

CROSS-BORDER MERGERS & ACQUISITIONS

PROFESSORS

Professor Dr. Carlos Portugal Gouvêa
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Professor Mariana Souza Pargendler
Escola de Direito de São Paulo da Fundação Getúlio Vargas
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Professor Maurizio Levi-Minzi
New York University School of Law
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TEACHING ASSISTANT

Mirella Miranda Boffi
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TUESDAYS, FROM 17H00 (5 P.M.) TO 21H00 (9 P.M.) (BRT – UTC-3)
REMOTELY: ZOOM

SYLLABUS¹

CLASS I – INTRODUCTION

March 29th, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa

Mandatory bibliography

LEVI-MINZI, Maurizio. *Introduction to Cross Border M&A* – supplied.

BRUNER, Robert F. *Applied Mergers and Acquisitions*. New York: John Wiley & Sons, Chapter 5.

DELOITTE. The future of M&A, 2022 M&A Trends Survey. January 2022.

CLASS II – DUE DILIGENCE AND DEAL ECONOMICS

April 5th, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa

Mandatory bibliography

SAVARE, Matt. M&A due diligence: A primer on transactions involving private sellers, *Westlaw Journal Mergers and Acquisitions* 02, 30 No. 08.

LEVI-MINZI, Maurizio. *BRICS Due Diligence: What You Need To Know* (Updated as of March 2019) – supplied.

KOLLER, Tim. *Valuation: Measuring and Managing the Value of Companies*. McKinsey & Company, 7th edition, Chapter 31.

According to the University’s official calendar, there will be no classes from April 11th to April 16th, 2022 (Easter holiday).

¹ Other texts and cases may be included in the program during the course.

CLASS III – DEAL ECONOMICS

April 19th, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa

Mandatory bibliography

BAUMAN, Jeffrey D. The old man and the tree: A parable of valuation. *Business Organizations Law and Policy: Materials and Problems*, 9th Edition, at 386 - 392.

Debt free cash free. *Accounting and Business Magazine*, February 2010.

KOLLER, Tim. *Valuation: Measuring and Managing the Value of Companies*. McKinsey & Company, 7th edition (Chapter 2).

NEW YORK UNIVERSITY STERN SCHOOL OF BUSINESS. A Primer on Financial Statements. Available at: http://pages.stern.nyu.edu/~adamodar/New_Home_Page/AccPrimer/acstate.htm

Supplementary bibliography

CORPORATE FINANCE INSTITUTE - CFI. *Profit and Loss Statement*.

FULLERTON, Alan. *Three perspectives on M&A value: what you pay, what you get, and what you give*. Available at: <https://merger.com/perspectives-ma-value-pay-get/>

HARVARD BUSINESS SCHOOL ONLINE. *Balance sheets 101: What goes on a balance sheet?* Available at: <https://online.hbs.edu/blog/post/balance-sheets-101-understanding-assets-liabilities-and-equity>

RUDENNO, Victor. *The Mining Valuation Handbook*, at 269 - 272.

STREET OF WALLS. *Valuation: A Conceptual Overview*. Investment Banking Technical Training.

Case Study: Susan's Lemon Stand – From enterprise value to purchase price

CLASS IV – PURCHASE PRICE ADJUSTMENTS AND EARN-OUTS

April 26th, 2022

Maurizio Levi-Minzi

Carlos Portugal Gouvêa

Mandatory bibliography

CRIMMINS, Paul M. Earn-outs in M&A Transactions, Key Structures and Recent Developments. *The M&A Journal*, v. 10, n. 10.

KIRKLAND & ELLIS. The Well-Adjusted Purchase Price Adjustment. Kirkland M&A Update, April 26, 2010.

MORGAN LEWIS. *Purchase Price Adjustments: Working Capital, Net Assets, Pensions, and Earn-outs.*

Purchase Price Adjustment Models – supplied.

PWC. *To lock or not to lock: An introduction to the Locked Box closing mechanism*, September 2013.

Supplementary bibliography

Earnout Readings:

<https://corpgov.law.harvard.edu/2018/02/10/the-enduring-allure-and-perennial-pitfalls-of-earnouts/>

<https://www.venable.com/files/Publication/1f65b164-4d03-458e-b42d-7cc5a779dfcc/Preview/PublicationAttachment/8fb640d8-610d-4574-9210-81216921d3be/Top Six Legal Issues in Earnout Lawsuits.pdf>

PPA Readings:

<https://www.clearmawatch.com/2015/07/revisiting-a-trap-for-the-unwary-in-purchase-price-adjustments/>

<https://cooley.com/2017/03/09/2-billion-purchase-price-dispute-over-gaap-compliance-highlights-need-for-careful-drafting/>

Case Study: Susan's Lemon Stand – Valuation, PPA and Lockbox.

CLASS V – DEAL STRUCTURES / NEGOTIATIONS / DRAFTING

May 3rd, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa

Mandatory bibliography

ADAMS, Kenneth A. Know Your Enemy: Sources of Uncertain Meaning in Contracts. *Michigan Bar Journal*, October 2016.

Asset Purchase Agreement – supplied.

Differences in Key Provisions - SPA x APA – supplied.

PRACTICAL LAW. *Private Acquisition Structures*.

Stock Purchase Agreement – supplied.

Uncertain Meaning in Contract Language – supplied.

Supplementary bibliography

MORGAN LEWIS. *Choosing an Acquisition Structure and Structuring a Deal*.
October 5, 2016.

Case Study: Deal Structures.

CLASS VI – THE ARCHITECTURE OF THE ACQUISITION AGREEMENT – PART 1

May 10th, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa

Mandatory bibliography

CHAPMAN, Jeffrey. *Representations and Warranties Insurance in M&A Transactions*. Harvard Law School Forum on Corporate Governance and Financial Regulation, December 11, 2017.

FREUND, James C. *Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions*. *Law Journal Seminar Press*, p. 139 – 174, Chapter 5.

FREUND, James C. *Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions*, *Law Journal Seminar Press*, p. 229 – 284, Chapter 7.

GOODWIN. *M&A Trends: Representations and Warranties Insurance*.

KOTRAN, Stephan M. *Material Adverse Change Provisions: Mergers and Acquisitions*, Practical Law.

Material Adverse Effect Provision – supplied.

SLACK, Richard. *The Material Adverse Effect Landscape after Akorn v. Fresenius*.

VERDESCA, Joseph. *Representations and Warranties Insurance: What Every Buyer and Seller Needs to Know*. LexisNexis Corporate Law Advisory, January 2016.

Supplementary bibliography

SRS ACQUIOM. *2022 M&A Deal Terms Study*.

Case Study: Architecture of the Agreement

CLASS VII – THE ARCHITECTURE OF THE ACQUISITION AGREEMENT – PART 2

May 17th, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa

Mandatory bibliography

Model Asset Purchase Agreement (Read only articles 2 and 5).

Model Stock Purchase Agreement (Read only articles 3, 8 and 11).

WEST, Glenn D. *Reassessing the “Consequences” of Consequential Damage Waivers in Acquisition Agreements*. Harvard Law School Forum on

Corporate Governance and Financial Regulation, August 13, 2008.

WEST, Glenn D. *That Pesky Little Thing Called Fraud: An Examination of Buyers' Insistence Upon (and Sellers' Too Ready Acceptance of) Undefined "Fraud Carve-Outs" in Acquisition Agreements*. Business Lawyer, Vol. 69, No. 4, 2014.

Negotiations Readings:

https://en.wikipedia.org/wiki/How_to_Win_Friends_and_Influence_People

<https://hbr.org/2020/07/whats-your-negotiation-strategy>

Supplementary bibliography

WEST, Glenn D. *A Delaware Supreme Court Footnote Reignites Concerns about the Reliability of Contractual Representations & Warranties – Are Deal Lawyers Really Going to Start Debating Sandbagging Again?* October 1, 2018.

WEST, Glenn D. *Debunking the Myth of the Sandbagging Buyer: When Sellers Ask Buyers to Agree to Anti-Sandbagging Clauses, Who Is Sandbagging Whom?* The M&A Lawyer, v. 11, January 2007.

Sandbagging and Materiality Scrape provisions – supplied.

Case Study: Frutas y Verduras S.L.

CLASS VIII – GOVERNING LAW / POLITICAL AND FX RISKS

May 24th, 2020

Maurizio Levi-Minzi

Carlos Portugal Gouvêa

Mandatory bibliography

ADAMS, Ken. *Revisiting Governing-Law Provisions*. Adams on Contract Drafting, August 1, 2019.

COYLE, John F. *The Canons of Construction for Choice-of-Law Clauses*. Washington Law Review, v. 92, number 2, 2017.

KHER, Priyanka; CHUN, Dongwook. *Policy Options to Mitigate Political Risk*

and Attract FDI. The World Bank Group, 2020.

MULTILATERAL INVESTMENT GUARANTEE AGENCY - MIGA. Annual Report 2021. The World Bank Group.

CLASS IX – GOVERNANCE

May 31st, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa

Mandatory bibliography

CORPORATION LAW COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. *The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions*.

SCHUMPETER. *Sticking together*. The Economist, November 13th, 2010 Edition.

Supplementary bibliography

FISCH, Jill E. *Stealth Governance: Shareholder Agreements and Private Ordering*. University of Pennsylvania Carey Law School, March 1, 2021.

Case Study: Governance Case Study.

CLASS X – ARBITRATION AND COMPLIANCE

June 7th, 2022

Maurizio Levi-Minzi
Carlos Portugal Gouvêa
Guest Speakers: Ina Popova and Andrew Levine

Mandatory bibliography

DEBEVOISE & PLIMPTON. *Debevoise International Arbitration Clause Handbook*, p. 1 - 46.

FCPA. *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Second Edition (Read p. 29 - 35, 51 - 52, 66 - 67 only). Available at:
<https://www.justice.gov/criminal-fraud/file/1292051/download>

LEVINE, Andrew. *The Guide to Corporate Compliance*. Latin Lawyer, Second Edition.

CLASS XI – CONTROL TRANSACTIONS

June 14th, 2022

Mariana Souza Pargendler
Carlos Portugal Gouvêa

Mandatory bibliography

KRAAKMAN, Reinier; ARMOUR, John; DAVIES, Paul; ENRIQUES, Luca; HANSMANN, Henry; HERTIG, Gerard; HOPT, Klaus; KANDA, Hideki; PARGENDLER, Mariana; RINGE, Wolf-Georg; ROCK, Edward. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. Oxford: Oxford University Press, 2017, Chapter 8.

CLASS XII – NATIONALISM IN M&A TRANSACTIONS

June 21st, 2022

Mariana Souza Pargendler
Carlos Portugal Gouvêa

Mandatory bibliography
To be defined.

CLASS XIII – PREPARATION

June 28th, 2022

CLASS XIV – DEBATES

July 5th, 2022

Mariana Souza Pargendler
Carlos Portugal Gouvêa

CLASS XV – FINAL REVIEW

July 12th, 2022

*Mariana Souza Pargendler
Carlos Portugal Gouvêa*

EVALUATION

The first evaluation will be based on the participation of students in the discussions of case studies in class, which will adopt the socratic method and shall have as its basis the analysis of whether the students read or not the indicated bibliography for the course. The second evaluation shall be a series of essays similar in format to the case studies to be presented at the end of the semester.

Weight: 30% participation and 70% essays.

Essay due date: July 19th, 2022.

BIBLIOGRAPHY

ADAMS, Ken. *Revisiting Governing-Law Provisions*. Adams on Contract Drafting, August 1, 2019.

ADAMS, Kenneth A. Know Your Enemy: Sources of Uncertain Meaning in Contracts. *Michigan Bar Journal*, October 2016.

BAUMAN, Jeffrey D. The old man and the tree: A parable of valuation. *Business Organizations Law and Policy: Materials and Problems*, 9th Edition, at 386 - 392.

BRUNER, Robert F. *Applied Mergers and Acquisitions*. New York: John Wiley & Sons.

CHAPMAN, Jeffrey. *Representations and Warranties Insurance in M&A Transactions*. Harvard Law School Forum on Corporate Governance and Financial Regulation, December 11, 2017.

CORPORATE FINANCE INSTITUTE - CFI. *Profit and Loss Statement*.

CORPORATION LAW COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. *The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions*.

COYLE, John F. *The Canons of Construction for Choice-of-Law Clauses*. *Washington Law Review*, v. 92, number 2, 2017.

CRIMMINS, Paul M. Earn-outs in M&A Transactions, Key Structures and Recent Developments. *The M&A Journal*, v. 10, n. 10.

DEBEVOISE & PLIMPTON. *Debevoise International Arbitration Clause Handbook*, p. 1 - 46.

Debt free cash free. *Accounting and Business Magazine*, February 2010.

DELOITTE. The future of M&A, 2022 M&A Trends Survey. January 2022.

FCPA. *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Second Edition.

FISCH, Jill E. *Stealth Governance: Shareholder Agreements and Private Ordering*. University of Pennsylvania Carey Law School, March 1, 2021.

FREUND, James C. *Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions*. *Law Journal Seminar Press*.

FULLERTON, Alan. *Three perspectives on M&A value: what you pay, what you get, and what you give*.

GOODWIN. *M&A Trends: Representations and Warranties Insurance*.

HARVARD BUSINESS SCHOOL ONLINE. *Balance sheets 101: What goes on a balance sheet?*

KHER, Priyanka; CHUN, Dongwook. *Policy Options to Mitigate Political Risk and Attract FDI*. The World Bank Group, 2020.

KIRKLAND & ELLIS. The Well-Adjusted Purchase Price Adjustment. Kirkland M&A Update, April 26, 2010.

KOLLER, Tim. *Valuation: Measuring and Managing the Value of Companies*. McKinsey & Company, 7th edition.

KOLLER, Tim. *Valuation: Measuring and Managing the Value of Companies*. McKinsey & Company, 7th edition.

KOTRAN, Stephan M. *Material Adverse Change Provisions: Mergers and Acquisitions*, Practical Law.

KRAAKMAN, Reinier; ARMOUR, John; DAVIES, Paul; ENRIQUES, Luca; HANSMANN, Henry; HERTIG, Gerard; HOPT, Klaus; KANDA, Hideki; PARGENDLER, Mariana; RINGE, Wolf-Georg; ROCK, Edward. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. Oxford: Oxford University Press, 2017.

LEVI-MINZI, Maurizio. *BRICS Due Diligence: What You Need To Know* (Updated as of March 2019).

LEVI-MINZI, Maurizio. *Introduction to Cross Border M&A*.

LEVINE, Andrew. *The Guide to Corporate Compliance*. Latin Lawyer, Second Edition.

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2016.

MORGAN LEWIS. *Purchase Price Adjustments: Working Capital, Net Assets, Pensions, and Earn-outs.*

MULTILATERAL INVESTMENT GUARANTEE AGENCY - MIGA. Annual Report 2021. The World Bank Group.

NEW YORK UNIVERSITY STERN SCHOOL OF BUSINESS. A Primer on Financial Statements.

PRACTICAL LAW. *Private Acquisition Structures.*

PWC. *To lock or not to lock: An introduction to the Locked Box closing mechanism,* September 2013.

RUDENNO, Victor. *The Mining Valuation Handbook.*

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SCHUMPETER. *Sticking together.* The Economist, November 13th, 2010 Edition.

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WEST, Glenn D. *Debunking the Myth of the Sandbagging Buyer: When Sellers Ask Buyers to Agree to Anti-Sandbagging Clauses, Who Is Sandbagging Whom?* The M&A Lawyer, v. 11, January 2007.

WEST, Glenn D. *Reassessing the “Consequences” of Consequential Damage Waivers in Acquisition Agreements.* Harvard Law School Forum on Corporate Governance and Financial Regulation, August 13, 2008.

WEST, Glenn D. *That Pesky Little Thing Called Fraud: An Examination of Buyers’ Insistence Upon (and Sellers’ Too Ready Acceptance of) Undefined “Fraud Carve-Outs” in Acquisition Agreements.* Business Lawyer, Vol. 69, No. 4, 2014.
