Portugal
Negotiated M&A Guide
Corporate and M&A Law Committee

Contact

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1. Introduction

In line with the tradition of civil law countries of continental Europe, in Portugal the most relevant aspects of commercial activity, including the acquisition of companies, are regulated by the law. The regime applicable to the acquisition of companies is, however, not codified under a sole statute, but results from different pieces of legislation governing different aspects.

The agreement for the acquisition of a company or a business is not specifically regulated, being in most cases (depending on the particulars of the relevant transaction) subject to the general rules set forth in the Portuguese Civil Code (approved by Decree-Law 47 344 of 25 November 1966) for sale and purchase agreements. Other statutes that govern relevant aspects of the acquisition of companies in Portugal are, among others, the Companies Code (approved by Decree-Law 262/86 of 2 September); the Securities Code (approved by Decree-Law 489/99 of 13 November); the Commercial Registry Code (approved by Decree-Law 403/86 of 3 December) and the Commercial Code (approved by a Law of 28 June 1888).

Additionally, labour, tax and competition laws as well as any laws or regulations that may be applicable to the relevant activity sector of the target company are also to be considered in any acquisition of a company in Portugal.

2. Structure of the transaction

2.1. Share deals and asset deals

Most businesses are acquired through transactions structured as: (i) share deals, whereby the shares representing the relevant company's share capital are transferred to the purchaser, or (ii) asset deals, whereby the assets and other elements used by the seller in the relevant business are jointly transferred as an on-going concern to the purchaser.

Both types of transactions are common, and the choice will depend on the particulars of the case at stake.

An asset deal is more direct and will generally allow the parties to determine more accurately the scope of the business being transferred, namely avoiding the potential transfer of any concealed liabilities or contingencies of the company developing the businesses, and allowing the carve-out of parts of the business or certain assets from the scope of the transaction. This may however in some cases not be the most appropriate structure to be adopted for the transfer of a business, to the extent that it may entail a disruption in the relationship maintained with the target company's clientele, the need for third parties' consents for the transfer of licences and agreements, or may subject the transaction to complex procedures for the transfer of certain assets.

On the other hand, the acquisition of a business by means of a share deal will, as a general rule (and with exception of the cases where change of control provisions apply), allow the continuity of the business and avoid the need to obtain third parties' consents. It will however require that any liabilities or contingencies resulting from the relevant company's past activity are transferred with the target company. This may consequently add complexity to the process to the extent that the level of due diligence and contractual protection required will be higher.

An additional aspect to be noted in the structuring of share deals is the legal prohibition on financial assistance set forth by the Portuguese Companies Code and the Second Company Law Directive. This prohibition prevents, with some exceptions, target companies from advancing funds, making loans or providing security for the purposes of facilitating the acquisition of their shares by a third party.

The above, together with tax aspects, are usually the key drivers in the choice between a share or an asset deal.

2.2. Tax aspects

From a tax standpoint, a company resident in Portugal is liable for corporate income tax ("**CIT**") on its worldwide income and is taxed on the basis of its financial statements prepared in accordance with accounting rules. The accruals basis must be used. The reported profit or loss is then adjusted, in accordance with regulations set out in the tax law, to arrive at taxable income subject to a standard tax rate of 23% (small- and medium-sized enterprises, as defined by law and subject to the *de minimis* rule of the European Union, avail of a 17 per cent IRC rate for the first EUR 15,000 of taxable income). Taxable income exceeding EUR 1,500,000 and up to EUR 7,500,000 will further be subject to a state surcharge at a 3% rate, increased to 5% for the taxable income in excess of EUR 7,500,000, and to 7% for taxable income in excess of EUR 35,000,000. A municipal surcharge may also be applied, at a rate varying up to 1.5%.

The acquisition of a Portuguese investment may be carried out through a non resident entity or a Portuguese company. The latter alternative is in many cases adopted for tax reasons, as it may, in certain conditions, allow a debt push down by tax consolidation and / or by merger. Both alternatives imply the interposition of a Portuguese vehicle between the investor and the Portuguese company to be acquired, so that a complete debt push down may be effected, i.e., the deduction for tax purposes of the total amount of interest paid regarding the funds used in the acquisition of the Portuguese company against the profits obtained by the latter in its operational activity.

We also note that should the Portuguese target company have accumulated tax losses, said tax losses will usually be lost following a change of ownership of more than 50% of the share capital, unless a petition is presented to the Minister of Finance requesting that the tax losses be maintained on the basis of a recognisable economic interest in the transaction being acknowledged. This notwithstanding, there may be ways to structure a transaction in such a fashion said losses are kept despite the change of ownership.

As a general rule, dividends and interest paid to non-resident and resident corporate entities by a Portuguese company are subject to withholding tax at a final rate of 25% (28% for individuals).

In case of non-residents, provided the conditions are met, a reduced withholding tax may be applicable under a double tax convention entered into with Portugal.

Furthermore there is the possibility of elimination of withholding tax over interest and dividends in case the European Directives, as implemented in Portugal, apply; broadly speaking, provided relevant parties are eligible, in order to apply, the EU Interest & Royalties Directive requires a 25% participation to be held for as long as 2 years, while the EU Parents & Subsidiaries Directive requires either a 5% participation or 5% voting rights to be held for the same 2 years (in both cases, whenever withholding tax applies because the 2 year period is not complied with, a reimbursement request may be filed once said period has elapsed).

According to the Portuguese tax law general regime, any capital gains derived by non resident companies from the sale of shareholdings in a Portuguese company are considered obtained in Portuguese territory and subject to Portuguese CIT at the rate of 25%.

However, in the event that, broadly speaking, at least 5% of the relevant company shareholdings or voting rights have been held for a minimum period of 2 years, said capital gains shall not be taxed pursuant to the Portuguese Participation Exemption regime, provided that such company asset´s value does not derive, directly or indirectly, in more than 50% from real property which has been purchased after January 1st 2014 (unless said property is allocated to a business activity other than the mere purchase and sale of real estate, in which case the regime will nevertheless be applicable).

Moreover, under the Tax Benefit Statute, as a general rule, the capital gains above referred are exempt from CIT in Portugal when obtained by non residents, except in cases of (i) non resident entities without

a permanent establishment in Portugal that are owned, directly or indirectly, in more than 25%, by Portuguese entities; (ii) non resident entities without a permanent establishment in Portugal that are resident in a country listed as a tax haven; (iii) capital gains obtained on the transfer of *quotas* or other participation in the capital of Portuguese resident companies whose assets are formed, directly or indirectly, in more than 50%, by real estate assets located in Portugal, or of their resident holding companies.

Finally, even if, neither the Participation Exemption regime nor the Tax Benefit Statute regime above described applies, it should be noted that under several of the double tax treaties entered into by Portugal, the capital gains obtained on the transfer of the shareholding in Portuguese companies may only be subject to tax in the country of residence of the transferor, unless the transferor has a permanent establishment in Portugal to which the shares may be allocated.

2.3. Merger control aspects

The transaction must be notified to the Portuguese Competition Authority if the aggregate turnover in Portugal of all the participants exceeded in the last financial year 100 million euros, provided that at least two of the participants have an individual turnover in Portugal of over 5 million euros. The relevant turnover of the acquirer includes the turnover of its entire group of companies, *i.e.*, its subsidiaries and controlling shareholders.

A transaction must also be notified to the Portuguese authorities, regardless of the parties' turnover, if, as a consequence of the concentration, a market share exceeding 50% of the relevant product or service market in Portugal is acquired or increased.

Notification is also required when the transaction entails the acquisition, creation or increase of a market share in Portugal equal to or greater than 30% and lower than 50%, provided that the individual annual turnover in Portugal of at least two of the undertakings concerned exceeds 5 million euros.

The transaction subject to notification has to be notified prior to its implementation, i.e., the parties shall hold on the implementation of the concentration until the Portuguese Competition Authority ("**PCA**") issues a decision. However, there is no specific deadline to notify after the triggering event. The lack of decision by the PCA within the period legally set forth for such purpose (30 business days in normal phase I and 90 business days following the notification in case of in-depth investigations), shall be deemed as a non-opposition to the transaction.

The breach of the obligation to suspend the implementation of the transaction prior to the PCA's decision entails a fine of up to 10% of the turnover of the undertaking in breach. Furthermore, any act or transaction implementing the concentration before notification, if required, or before clearance from the PCA, is legally unenforceable (*ineficaz*).

Please note however that if the relevant transaction meets the thresholds to be notified at the European Union level, it will not be necessary to notify it locally.

2.4. Other structures

It is also worth mentioning that the direct acquisition of businesses by mergers is not very common in Portugal. In most cases where there is an intention to acquire a business and to combine it with the business developed by the acquiring entity, the transaction is structured in two stages. A first step where the target is acquired by the acquiring entity and a second step where the legal entities (target and acquiring entity) merge, combining their businesses.

Without prejudice to other possible structures (for instance, the transfer of a business as a contribution in kind within the scope of a share capital increase of the acquiring entity), we will restrict the scope of this note to the most common forms of asset and share deals.

3. Formalities

The formalities required to complete an asset or a share deal are different.

The transfer of a business under an asset deal must comply with the formalities applicable to the transfer of the elements comprising the scope of the transaction (for instance if real estate property is being transferred together with the remaining elements forming the business, its transfer will have to be formalized by means of a notarial deed or a document with the signatures of the relevant parties duly legalised, in compliance with the legal requirements for the transfer of real estate property).

The formalities applicable to a share deal will depend on the nature of the target company. The most common types of companies in Portugal are the *sociedades por quotas* (private limited liability companies) and the *sociedades anónimas* (joint stock companies).

Private limited liability companies have their share capital divided into *quotas* which are registered with the companies' registry. The *quotas* are not represented by certificates and their transfer is made by means of an agreement in writing and is subject to registration with companies' registry. As a general rule the transfer of *quotas* is subject to the consent of the company (to be granted by its shareholders general meeting). It is not unusual for the company by-laws to set-forth a pre-emption right in favour of the company, or the remaining shareholders, in the event of the transfer of *quotas* to third parties.

The formalities applicable to the transfer of shares in joint stock companies will depend on the type of shares at stake. Bearer shares represented by certificates are transferred by means of the relevant share certificates being delivered to the purchaser. Nominative shares represented by certificates are transferred by means of the inscription in writing of the transfer by the seller in the relevant share certificate, and the subsequent registration with the company. Book-entry type shares are transferred by means of their registration in the account of the purchaser.

4. Transaction documentation

4.1. Preliminary remarks

Under the Portuguese practice, historically transaction processes were quite simple and consisted of the negotiation of the transaction terms and formalization by means of a transfer agreement, which tended to be a relatively simple document.

This practice has dramatically changed in the last decades, and increasingly complex and sophisticated transaction processes and detailed documentation specifying all the aspects of the transaction are currently usual.

Commonly the transaction process is divided into two stages:

(i) a first round where the initial contacts between the parties are made, due diligence is carried out, and the parties execute a confidentiality or exclusivity agreement or a more developed agreement setting the negotiation process to be followed and the basic terms of the prospective transaction; and

(ii) a second stage where upon the due diligence being concluded, the negotiations are completed and the parties execute the agreements formalizing the transaction.

4.2. First round documents

The negotiation of an acquisition often includes, at a preliminary stage, the execution of a first round of documents. This is particularly common in cases where the transaction is developed by means of an organised process such as a competitive bid where the period preceding the execution of a binding agreement will necessarily be long, or when confidential information will be disclosed to the potential

purchaser in the course of the negotiations. The need to manage the risk of the negotiation process impels the parties to agree on and execute written documents whereby they agree on: (i) the fundamentals of the prospective transaction; (ii) the process to be followed in the negotiations; (iii) confidentiality and exclusivity. The documents most commonly entered at this preliminary stage are confidentiality agreements, exclusivity agreements and/or letters of intent (also referred to as "memorandum of understanding", "heads of agreement" or "agreement to negotiate").

a) Confidentiality agreements

During negotiations the parties exchange information regarding the target company and its business which is not available to the public, in order to allow the evaluation of the transaction. The need to protect such information and to prevent its misuse forces the parties to enter into confidentiality agreements in which they undertake to hold in confidence all non-public information received from the other party and to use it for no purpose other than evaluating and completing the transaction.

Under such agreements the parties usually also guarantee that their employees or advisers, to whom the information may, in accordance with the terms of the agreement, be disclosed, will also keep such information confidential, so that in case of breach of the confidentiality duty by such a person, the party will be deemed liable. Confidentiality agreements are usually signed at a very early stage of negotiations, normally before the beginning of the due diligence review of the target, if it takes place.

It is usually agreed that in case the transaction is not consummated, the parties will return all confidential information or, to the extent that this is not possible, destroy it.

Confidentiality obligations undertaken by the parties are usually not limited to the negotiation period and remain in force after the negotiations cease.

It is a common practice to set forth a penalty clause according to which, in case of breach of the confidentiality undertakings, the defaulting party will pay to the other party a pre-fixed amount defined in the agreement, to compensate for damages incurred in by the non-defaulting party as a consequence of the breach. The reason for such practice is that it may be difficult to prove in judicial or arbitration proceedings the amount of the damages incurred and consequently the amount of the corresponding indemnification.

Bear in mind that, under Portuguese law, whenever the parties agree on a penalty clause, the non-defaulting party is prevented from claiming for damages in excess of such amount, unless otherwise provided. It is advisable (specially whenever advising the disclosing party) to specifically provide for the possibility of the damages being in excess of the amount specified in the penalty claims.

b) Exclusivity agreements

Typically the purchaser requests an exclusivity period to complete its due diligence and to negotiate the agreement, during which the seller will not share information or seek discussions with other potential purchasers. This exclusivity withdraws the target, at least temporarily, from the market. For this reason, in some cases the prospective buyer agrees to pay an exclusivity fee, which, in case the transaction is concluded, is usually deducted from the purchase price.

c) Letters of Intent

Exclusivity commitments and confidentiality obligations are, in most cases, part of a broader pre-agreement, usually referred to as letter of intent, memorandum of understanding, heads of agreement or agreement to negotiate.

These letters of intent usually describe the basic structure of the transaction and are used to record the intention of the parties to proceed with the negotiations and to set forth the process to be followed for such purpose.

It generally includes the description of the envisaged transaction, a section relating to due diligence (namely, deadlines, rules and scope), an outline of the structure of the transaction and sometimes an introduction to the main issues to be dealt with in the acquisition agreement should it be executed (in particular, mechanisms of adjustment to the price or representations and warranties to be granted). It is also common to specify a deadline for a binding agreement. As mentioned above, whenever confidentiality or exclusivity agreements are not executed separately, such undertakings are included in the letter of intent.

Portuguese law does not have specific rules regarding these pre-agreements and, therefore, their regime and, in particular, their binding character, will depend on the exact terms and conditions of each particular agreement. Taking into consideration that the binding or non-binding nature of the agreement will result from the interpretation of the document (irrespectively of the name given to it), there is a risk that a letter of intent will be considered (i) an actual agreement, should it contain all elements of an agreement and the parties express their will to agree; or (ii) a "promissory agreement", should any or both of the parties undertake an actual obligation to execute an agreement.

In fact, the difference pointed between these pre-agreements (letters of intent, memorandum of understanding, heads of agreement...) and promissory agreements is that under the latter the parties undertake to, under certain conditions and according to certain terms, execute other agreements. In contrast, letters of intent do not contain any obligations of the parties to conclude the transaction and execute an agreement. Regardless of the theoretical distinction, it should be clear in the letter of intent that the parties' do not intend to be bound to the completion of the transaction; otherwise they may be undertaking commitments which they have not foreseen. For such purpose, and in addition to a particular care in the drafting of the this type of documents, it is usual to include clauses specifying the "non-binding" nature of the agreement and setting forth that, until the purchase agreement is entered into, there is no agreement between them as to the transaction nor any commitment to enter into it.

As a result of the above mentioned, letters of intent are only relevant in terms of pre-contractual liability, as they do not create contractual obligations.

In this respect, the Portuguese Civil Code sets forth that one must act in good faith in the negotiation of an agreement; otherwise such party shall be liable to indemnify the other for the damages it incurs in result of the breach of this duty (*culpa in contrahendo*). In the context of a negotiation of an agreement, it is generally deemed that the good faith duties of information, loyalty and confidentiality are the most relevant. In case these duties are breached, the non defaulting party must be indemnified for all damages. According to the jurisprudence and doctrine prevailing in Portugal, only damages corresponding to the "negative contractual interest" shall be indemnified, i.e., the non defaulting party shall be put in the same position it would be should negotiations had not taken place.

4.3. Acquisition agreement

In most cases there is a gap of time between the date when the parties conclude the negotiations of the final terms of the acquisition agreement (and sign the agreement) and the date when the transaction may be consummated. Usually there are a number of conditions to be met before the transaction is closed, such as any third party consents, competition or regulatory authorities' approvals, the carve out of assets or parts of the business from the scope of the transaction, the funding required for the transaction being made available to the purchaser, etc, which may take some time to be met.

Consequently in such cases there is also a lapse of time between the date when the parties execute the acquisition agreement and the date when the transaction is effective. From a contractual perspective there are usually two options available to formalize the transaction in such circumstances.

The first one, somewhat more in line with the Portuguese practice, is to enter into a promissory agreement, whereby the parties agree on all aspects of the transaction, reciprocally promising to execute a definitive agreement formalizing the transaction upon the applicable conditions being met. It is usual that, at the time of the execution of the promissory agreement, the purchaser will make a down payment, which, unless otherwise agreed, will be kept by the seller in the event of the purchaser breaching its obligation to complete the definitive agreement (or will be returned in double if it is the seller that breaches its obligation to complete such agreement). If the parties agree that the purchaser will provide a down payment (or if the agreement foresees a penalty clause applicable in the event the purchaser fails to comply with its obligation to enter into the definitive acquisition agreement) and it is not specifically otherwise agreed, the seller will not have the right to specific performance should the purchaser breach its obligation to enter into the definitive acquisition agreement. The execution of the definitive agreement is usually done by the parties carrying out the actions required for the transfer of the shares or the assets at stake, in the terms determined in the promissory agreement.

The second option is to execute an acquisition agreement subject to conditions precedent. Once the conditions are met, the parties will carry out the actions required for the transfer of the relevant shares or assets.

A certain number of imperative rules will apply to these agreements, regardless of their type. For example, there are restrictions to the limitation of the parties' liability in case of wilful misconduct or gross negligence and penalties deemed to be disproportionate are subject to be reduced in equitable terms.

Also, all rights *in rem* (i.e., rights directly assigned to real estate property, which as a consequence of their specific nature, can be enforced against third parties) are specified in the law, in terms which may not be changed by the parties.

a) Holdbacks and escrows

Holdbacks, escrows and bank guarantees are commonly used in transactions, as a form of guaranteeing any adjustments to be made to the purchase price, as well as any compensation due for a breach of the terms of the agreement.

These mechanisms are particularly important due to the fact that dispute resolution procedures in Portuguese courts usually take a long time. Through these mechanisms it is more expeditious to obtain the payment, which otherwise could take several years to be made.

Holdbacks and escrows are most commonly used to guarantee any adjustments to be made to the purchase price, namely when it is not possible to determine the final purchase price at the time the transaction is consummated (for instance because the final purchase price depends on the relevant company's accounts at closing date, or if the purchase price is subject to an earn-out scheme relating to a certain period after closing date). Occasionally it is also agreed to maintain part of the purchase price in escrow for a period after closing, in order to guarantee any potential breach of the seller's warranties. Whenever the price is subject to be increased subject to the verification of specific milestones or the meeting of certain requirements, it would be usual to have the purchaser place that amount in escrow.

Most commonly the amounts retained are deposited in escrow with a bank, which acts as escrow agent. Escrow agreements are not specifically regulated by Portuguese law, hence freedom of the parties to contract applies.

As an alternative to holdbacks, it is not uncommon for the parties to obtain bank guarantees. The type of guarantee (i.e. if payable at first demand or not) will depend on the agreement the parties reach in that respect. The determination of the nature of a bank guarantee depends on its particular wording, so it is of the utmost importance that it adequately reflects the agreement of the parties in that respect as there are relevant differences between the regime applicable to first demand bank guarantees and simple bank guarantees. First demand bank guarantees create an autonomous obligation to the bank, and the bank

will consequently be bound to pay the amounts guaranteed upon first demand of the beneficiary, without being entitled to oppose it on the grounds of any defence or claim that the other party in the acquisition agreement may have against the beneficiary of the guarantee. Under a simple guarantee the bank will be able to use any arguments that such other party may have against the beneficiary.

Other types of guarantees as parent company's guarantees are also common, in particular when the party at stake is a mere vehicle or a company which does not offer the adequate level of guarantee.

Down-payments are also a very common form of guarantee as to the consummation of the transaction.

b) Representations and warranties

The section dedicated to the representations and warranties granted by each party is one of the most discussed and negotiated legal aspects of a transaction, and its final wording tends to reflect the power of each of the parties in the negotiation.

There is an absence of consensus within the Portuguese doctrine in respect of the legal regime applicable to share purchase agreements. The doubts in this respect result from the formal object of the purchase being the shares or *quotas*, according to the type of the target company, although the material object of the sale is the company and the business underlying such shares or *quotas*. The discussion focuses on whether the legal regimes provided for in the Portuguese Civil Code, in respect of the purchase of encumbered or imperfect goods, may be applicable to the purchase of shares/*quotas* when the issue detected by the purchaser is not related to the shares or *quotas* themselves but to the company being acquired or its business. Most scholars argue that such regimes will be applicable whenever certain requirements are met, in particular, whenever the control of the company is transferred to the purchaser.

Apart from the potential application of these regimes, pre-contractual liability as well as the doctrine of the error regarding the basis of the agreement (*erro sobre a base negocial*) may also be relevant as complementary means of protecting the purchaser.

On the other hand, it must be noted that under the regime provided in the Portuguese Civil Code for the sale and purchase of imperfect goods, if the agreement is deemed invalid because of simple error, the seller will not be liable to indemnify the purchaser if it ignored, without fault, the defect or lack of quality of the good.

Considering that, as a result of the above, purchasers may not be sufficiently protected and parties cannot foresee the risk assumed by entering into such a transaction, it is convenient to expressly regulate the agreement of the parties in that respect, including representations and warranties and detail the scope of the parties' liability in case of its breach. Deriving from common law countries legal practice, representations and warranties are already regarded as standard terms in Portuguese contractual practice.

Without prejudice to the diversity which characterizes this section of the agreements, representations and warranties can be divided into two fundamental types: formal warranties and business warranties. Formal warranties cover, among others: (i) the capacity to enter into and perform the agreement; (ii) the legal status of the company: incorporation, resolutions and articles of association; (iii) the ownership of the shares and, in situations in which it is essential in the context of the transaction, the ownership by the company of a particular asset, e.g., a real estate asset or certain shares in other companies; and (iv) the inexistence of encumbrances over or affecting the shares or any agreement or commitment entered into to give or create any such encumbrance.

Business warranties relate to the economical, patrimonial and legal status of the company whose shares or *quotas* are being acquired. Among the most common warranties are the clauses regarding: (i) assets, liabilities and state of affairs of the company by reference to specific financial statements (which are

usually attached to the agreement); (ii) compliance with applicable laws (tax, social security, employment, environment, intellectual property rights, etc.); (iii) litigation; (iv) contracts and commitments; (v) authorizations, permits and licenses required for the sound conduct of business of the company; and (vi) inexistence of any steps taken for the winding up or liquidation of the company.

The above mentioned representations and warranties are granted by the seller. Usually, the purchaser only represents and warrants to the seller that it has the necessary capacity to enter into the agreement and to perform its obligations thereunder and that the execution and performance do not result in the breach of laws applicable to the Purchaser nor the breach of its constitutional documents and do not require the consent, approval, authorisation or notification, nor result in any conflict with contracts, agreements or instruments to which the Purchaser is a party, or to which the Purchaser is bound.

c) Limitations to the seller's liability

The seller's liability for the representations and warranties is usually limited, among others:

(i) to the amount of the claims, by establishing a *de minimis*, a threshold and a maximum aggregate liability cap;

(ii) in time, by setting forth a period of time where claims may be brought (it is common practice in Portugal to limit the possibility of the purchaser to claim for the breach of any of the warranties to a period from one to two years, except in tax and social security matters in respect of which the limit is extended to the respective statute of limitation);

(iii) in cases where the purchaser is otherwise compensated for the loss or the claim is wholly or partly attributable to the purchaser;

(iv) to damages suffered as a direct consequence of a breach, excluding indirect or consequential loss or loss of profit; and

(v) in cases where the relevant fact, matter or circumstance which causes the relevant warranty to be breached was previously disclosed by the seller.

The above mentioned limitations usually do not apply to the breach of seller's warranties concerning the title to the shares or the capacity of the seller.

d) Covenants of the buyer and seller

In cases where the acquisition agreement is subject to a certain number of conditions precedent (or in the case of a promissory agreement where a certain number of requisites must be met in order for the parties to be obliged to proceed to the final agreement), the parties usually stipulate a number of covenants in order to ensure that the transaction will be consummated as planned.

The seller's covenants in this respect usually include its commitment to carry out all actions required to meet the conditions precedent for which he is responsible (e.g. obtain any specific license or third party consent; legalise some elements of its activity; terminate any agreements or carve out a part of the relevant companies business, etc.) and to maintain a standard in the conduct of the company's business until closing (e.g. to inform the purchaser or obtain his consent for any actions out of the ordinary course of business; to inform the purchaser of the progress of the business, etc.).

The covenants of the purchaser are usually limited to the commitment to carry out all actions required to meet the conditions precedent for which he is responsible.

The most usual covenants agreed between the parties, for the post closing period, relate to confidentiality duties, transition services and to non-compete periods.

e) Conditions of closing of the buyer and seller

Closing will take place when all of the conditions precedent are fulfilled. Usually, the party who is in a position to acknowledge the verification of such events will give a closing notice to the other party. The evidence that the conditions precedent have been met is usually exchanged between the parties before or on closing date.

On closing date the seller will deliver to the purchaser all elements required to complete the transfer. Should the object of the transaction be a company, the seller will usually deliver the share certificates (if applicable), the company's books and records, the resignation letters of the members of the corporate bodies, the revocation deeds of the attorney's powers, and all relevant documents that may be in its power at that date.

On the other hand, the purchaser will pay the purchase price (or the remaining part of the purchase price) and usually will hold a shareholders' meeting of the target company (and any subsidiaries) to accept the resignations of the resigning directors and to appoint new members for the corporate bodies.

4.4. Shareholders Agreement

Further to the acquisition agreement, whenever the purchaser does not acquire all of the share capital of a target company, it is common that the purchaser and remaining shareholders enter into a shareholders agreement, whereby they set forth the rules which will govern their future relationship as shareholders of the relevant company.

The Portuguese Companies Code sets some limitations to the parties' freedom to contract in the scope of a shareholders agreement, in particular in respect of voting arrangements.

A shareholders agreement which limits the freedom of action of the directors is not valid. In addition, all agreements in which a shareholder undertakes to vote (i) always following the instructions of the company or one of its bodies, (ii) to approve the proposals submitted by one of its corporate bodies or (iii) to exercise or not exercise voting rights in exchange for special advantages (the denominated principle of the prohibition to purchase the voting right) are null and void.

These agreements usually also regulate issues as the funding of the company, tag-along and drag-along rights betweens shareholders, lock-up periods where they undertake to maintain their shares, and similar matters.

5. Dispute resolution

The alternatives are the Portuguese courts and arbitration to resolve disputes.

The main advantages of arbitration proceedings over judicial proceedings are speed, the expertise of the arbitrators, confidentiality of the process and, in particular, whenever one of the parties is not Portuguese, the election of the language according to which the proceedings shall be held. On the other hand, it may take several years for a final judgment to be provided in a Portuguese judicial court.

If the choice is arbitration, this may be held in Portugal or abroad. Purchasers (when Portuguese) typically prefer to hold the arbitration in Portugal to the extent that the costs involved are general lower, and high arbitration costs may discourage a dispute over a potential claim for the breach of the seller's representations and warranties.

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