Snapshot: tech M&A purchase agreements in Brazil

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Purchase agreement

Representations and warranties

In technology M&A transactions, is it customary to include representations and warranties for intellectual property, technology, cybersecurity or data privacy?

Yes, in technology M&A transactions it is customary (and also advisable) to include clauses of representations and warranties related to intellectual property, cybersecurity and data privacy.

Normally, if the IP assets of the target company are essential to the transaction, the respective purchase agreement shall include specific representations and warranties to ensure the enforceability and ownership of these IP assets. The seller must guarantee that it is the sole and exclusive owner of such IP and that it is not limited or subject to any encumbrances. The seller must also ensure it has all the appropriate licences for the use of third-party IP rights, as well as that the target IP does not infringe any third-party right or that it is not and will not be subject to any dispute that may impact the buyers' right to exploit the relevant IP asset(s).

Since the enactment of the Internet Law in 2014, data privacy representation and warranties are becoming more common and after the enactment of the Brazilian General Data Protection Law in 2018, these representations and warranties are essential to technology M&A. Purchase agreements shall include specific representations to ensure that the target company complies with all the applicable laws and security standards regarding the collection, use, processing, storage and transfer of personal data. The seller shall also guarantee the actual enforcement of data privacy policies, safeguarding all the rights of the data subject (customers or employees, or both) and having in place all the legal mechanisms in the event of a data breach incident, for example. Cybersecurity representations and warranties should encompass data privacy issues but also more broad IT matters, like how the systems used by the target are sufficient for the performance of the target's activities, without material disruptions that may cause losses to the target.

Customary ancillary agreements

What types of ancillary agreements are customary in a carveout or asset sale?

In any case, technology M&A usually requires IP assignments, licence and grant-back licences for carve-out assets, as well as transition services agreements, which commonly involve IT systems (like data centres) and other technical services.

However, in Brazil we usually have more equity deals (rather than asset deals), because asset deals usually entail risks of universal succession of liabilities.

Conditions and covenants

What kinds of intellectual property or tech-related pre- or post-closing conditions or covenants do acquirers typically require?

Usual pre- and post-closing conditions and covenants for technology M&A transactions include, without limitation: entry into and registry (if applicable) of IP ancillary agreements (especially IP assignments); delivery of source codes; transfer of know-how (and other material confidential business information), settlement of possible IP disputes; separation or replacement of shared IT agreements; and waivers from important licensors regarding change of control clauses.

Notwithstanding the above, it is important to mention that the Brazilian Competition Law (Law No. 12,529/2011), establishes a mandatory pre-merger notification and approval regime for some transactions, which may or may not include material technology and intellectual property assets. The territorial scope of the Brazilian Competition Law concerns acts performed, in whole or in part, within Brazil and acts that produce or may produce effects in Brazil. The following transactions are subject to pre-merger review clearance (thus, submitted to the Brazilian Competition Authority (CADE) and can be defined as 'concentration acts':

- the merger of two or more formerly independent companies;
- the acquisition of control (or portions thereof) of one or more companies by one or more other companies, pursuant to purchase or exchange of stocks, shares, bonds or securities convertible into stocks or assets;
- the merger of one or more companies into one or more other companies; and
- the entering by two or more companies into an associative contract, consortium or joint venture (except when used for bids promoted by the direct and indirect public administration and for contracts arising therefrom).

The legal thresholds for mandatory pre-merger review are: at least one of the groups involved in the transaction has had, in the latest balance sheet, annual gross sales or total turnover in Brazil, in the year preceding the transaction, equivalent to or higher than 750 million reais and that at least one other group involved in the transaction has had, in the latest balance sheet, annual gross sales or total turnover in Brazil, in the year preceding the transaction, equivalent to or higher than 75 million reais. For the sole purpose of assessing the above thresholds, under CADE's rules, the following shall be considered as part of the same economic group: (1) companies under the same control, internal or external; and (2) companies in which any of the companies of item 'i' owns directly or indirectly at least 20 per cent of equity interest.

The lack of submission of a transaction the notification of which is mandatory, may lead to the application of penalties to the parties. The penalties include but are not limited to the declaration of nullity of the contract and imposition of a pecuniary fine ranging from 60,000 to 60 million reais.

Survival period

Are intellectual property representations and warranties typically subject to longer survival periods than other representations and warranties?

Normally, intellectual property representation and warranties have the same survival periods as other general representations. Nonetheless, within a technology M&A where an IP right is the main asset of the target company, it is advisable to make specific IP representations and warranties valid for a longer period, ideally in accordance with the statutory period of limitation provided for in the applicable law (for example, 20 years for a patent).

Liabilities for breach

Are liabilities for breach of intellectual property representations and warranties typically subject to a cap that is higher than the liability cap for breach of other representations and warranties?

If a certain IP right is the main asset of the target company, the representations and warranties regarding such asset are usually excluded from the general liability cap or at least higher than such general cap. Nonetheless, liability caps customarily vary in each transaction, depending on the size of the company and the known contingencies associated with the target company.

Are liabilities for breach of intellectual property representations subject to, or carved out from, de minimis thresholds, baskets, or deductibles or other limitations on recovery?

Regarding technology M&A transactions, intellectual property representations are usually subject to or carved out from other limitations on recovery. Other recovery mechanisms are not commonly applied to intellectual property representations in technology M&A transactions.

Indemnities

Does the definitive agreement customarily include specific indemnities related to intellectual property, data security or privacy matters?

The definitive agreement resulting from a technology M&A transaction customarily includes specific indemnities for losses related to intellectual property, data security and privacy matters. The seller is usually required to indemnify the purchaser in connection with any and all breaches of the IP representations. Indemnity provisions are normally subject to certain conditions, such as immediate notice of the claim and the control of the claim to the indemnifier party. Indemnities related to data privacy matters are usually out of any limits or thresholds.

Walk rights

As a closing condition, are intellectual property representations and warranties required to be true in all respects, in all material respects, or except as would not cause a material adverse effect?

‘Walk rights’ of the purchaser vary a lot. However, most agreements provide for ‘walk rights’ if the IP representation breach causes a material adverse event to the target company. Less important breaches may be remedied or fully indemnified by the seller.

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