of a regulatory body or a result of a specific performance required before a court.

Concerning regulatory matters, competition is the most relevant. The Brazilian antitrust authorities may condition the approval of a transaction upon the execution of measures such as the transfer of corporate control and the spin-off of the corporation as set forth in the second paragraph of article 61 of the Brazilian Competition Law.

Whether the transaction is part of a binding agreement, the specific performance of the obligations thereof can be required at court. In such case, courts are authorised to take any legal measure deemed necessary to oblige the party to execute the M&A transaction as agreed in the preliminary agreement.

33 What are the duties and responsibilities of directors in your jurisdiction when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction?

Regarding unsolicited and unwanted offers, section 32-D of CVM rule 361 establishes that the board of directors must give an opinion on the success of the offer. Such opinion must take into consideration elements such as the offer price and changes in the corporation's finances. However, the shareholders have the final word related to the acceptance of the offer.

Furthermore, the Corporate Law provides that management members must comply with the duties of care, loyalty and disclosure, and their ramifications, in the conduct of corporate matters, including in providing an opinion, as referred to above.

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34 Shareholders aside, what are the most common types of claims asserted by and against counterparties to an M&A transaction?

Brazilian M&A transaction documents usually contain indemnification provisions whereby:

- each of the parties will indemnify and hold the other blameless for any breach of representations and warranties provided thereunder; and
- sellers will indemnify buyers – and this may be subject to several carve-outs – for losses incurred by the target company or the buyer, or both, stemming from any acts, facts, activities, omissions or business of the target company prior to the date the shares or assets of the target entity are transferred to the buyer (the pre-closing liabilities).

Indemnifications under the above items shall be without duplication.

Shareholders aside, indemnification claims for breach of representations and warranties or for pre-closing liabilities are the most common types of claims asserted by and against counterparties to an M&A transaction.

Issues regarding purchase price adjustments and earn-outs are usually settled between the parties to Brazilian M&A transactions prior to litigation. Well-negotiated M&A deals will set forth detailed procedures for the parties to discuss and eventually agree on such amounts. Such procedures will usually commence without the interference of any third parties, but if disagreements persist, third-party specialists may be called in to settle certain aspects under discussion. Litigation is sought in the event that the parties fail to reach an agreement following such procedures.

35 How does litigation between the parties to an M&A transaction differ from litigation brought by shareholders?

Since the Brazilian jurisdiction does not provide for cases of derivative suits brought against third parties in M&A transactions, only the parties to the transaction can bring litigation to discuss the conflicts arising out of M&A documents. Brazilian law provides shareholders with the right to challenge decisions taken by the management or by the controlling shareholder. In this case, shareholders can bring derivative suits in the name of the company against management or the controlling shareholder, or both.

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